CLERK'S COPY. 1111

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 333, 88

THE UNITED STATES, APPELLANT,

vs.

THE CHOCTAW NATION AND THE CHICKASAW NATION.

No. 338. 89

THE WICHITA AND AFFILIATED BANDS OF INDIANS, APPELLANTS,

vs.

THE CHOCTAW NATION, THE CHICKASAW NATION, AND THE UNITED STATES.

No. 339. 90.

THE CHOCTAW NATION AND THE CHICKASAW NATION, APPELLANTS,

vs.

THE UNITED STATES AND THE WICHITA AND AFFILIATED BANDS OF INDIANS.

APPEALS FROM THE COURT OF CLAIMS.

FILED JUNE 26, 1899.

(17451, 17452, 17453.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

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1 In the Court of Claims of the United States.

THE CHOCTAW NATION AND THE CHICKASAW NATION, claimants,
v.
THE UNITED STATES AND THE WICHITA AND AFFILIATED bands of Indians, defendants.
No. 18932.

I. *Petition—Filed March 26, 1895.*

To the honorable the chief justice and the associate justices of the United States Court of Claims:

Your petitioners, the Choctaw Nation and the Chickasaw Nation, in their own behalf and in behalf and for the benefit of certain individuals who are members and citizens of said nations and interested in the subject-matter of this petition, respectfully represent:

First. That this petition is filed, and the jurisdiction of this court invoked, under and by virtue of certain provisions of an act of Congress approved the 2d day of March, 1895, entitled "An act making appropriations for the current and contingent expenses of the Indian
2 Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30, 1896, and for other purposes." These provisions are in the words and figures following, to wit:

"That, as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, which claim is controverted by the United States, jurisdiction be, and is hereby, conferred upon the Court of Claims to hear and determine the said claim of the Choctaws and Chickasaws and to render judgment thereon, it being the intention of this act to allow said Court of Claims jurisdiction; so that the rights, legal and equitable, of the United States and the Choctaw and Chickasaw nations and the Wichita and affiliated bands of Indians in the premises shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party in the hearing of said claim; and the Attorney-General is hereby directed to appear in behalf of the Government of the United States, and either of the parties to said action shall have the right of appeal to the Supreme Court of the United States: Provided, That such appeal shall be taken within sixty days after the rendition of the judgment objected to, and that the said courts shall give such causes precedence: And provided further, That nothing in this act shall be accepted or construed as a confession that the United States admit that the Choctaw and Chickasaw nations have any claim to or interest in said lands or any part thereof.

"That said action shall be presented by a single petition, making the United States and the Wichita and affiliated bands of Indians parties defendant, and shall set forth all the facts on which the said Choctaw and Chickasaw nations claim title to said land; and said petition may be verified by the authorized delegates, agents, or attorney of said nations upon information and belief as to the existence of such facts, and no other statement or verification shall be necessary: Provided, That if said

Choctaw and Chickasaw nations do not bring their action within
3 ninety days from the approval of this act their claim shall be forever barred: And provided further, That it shall be the duty of the Attorney-General of the United States, within ten days after the filing of said petition, to give notice to said Wichitas and affiliated bands, through the agents, delegates, attorneys, or other representatives of said bands, that said bands are made defendants in said suit; of the purpose of said suit; that they are required to make answer to said petition, and that Congress has, in accordance with article five of said agreement, adopted this method of determining their compensation, if any. And the answer of the Wichitas and affiliated bands shall state the facts on which they rely for compensation, and may be verified by their agents, delegates, attorneys, or other representatives, upon their information and belief as to the existence of such facts, and no other statement or verification shall be necessary: And provided also, That said Wichitas and affiliated bands shall file their answer in said suit within sixty days after they shall receive from the Attorney-General of the United States the notice herein provided for, unless further time is granted by the court, and in the event of failure to answer they may be barred from all claim in the premises aforesaid.

"The said Court of Claims shall receive and consider as evidence in the suit everything which shall be deemed by said court necessary to aid it in determining the questions presented, and tending to shed light on the claim, rights, and equities of the parties litigant, and issue rules on any Department of the Government therefor if necessary.

"It is hereby further provided that said Choctaw and Chickasaw nations may, at any time before the rendition of final judgment in said case by the Court of Claims, negotiate with the commissioners appointed under section sixteen of the act of Congress approved the third day of March, eighteen hundred and ninety-three (Twenty-seventh Statutes, page six hundred and forty-five), or with any successor or successors in said commission, for the settlement of the said matters involved in said suit, and move the suspension of such action until such negotiations shall be accepted or rejected by Congress, such settlement, how-
4 ever, to be made with the concurrence of the Secretary of the Interior and Attorney-General of the United States."

The following additional provisions, material to the present case, are also, in substance, embraced in said act of March 2, 1895, taken along with the provisions of the agreement of June 4, 1891, mentioned therein, and which said act confirms:

(a) Said agreement of June 4, 1891, is, by said act of March 2, 1895, "accepted, ratified, and confirmed," as provided in said act.

(b) There should be allotted to each and every member of the Wichita and affiliated bands of Indians, in the Indian Territory, native and adopted, 160 acres of land, one-half thereof to be allotted in grazing lands; the allotments to be selected within ninety days from the ratification by Congress of said agreement of June 4, 1891; the titles to the land taken under such allotments to be held in trust for 25 years, in the manner and to the extent provided for in the act of Congress approved February 8, 1887. (24 Stats., 388.)

(c) Whenever the lands acquired under said agreement of June 4, 1891, shall by operation of law, or proclamation of the President, be

open to settlement, they shall be disposed of under the general provisions of the homestead and townsite laws of the United States, provided that, in addition to the land-office fees prescribed by the statute, the entrymen shall pay $1.25 an acre for the land entered at the time of submitting final proof; and that all such entries, where the entryman has resided upon and improved the land by him entered, in good faith, for a period of fourteen months, may be commuted to cash upon the payment of $1.25 per acre. Sections 16 and 36 and 13 and 33 in each township shall not be subject to entry, but reserved—sections 16 and 36 for the use of common schools, and sections 13 and 33 for university, agricultural college, normal school, and public buildings of the Territory and future State of Oklahoma.

(d) As fast as the lands open for settlement under the act are sold the money received from such sales shall be deposited in the Treasury, subject to the judgment of the court in the suit provided for in said act, less a reservation of not exceeding $15,000 for a designated purpose.

Second. Claimants further show that the Choctaw and Chickasaw nations are now and ever since and long before the organization of the Government of the United States were and have been Indian tribes, occupying, from time to time, different portions of the territories now embraced within the United States, and have been, by the Government of the United States, since its organization, recognized and dealt with as such Indian tribes according to the policies which the Government has pursued in regard to the rights of such tribes and according to the duties and obligations which the said Government has accorded to the Indians as the aboriginal possessors and inhabitants of the said territories.

Third. Claimants further show that at and prior to the 18th day of October, 1820, the said Choctaw Nation of Indians was the possessor of certain lands east of the Mississippi River in the States of Mississippi and Alabama, which, by the first article of the treaty of October 18, 1820 (7 Stat., 211), between the United States and the said nation, they ceded to the United States. In consideration of said cession, and in part satisfaction therefor, the United States ceded to the Choctaw Nation the tract of country described in the second article of said treaty, including, amongst others, the land hereinafter described, for the interest of the Choctaw and Chickasaw nations in which this action is brought. By the fourth article of said treaty the United States stipulated that the boundaries of said cession to the Choctaws should remain without alteration until the period at which said nation should become so civilized and enlightened as to be made citizens of the United States and that Congress should lay out a limited portion or parcel of such land for the benefit of each family or individual in the nation.

Claimants hereby, by reference thereto, make the provisions of said treaty a part of this petition.

Fourth. Subsequent to said treaty of October 18, 1820, the treaty of the 20th of January, 1825 (7 Stats., 234), was made. By its first article the Choctaw Nation retroceded to the United States so much of the territory ceded to said nation by said treaty of October 18, 1820, as is described in said article, but this retrocession did not embrace any of the land for an interest in which this action is prosecuted.

Claimants, by reference thereto, make the provisions of said first article of the treaty of January 20, 1825, a part hereof.

Fifth. Claimants further say that, on the 27th of September, 1830, a treaty was made and entered into between the United States and the said Choctaw Nation, by the second article of which (7 Stats., 333) it was agreed that the United States should cause to be conveyed to the
7 Choctaw Nation a tract of country west of the Mississippi River, in fee simple, to them and to their descendants and to inure to them while they should exist as a nation, beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork if within the limits of the United States, or to those limits, thence due south to the Red River and down the Red River to the western boundary of the Territory of Arkansas, thence north along that line to the beginning, the boundary of the same to be agreeable to the treaty made and concluded at Washington in the year 1825. In the third article of said treaty the Choctaws cede to the United States the entire country owned by them east of the Mississippi River, the land in controversy in the present case being within the territory so agreed to be ceded to the Choctaw Nation by said treaty of September 27, 1830.

Claimants, by reference thereto, make the provisions of said treaty a part of this petition.

Sixth. Claimants further say that, on the 23d day of March, 1842, a patent was issued by the United States, a copy of which is hereto attached, marked Exhibit A, conveying to the Choctaw Nation the title stipulated for in the second article of said treaty of September 27, 1830, and which patent embraced the land in controversy in the present case.

Seventh. Claimants further show that, by a convention between the Choctaw and Chickasaw nations, dated January 17, 1837, approved
8 by the Senate of the United States on the 25th of February of the same year, and by the President on the 4th of March, 1837, it was agreed that the Chickasaws should have the privilege of forming a district within the limits of the Choctaw country, to be held on the same terms with the Choctaws, except as to the right of disposing of it, &c., to the full provisions of which reference is here made, and the same prayed to be taken and read as a part of this petition. (See 11 Stats., 573.)

Eighth. Claimants further show that on the 22d day of June, 1855, a convention and agreement was made and entered into between the United States and the Choctaw and Chickasaw nations of Indians (11 Stats., 611 et seq.), the parts of which material in the present case being articles 9 and 10, found on page 613 of said volume, and which articles 9 and 10 are as follows:

"ARTICLE 9. The Choctaw Indians do hereby absolutely and forever quitclaim and relinquish to the United States all their right, title, and interest in and to any and all lands west of the one hundredth degree of west longitude; and the Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein, excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas River, but including those bands whose permanent ranges

are south of the Canadian, or between it and the Arkansas, which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the President for their government: Provided, however, The territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore.

9 "ARTICLE 10. In consideration of the foregoing relinquishment and lease, and as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct."

The lands in controversy in the present case are embraced within the lands covered by the lease named in the ninth article, above quoted, which last-named treaty is, by reference, made part of this petition.

Ninth. On the 28th day of April, 1866, a treaty was entered into between the United States and the Choctaw and Chickasaw nations of Indians, to which reference is hereby made and the same prayed to be taken and read as a part of this petition. The third article of said treaty is as follows (14 Stats., 769):

"The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98th degree west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States at an interest not less than five per cent, in trust for the said nations until the legislatures of the Choctaw and Chickasaw nations, respectively, shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by or belonging to said nations,

10 respectively, and also to give to such persons who are residents, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided, and immediately on the enactment of such laws, rules, and regulations the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter, less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as, within ninety days before the passage of such laws, rules, and regulations, shall elect to move, and actually remove, from the said nations, respectively. And should the said laws, rules, and regulations not be made by the legislatures of said nations, respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper, the

United States agreeing, within ninety days from the expiration of said two years, to remove from said nations all such persons of African descent as may be willing to remove, those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars or any part thereof, but shall be upon the same footing as other citizens of the United States in said nations."

The tenth article of said treaty is as follows:

"The United States reaffirms all obligations arising out of treaty stipulations or acts of legislations with regard to the Choctaw and Chickasaw nations, entered into prior to the late rebellion, and in force at that time, not inconsistent herewith; and further agrees to renew the payment of all annuities and other moneys accruing under such treaty stipulations
11 and acts of legislation from and after the close of the fiscal year ending on the thirtieth of June, in the year eighteen hundred and sixty-six."

The forty-fifth article of said treaty is as follows:

"All rights, privileges, and immunities heretofore possessed by said nations, or individuals thereof, or to which they were entitled under the treaties and legislation heretofore made and had in connection with them, shall be, and are hereby, declared to be in full force, so far as they are consistent with the provisions of this treaty."

The proportionate interest of the Choctaws and Chickasaws in the lands in controversy in the present case is fixed by the 10th article of the treaty of June 22, 1855 (11 Stats., 613), by the 3d and 37th articles of said treaty of April 28, 1866 (14 Stats., 769), and by the 15th section of the act of March 3, 1891 (26 Stats., 1025), at three-fourths in the Choctaws and one-fourth in the Chickasaws.

Tenth. Claimants further aver and charge, that under and by virtue of the treaties hereinabove set forth, taken and considered together, the claimants have in the premises in controversy in the present case, to wit, in the premises described in the first article of the agreement entered into at Anadarko, in the Indian Territory, on the 4th of June, 1891, by and between David H. Jerome, Alfred Wilson, and Warren G. Sayre, commissioners on the part of the United States and the Wichita and affiliated bands of Indians, as the same is set forth in the said act of Congress approved March 2, 1895, the equitable interest hereinafter stated. The said premises are described in the said first article of the agreement of June 4, 1891, as follows:

12 "Commencing at a point in the middle of the main channel of the Washita River, where the ninety-eighth meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the line of 98° 40′ west longitude, thence on said line of 98° 40′ due north to the middle of the channel of the main Canadian River, thence down the middle of said main Canadian River to where it crosses the ninety-eighth meridian, thence due south to the place of beginning."

Eleventh. Claimants further aver and charge that their said interest in the premises last above described is the full ownership of the equitable and beneficial interest and title in and to the same in the event contemplated by and provided for in the said act of March 2, 1895, to wit, in the event that the United States shall cease to appropriate and use the same for the purpose of colonizing and settling Indians thereon, as provided in the ninth article of the treaty of June 22, 1855 (11 Stats., 613),

and shall make disposition thereof as a part of the public domain under the homestead laws of the United States, as modified by said act of March 2, 1895, and shall include said lands within and make them subject to the laws of an organized Territory or State of the United States.

Twelfth. Claimants further aver and charge that said lands named in said first article of the agreement of June 4, 1891, above quoted—the same being the lands for their alleged interest in which the above-quoted provisions of said act of March 2, 1895, authorizes claimants to bring suit—are still held by the United States subject to the trust which attached thereto, under the treaties hereinabove set forth, prior to
13 the making and ratification of said treaty of April 28, 1866, and notwithstanding the alleged cession contained in the third article of said last-named treaty (14 Stats., 769).

Thirteenth. Since the said act of March 2, 1895, under the authority of which this suit is brought as aforesaid, requires that this petition "shall set forth all the facts on which the Choctaw and Chickasaw nations claim title to said land," claimants set forth the following facts and considerations in support of their averment that said lands are still held by the United States, in trust for them, notwithstanding the alleged cession contained in article 3 of said treaty of April 28, 1866, and notwithstanding any and all other facts existing:

(a) It is the settled law of the Government of the United States, applicable to the construction of treaties with the Indians, that "the language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people rather than their critical meaning should form the rule of construction." (119 U. S., 27–8.)

(b) Applying this rule of interpretation to the language of this third article of the treaty of April 28, 1866, considering it in the light of the other provisions thereof, and of the facts and circumstances which led up to and surrounded the making of said treaty, and also considering it in the light of the subsequent action of the Government of the United States touching the effect of the same, the said language establishes
14 the proposition that this treaty was executed by the Indians with the understanding, and under the assurance from the parties aforesaid who made the treaty on behalf of the United States, that the purchase of this land was made by the United States subject to the trust and for the purpose of setting apart the lands embraced in said cession "for the friendly tribes now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government."

(c) One set of circumstances surrounding the making of said treaty is thus disclosed by the annual report of the Commissioner of Indian Affairs of 1864 (p. 33–4), and in which, amongst other things, the Commissioner states the then adopted and settled policy of the United States touching the lands in question, and other Indian lands, as follows:

"Under these circumstances I feel that I can not too strongly urge the importance of preserving the Indian country for the use of the Indians alone, and in all treaties or other arrangements which may hereafter be

made with its former owners insisting upon and, if need be, enforcing such terms as will secure ample homes within that country for all such tribes as, from time to time, it may be found practicable and expedient to remove thereto."

(d) By reference to the next annual report of the Commissioner of Indian Affairs, of 1865, it will be seen that the President appointed a commission comprised of D. N. Cooley, Commissioner of Indian Affairs; Hon. Elijah Sells, superintendent of Southern superintendency; Thomas Wistar, a leading member of the Society of Friends; Brigadier-General W. S. Harney, of the United States Army; and Col. Eli S. Parker, of General Grant's staff, to make treaties between the United States
15 and the Indian tribes that were convened in general council at Fort Smith, Arkansas.

On September 9, 1865, to the tribes then and there represented, including the Creeks, Choctaws, Chickasaws, Cherokees, Seminoles, Osages, Senecas, Shawnees, Quapaws, Wyandottes, Wichitas, and Comanches, the Hon. D. N. Cooley (as disclosed by said annual report of 1865) addressed a speech, and, amongst other things, informed them that the commissioners were empowered to enter into treaties with the several tribes upon the basis of the following propositions:

"1st. That such tribes must enter into a treaty for permanent peace and amity among themselves, with each other as tribes, and with the United States.

"2d. The tribes settled in the Indian Territory to bind themselves, at the call of the United States authorities, to assist in compelling the wild tribes of the plains to keep the peace.

"3d. Slavery to be abolished and measures to be taken to incorporate the slaves into the tribes, with their rights guaranteed.

"4th. A general stipulation as to final abolition of slavery.

"5th. A part of the Indian country to be set apart to be purchased for the use of such Indians from Kansas or elsewhere as the Government may desire to colonize therein.

"6th. That the policy of the Government to unite all the Indian tribes of this region into one consolidated government should be accepted.

"7th. That no white person, except Government employees, or officers or employees of internal improvement companies authorized by the Government, will be permitted to reside in the country, unless incorporated with the several nations."

This report says, in express words, that "with the Choctaws
16 and Chickasaws a treaty was agreed upon on the basis of the seven propositions hereinbefore stated," except that it appears, by a communication from the representatives of the loyal Choctaws—to wit, William S. and Robert B. Patton—that they ask for the following to be substituted in lieu of the 7th proposition of the series above set forth, to wit:

"No white persons, except officers, agents, and employees of the Government, or of any internal improvement companies authorized by the Government of the United States, also no person of African descent, except our former slaves, or other persons of color who are now or have been residents of the Territory, will be permitted to reside in the Territory unless formally incorporated with some tribe according to the usages of the band."

An inspection of the said treaty of 1866 will show that the substance of all these seven propositions was embodied therein, except the fifth, which 5th proposition complainants aver and charge was, on conclusive grounds and reasons, understood by the Choctaw and Chickasaw nations to be, in substance, embodied in said treaty, and was also so understood by the United States commissioners who made it.

(e) Another circumstance showing that the parties to said treaty regarded the said fifth proposition as being substantially embodied therein is thus disclosed: "It is expressly provided in the tenth article of said treaty (above quoted) that all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw nations entered into prior to the late rebellion, and in force at that time, not inconsistent herewith, are reaffirmed," and a like provision is repeated in article 45 of said treaty, declaring that "all rights, privileges, and immunities heretofore possessed by said nations, or individuals thereof, to which they were entitled under the treaties and legislation heretofore made and had in connection with them, shall be, and
17 the same are hereby, declared to be in full force so far as they are consistent with the provisions of this treaty."

Claimants further aver and charge that there is nothing in the said third article of said treaty, or in any other part thereof, which, construed in the light of all the surrounding facts hereinabove and hereinafter set forth, is inconsistent with the restoration to the Choctaws and Chickasaws of all their rights in the lands in question as they existed prior to the rebellion and under and by virtue of the treaties preceding the treaty of 1866. These provisions, therefore, of said articles 10 and 45 do restore the said Choctaw and Chickasaw nations to their rights as beneficiaries of the trust existing in their favor in the lands in question as these rights and equities existed prior to said rebellion.

Other circumstances showing that it was not the intention of the parties to said treaty, in inserting the said 3rd article thereof, to divest the lands in question of said trust in favor of the claimants are found by contrasting with the consideration of $300,000 which was stipulated to be paid for said cession made in article 3 the dealings of the Government with other Indian tribes, hereinafter stated.

The quantity of land embraced in said cession is 7,713,239 acres. Excluding from this estimate the $800,000 paid for the lease and cession embraced in section 9 of the treaty of June 22, 1855 (and which must be excluded because the $800,000 there provided for was paid for the Choctaw lands extending to the western boundary of the United States from the 100th degree of west longitude, lying between the Red and Canadian rivers, and embracing a strip of country correctly estimated by the United States authorities to contain over 6,500,000 acres, and because the said $800,000 if applied to the said purchase lying west of the 100th meridian would be less than 12 cents per acre),
18 the $300,000 paid for said cession is less than 4 cents an acre. (See report of Acting Commissioner of Indian Affairs R. B. Belt of September 13, 1890.)

And, besides, this said $300,000 was not to be paid to the said Indians, but was to be held in trust for them, subject to the full performance of the conditions set forth in said article 3, hereinabove quoted; and claimants aver that at the time of making said treaty it was foreseen that

the performance of the conditions of said article, in favor of the freedmen of said nation, would cost, and did in fact cost, the Choctaws, upon and after their adoption of said freedmen, more than twice their proportionate share of said amount of $300,000—this by reason of what was required and resulted from satisfying said allotments of forty acres of land to be taken out of the home lands of the Choctaw Nation, and the other obligations resulting from the adoption of said freedmen.

Claimants further show, by way of contrasting article 3 of the said treaty of April 28, 1866 (construed by the present defence to completely cut off all equities and interests of the Choctaws and Chickasaws in the lands embraced by said article), with the dealings of the Government of the United States with other Indians, located in said Indian country, whose conditions and lands were substantially the same as those of the Choctaws and Chickasaws, the following examples of the transactions of the Government with such other tribes regarding their lands:

The treaty of June 14, 1866 (14 Stats., 785), with the Creek Nation of Indians, made only two months later than said treaty of April 28 with the Choctaws and Chickasaws, in the third article thereof, cedes to the United States, at the price of 30 cents per acre, the west half of their entire domain,
estimated to contain 3,250,560 acres of land, the aggregate price
19 paid therefor being $975,168. This price is eight times as great as the price allowed by article 3 of the treaty of April 28, 1866, for the lands of the Choctaws and Chickasaws, even if said $300,000 had been paid free from the conditions and encumbrances above quoted. The lands of the Creeks were adjacent and equivalent in value per acre to the lands ceded by the Choctaws and Chickasaws; and yet this cession by the Creeks, for which 30 cents an acre was allowed and paid, was made expressly in trust to be used as homes for such other civilized Indians as the United States might choose to settle thereon, thus reserving to the Creeks their reversionary and equitable interest in said lands. The United States has fully recognized this equitable interest in the act of Congress of March 1, 1889 (25 Stats., 759), appropriating $2,280,857.10, which was paid to said Creek Nation for its equitable interest in said lands, being at the rate of $1.25 per acre, deducting, however, the payment made in article 3 of the treaty of June 14, 1866, and 20 cents for lands theretofore assigned to and occupied by other Indians.

Again, take the case of the Seminole Indians. It will be seen that by the third article of the treaty of March 21, 1866 (14 Stats., 756), the Seminoles ceded to the United States, "in compliance with the desire of the United States to locate other Indians and freedmen thereon," their entire domain, embracing a tract of land ceded to the Seminoles by the Creeks under the provisions of article 1 of the treaty with the Creeks and Seminoles of August 7, 1856 (11 Stats., 699). This article 3 states the quantity of land ceded to be 2,169,080 acres, and the United States agreed to pay therefor $325,362, or 15 cents an acre, and this although the cession was made subject to the equity in favor of the Seminoles entitling them to the land in the event of its ceasing to be used as aforesaid.
For this equity, so retained by the Seminoles in virtue of said
20 article 3 of the treaty of March 21, 1866, the United States subsequently paid to the Seminoles the sum of $1,912,942.02,

appropriated by the act of March 2, 1889 (25 Stats., 1004), and which price was at the rate of $1.25 per acre, subject to the same deductions as were made in the above-stated case of the Creeks.

Examples might be indefinitely multiplied wherein the Government has recognized its obligation to pay the various Indian tribes for their equities in the lands which have been ceded to the United States for the purpose of occupancy by other Indians, all going to show that where lands were so ceded, and where the United States decided to become the full owner thereof, and to make the same a part of the public domain, subject to disposition as such, there, and in every such case, the United States has purchased the equities of the Indians in such lands at the price of $1.25 an acre. But such examples can not all be here introduced, because it would make this petition too voluminous.

Claimants further aver and charge that, in the 15th section of the act of Congress approved March 3, 1891 (26 Stats., 1025), entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June 30, 1892, and for other purposes," there is contained a provision in the words and figures following, to wit:

"And the sum of two million nine hundred and ninety-one thousand four hundred and fifty dollars be, and the same is hereby, appropriated out of any money in the Treasury not otherwise appropriated, to pay the Choctaw and Chickasaw nations of Indians for all the right, title, interest, and claim which said nations of Indians may have in and to certain lands now occupied by the Cheyenne and Arapahoe Indians under Executive order; said lands lying south of the Canadian River, and now occupied by the said Cheyenne and Arapahoe Indians; said lands have been
21 ceded in trust by article three of the treaty between the United States and the said Choctaw and Chickasaw nations of Indians, which was concluded April 28, 1866, and proclaimed on the 10th day of August of the same year, and whereof there remains, after deducting allotments as provided by said agreement, a residue ascertained by survey to contain two million three hundred and ninety-three thousand one hundred and sixty acres; three-fourths of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of said Choctaw Nation to receive the same, at such time and in such sums as directed and required by the legislative authority of said Choctaw Nation, and one-fourth of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of said Chickasaw Nation to receive the same at such time and in such sums as directed and required by the legislative authority of said Chickasaw Nation; this appropriation to be immediately available and to become operative upon the execution, by the duly appointed delegates of said respective nations specially authorized thereto by law, of releases and conveyances to the United States of all the right, title, interest, and claim of said respective nations of Indians in and to said land (not including Grier County, which is now in dispute) in manner and form satisfactory to the President of the United States; and said releases and conveyances, when fully executed and delivered, shall operate to extinguish all claim of every kind and character of said Choctaw and Chickasaw nations of Indians in and to the tract of country to which said releases and conveyances shall apply."

Claimants further say that the lands which, by the above-quoted section, are declared to "have been ceded in trust by article 3 of the treaty between the United States and the said Choctaw and Chickasaw nations of Indians," concluded April 28, 1866, include and embrace all of the lands involved in the present suit, as well as all other lands so ceded by article 3 of the treaty of April 28, 1866.

22 Claimants further say that the effect of the contract between the United States and the Choctaw and Chickasaw nations, which led to the enactment of the provision above quoted from said section 15, and to the enacting of said law by Congress, and the effect of the full execution of said agreement, was to impress upon and give to all the lands within said cession, contained in said article 3, the trust character expressly declared by said act of March 3, 1891, and that, did said cession embraced in article 3 not have the said trust character prior to the enactment of said statute of March 3, 1891, the enactment of said section 15, and the execution of the contract which led to said enactment of said section 15, making appropriation to pay for the part of said cession occupied by the Cheyennes and Arapahoes, yet said enactment and the transactions leading thereunto evidenced by said provision above quoted from section 15 do impress upon all the lands embraced in said cession, including the lands involved in this suit, the character of a trust in favor of the claimants, as hereinbefore asserted and set forth, and do give to the claimants the ownership of the equity hereinabove described, and for the value of which this action is prosecuted.

Fourteenth. Claimants further show to the court that ever since the making of said treaty with them of the 28th of April, 1866, the defendant, the Government of the United States, acting by and through its appropriate officers having official charge of the lands in controversy herein, and of the duty of determining what the legal status of said lands was, and of controlling the use, possession, and occupation thereof, and in the exercise of their official control over said lands, has continuously and expressly acknowledged that said lands so in controversy in this suit had not, either owing to the said cession contained in said article

23 3 of the treaty of April 28, 1866, or otherwise, ceased to be Indian trust lands, or had ceased to be subject to the trust created by said article 9 of said treaty of June 22, 1855, or had become lands in the full and absolute ownership of the United States, and, on the contrary thereof, expressly acknowledge in their official dealing with said lands that the same were still trust lands, and as such subject to the equities which entitled claimants to the ownership and value of such lands in the event of the Government deciding to discontinue the occupancy thereof by Indians, this action of the Executive of the Government being here set forth and relied on as tending to give to said article 3 of said treaty of April 28, 1866, the interpretation herein contended for, to wit, that said cession did not cut off or bar said equity of claimants in such land embraced in said cession of said third article.

The following are examples of the said action of said officers of the Government acknowledging and asserting the said continued existence of said trust after the making of said treaty of April 28, 1866, in favor of claimants in said lands in controversy in the present case:

(a) The Secretary of the Interior, Hon. Carl Schurz, in a letter to the Secretary of War, dated May 1, 1879, speaking of the lands embraced in

said third article of the treaty of April 28, 1866, says that said last-named treaty "substituted a direct purchase for the lease" made by article 9 of said treaty of June 22, 1855, "but did not extinguish or alter the trust," this being written by the Secretary in reply to an inquiry from the Secretary of War as to the right of the Government to expel from said lands intruders by military force under the laws regulating the care of Indian country as provided in section 2147 of the Revised Statutes, the decision of the Secretary being that said lands were still Indian country and subject to said trust in favor of the Indians and so
24 advised the Secretary of War, and, based on said advice, the President of the United States, on the 12th of February, 1880, issued the proclamation found in volume 21 of the U. S. Statutes at Large, pp. 798, 799, commanding intruders in said Indian country to depart, etc.

(b) The Senate of the United States, on the 7th of February, 1882, called upon the Interior Department for information in reference to the right of occupation by settlers of any portion of the Indian Territory. In answer to that inquiry, on April 25, 1881, C. W. Holcomb, Acting Commissioner of Indian Affairs, to the Secretary of the Interior, S. J. Kirkwood, made the report which was transmitted to the Senate and is found in Sen. Ex. Doc. 111, 47 Cong., 1st sess., in which report, amongst other things, the Acting Commissioner says:

"The Choctaw and Chickasaw cession of April 28, 1866 (14 Stats., 769), was, by the tenth section thereof, made subject to the conditions of the compact of June 22, 1855 (11 Stats., 613), by the ninth article of which it is stipulated that the land should be appropriated for the permanent settlement of such tribes or bands of Indians as the United States might desire to locate thereon."

On the fourth page of said document is the following additional statement by the Acting Commissioner touching the status, amongst others, of the lands in controversy in this case:

"The title of the United States to lands in the Indian Territory is, as heretofore shown, subject to a specific trust, and it is not within the lawful power of either the legislative or executive departments of the Government to annihilate such trust or to avoid the obligations arising thereunder."

Claimants, by reference thereto, make said report (Ex. Doc. 111) a part of this petition.

25 (c) On the 23d of January, 1884, the Senate passed a resolution asking the Secretary of the Interior to advise the Senate of the "present status of lands in the Indian Territory" (all lands in the Indian Territory). In reply to this inquiry, on February 14, 1884, Secretary Teller states as follows:

"These lands were acquired by treaties with the various Indian nations or tribes in that Territory in 1866, to be held for Indian purposes and, to some extent, for the settlement of the former slaves of some of said nations or portions thereof. Such are the purposes for which said lands are now being used or held, according to the common understanding of the objects of the treaties by which they were acquired, and from these arise the necessity for or obligation to keep said lands in their present condition of occupancy or otherwise." (See Sen. Ex. Doc. 109, 48th Cong., 1st ses.)

(d) In a letter to the Secretary of the Interior by Hiram Price, Commissioner of Indian Affairs, dated January 31, 1884, touching, amongst others, the lands in controversy in this case, the Commissioner sets forth the disposition that had been made of the lands ceded by the Choctaws and Chickasaws by the third article of said treaty of April 28, 1866, and shows that they were, like all other lands ceded by the various Indian tribes in 1866 to the United States for the purpose of settling Indians thereon, appropriated to the settlement of various Indian tribes, just as claimants insist was the purpose of said cession in said article 3, and the various tracts are specifically designated, and shows that all of said leased district embraced in said cession in said third article was so assigned to the settlement of Indians, except Greer County, which was not so appropriated, because claimed by Texas. He concludes the said letter in the following words:

26 "This being the condition of things, it is clear that no authorized settlement could be made by any persons in the Territory, except under the provisions of the intercourse laws, such persons having first obtained the permission provided for in those statutes. It may be further stated that no part of said Territory remains free from appropriation either to a direct trust assumed by treaty or by reservations for tribes thereon under Executive order, except that portion still claimed by the State of Texas and lying between the Red River and the North fork of the same."

(e) In a letter by R. V. Belt, Acting Commissioner of Indian Affairs, to the Secretary of the Interior, and which was written in answer to a communication from the Hon. S. W. Peel, on behalf of the Committee on Indian Affairs of the House of Representatives, asking the views of said Commissioner in regard to the sale and relinquishment by the Choctaws and Chickasaws of their lands west of the 98th degree of west longitude, embracing the lands in controversy in the present case, said information being asked for by said House committee for the purpose of throwing light on the propriety of enacting into law a bill then pending before the House, being House bill No. 12106, 51st Congress, 1st session, entitled "A bill to fully execute article 3 of the treaty between the United States and the Choctaw and Chickasaw nations of Indians, concluded on the 28th day of April, 1866," the said Commissioner fully considers and presents the documents and authorities throwing light on the question whether said trust in favor of claimants still exists or whether it was extinguished by said article 3 of said treaty of April 28, 1866.

In this report by the said Acting Commissioner, he, amongst other things, presents a statement of the utterances of the officers of the Government regarding the status of said lands here in controversy. In that report the said Acting Commissioner, in view of all the facts

27 and considerations gone over therein, reaches the conclusion which he expresses in the following words:

"I am inclined, therefore, to the opinion that the Choctaw and Chickasaw Indians have good ground for the claim that the United States took the lands ceded by them upon the trust to settle other Indians and freedmen thereon, as the policy upon which the negotiations were made clearly indicated its desire and purpose to do."

ifteenth. Claimants further show to the court that in making said ty of the 28th of April, 1866, and especially in agreeing to said article ereof, the Choctaw and Chickasaw nations, and their representatives negotiated the said treaty, were moved, influenced, and induced, in rge degree, to make said treaty and said third article thereof by the rances held out to them and their said representatives by the com- sioners of the United States, authorized and sent to negotiate the said ty, that the propositions hereinbefore set forth, including said fifth position, asserting that part of the Indian country was to be set apart he purchase for the use of such Indians from Kansas or elsewhere as Government might desire to colonize therein, and especially by the ress to the representatives of the Choctaw and Chickasaw nations, other tribes, made by the hon. president of said commission, D. N. ley, on the 9th of September, 1865, at the convention at Fort Smith, which he reasserted to said representatives of the Indian tribes that h treaties must contain substantially, amongst others, the said fifth position reported in the official proceedings of said meeting in the following words:

"A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes now in Kansas and else- ere, on such terms as may be agreed upon by the parties and approved the Government or such as may be fixed by the Government."

In this address of the president of said commission, as appears by the cial minutes of said meeting of September 9, 1865, he "then stated t the agents will be supplied with printed copies of the address, and requested to go with an interpreter to their respective tribes for the rpose of fully explaining what is said there," which advice was lowed.

Claimants further show to the court that many other like assurances re, by said officers and agents of the United States and the commis- ners authorized to make said treaties, held out from time to time to claimants and their representatives engaged in considering and mak- said treaty, of like character with the assurances and statements ntained in said address of the 9th of September, 1865, some of which hereinabove specifically set forth.

Claimants further show that the said treaty of the 28th of April, 1866, cluding the third article thereof, was agreed to on the part of the Choc- w and Chickasaw nations, and their representatives, on the faith of the surances so held out to them by the said commissioners of the United ates to the effect that said lands were being acquired by the United ates for the special and specific purpose of settling Indians thereon, d upon no other trust or purpose, and that said cession in article 3 was bject to the said trust and condition, and subject to the reservation and uity in favor of claimants that if said lands embraced by said cession should cease to be occupied by Indian tribes and become divested of said trust and part of the absolute public domain of the United States, open to occupation and entry under the land laws thereof, otherwise devoted to purposes not expressed or contemplated by said fth proposition, then the equity of the claimants, the Choctaw and hickasaw Nations, should attach and inure to them in immediate right nd possession, as such equity is hereinabove set forth; and but for their

faith and trust in said representations, so made by the commissioners of the United States, and their confidence that said treaty of the 28th of April, 1866, would, and in substance did, embody the said provisions establishing and securing to claimants the said equity in said lands, the Choctaw and Chickasaw nations would not have assented to or made said treaty; and claimants have, during the years which have elapsed since said treaty was made, failed to make any effectual objections to said treaty, because of their then and continuing belief that said equity was in substance secured to the claimants by the provisions of said treaty as made, and further by reason of their reliance on the truth of the assurances by the Government of the United States, some of which are hereinabove set forth, that such was the intent and effect of said treaty.

Claimants further aver and charge that to now repudiate said equity and trust in favor of claimants on the faith of which said treaty was made as aforesaid would be most unjust to claimants and would operate, though not so intended, as a fraud against the claimants, and would be against justice and equity.

Sixteenth. Claimants further show to the court that the practical construction given to the provisions of said treaty at the time of its being negotiated for, at the time of its actual negotiation, and ever since its ratification by Congress and by the commissioners, officers, and
30 agents of the United States whose duties connected them with said negotiations, with the making of said treaty, and with the interpretation and execution of the provisions thereof, has at all times been an interpretation which gave and secured to claimants, the said Choctaw and Chickasaw nations, the rights and equities in said lands embraced in said article 3 of said treaty of the 28th of April, 1866, some examples of which practical construction and interpretation are hereinabove set forth.

Now, to depart from and ignore that interpretation, on the faith of which, as aforesaid, said treaty was assented to by the Choctaw and Chickasaw nations, and to adopt an opposite construction, cutting off claimants from all equities and interest in said lands, would not only operate as a great wrong against the claimants, but would also be to disregard that settled rule for interpreting treaties, statutes, and other provisions of law which ordain that "the construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons." (113 U. S., 571, and cases there cited.)

Seventeenth. Claimants further show to the court that for the Government of the United States, without the consent of the Choctaw and Chickasaw nations, to cut off and debar said nations from their equities that would arise, in immediate possessory right, to such nations at and upon the accomplishment of the disposition of said lands involved in this controversy, which is provided for and contemplated by said act of the 2d of March, 1895, would not only be a most injurious and flagrant violation of the property and treaty rights of the claimants in regard to said equities herein asserted by them, but such appropriation of said lands to the public domain and the disposition thereof under the
31 homestead and other laws of the United States would be a palpable and most injurious violation of other treaty obligations existing in favor of the Choctaw and Chickasaw nations under and in virtue of the provisions of said treaty of April 28, 1866.

ne of the provisions of a treaty which would be violated by dispos-
of the lands in controversy as part of the public domain, provided
nants are indeed entitled to the equities which they hereinbefore set
nd assert, is found in article 43 of said treaty of the 28th of April,
, which stipulates that no white person shall be permitted to go into
Territory unless incorporated in one or the other of the said claimant
ns, with the exception of officers, agents, and employees of the
ernment and of any internal improvement company, or persons trav-
g through or temporarily sojourning in said nations, or either of
n.

ighteenth. Claimants further show to the court, in the alternative,
if the court should find and hold said article 3 of said treaty of the
of April, 1866, does make and constitute an absolute conveyance of
itle in and to the lands in controversy herein, divested of all equities
trusts in favor of claimants, and this court should reach that con-
on notwithstanding all the facts herein set forth, then still these
nants are entitled to the decree of this court securing to them all
ights and equities hereinabove claimed and set forth, notwithstand-
he said effect of said cession of said third article of said treaty of
28, 1866. Because the claimants say that if such is the effect of
article 3 as the same now stands, then the fact that said article omits
to set forth and state the said trust and equity expressed in said
proposition 5 hereinabove set forth, and omits to reserve and
secure to these claimants the right and equity of the ownership
id land which it was the design of claimants and of the Government
e United States to secure to these claimants in the event that said
should cease to be used for the settlement of Indians, and should
sposed of as is provided in said act of Congress of the 2d of March,
, is due to mistake and inadvertence on the part of the commission-
nd officers of the Government of the United States who procured
making of the said treaty of April 28th, and of said third article
of, and who drew the same for execution, in omitting to insert the
provisions which reserved and secured to claimants the interest,
and equity hereinabove set forth, as promised to be reserved and
ed by the commissioners who negotiated the same, and to the mis-
and inadvertence of the representatives of the claimants in assent-
o and executing the said treaty omitting said reservation of said
y in favor of claimants.

e facts going to show that said omission of said clause, proposition
ve named, was the result of mistake on the part both of the officials
e Government of the United States who negotiated for, drew, and
red the execution of said treaty, and also of the Choctaw and
asaw nations and their commissioners and agents who conducted
egotiations for the making of said treaty, and who procured the
tion thereof on behalf of the Choctaw and Chickasaw nations, are
me facts which are hereinabove set forth going to show—

That it was expressly agreed and asserted that said proposition 5
l be inserted in all the treaties then being negotiated; (b) the agree-
of the said Choctaws and Chickasaws that the provisions of said
propositions should be inserted in all the treaties then being

33 negotiated, including that with the Choctaws and Chickasaws, with the exception of the above-named modification of proposition 7; (c) that the Commissioner of Indian Affairs, before said treaty was concluded, reported that substantially such provision should be inserted in said treaty as is hereinabove quoted from his annual report of 1864; (d) that the said Commissioner in his annual report of 1865 repeated that "with the Choctaws and Chickasaws a treaty was agreed upon upon the basis of the seven propositions heretofore stated;" (e) the fact that said proposition 5 was in substance inserted in the other treaties being negotiated for at said convention at Fort Smith, Arkansas, held in September, 1865, along with the said treaty of the 28th of April, 1866, and which were negotiated under conditions substantially the same as that negotiated with the Choctaws and Chickasaws; (f) the inequity and injustice that would be involved in making said article 3 extinguish all equities of the claimant nations in the lands embraced in said article upon and for the considerations expressed in said article, whilst to the other tribes then being negotiated with, and from whom the Government did not withhold their equities in lands embraced in their respective treaties of the year 1866, but, on the contrary, have purchased and paid therefor as hereinabove set forth, and all the other facts hereinbefore set forth.

Claimants therefore aver and charge that if said article 3 as it stands does extinguish said equities of claimants, then the said provisions of said article ought, in justice and equity, to be by this court so reformed as that it will not extinguish said rights and equities of the claimants in and to the lands here in controversy and the other lands embraced in the cession of said article 3.

34 Nineteenth. Claimants further show to the court that the affiliated bands of Indians who are named in the above-quoted provision of the act of March 2, 1895, are fractions or parts of certain ancient tribes of Indians, as claimants are informed and believe, and therefore aver, to wit, of Delawares, Caddoes, Keechies, Towaconies, and Wacoes.

The words "affiliated bands," as employed in said last-named act of Congress, may take in fractions of other tribes, but as to this claimants are not informed and cannot aver.

Claimants further show to the court that the Wichita and affiliated bands of Indians named in the above-quoted provision of said act of March 2, 1895, and who are, by said act, required to be made defendants herein, will have, after the lands here in controversy are disposed of as provided in said last-named act under the homestead laws of the United States as modified by said last-named act, no right to or interest in the proceeds of the disposition and sale of said lands, and which proceeds are required by said act of the 2d of March, 1895, to be deposited in the Treasury subject to the judgment of the Court of Claims in the suit therein provided for, but the whole of said money so deposited will be the property of claimants in virtue of all the premises herein set forth, and especially in virtue of the fact that the treaties herein set forth conveyed and secured to the Choctaw and Chickasaw nations the ownership of the lands here in controversy as between the United States and the said Choctaw and Chickasaw nations, and also as between the last-named two nations and the Wichita and affiliated bands of Indians and all other Indians or Indian tribes.

Claimants further show, aver, and charge that, as between the United States and them, it was, by reason of treaty obligations isting between the United States and claimants, and herein set forth, yond the competency of the United States, as against the grants d provisions of said treaties above named of the 18th of October, 20 (7 Stats., 211), of the 20th of January, 1825 (7 Stats., 234), of e 27th of September, 1830 (7 Stats., 333), of the said patent of the d of March, 1842 (see Exhibit A), of the 17th of January, 1837 (11 ats., 573), of the treaty of the 22d of June, 1855 (11 Stats., 611), and id treaty of the 28th of April, 1866 (14 Stats., 769), to grant unto the ichitas and affiliated bands any title or interest in the lands in con- oversy, or in the proceeds thereof, except the right of occupancy d possession contemplated and secured by the said fifth proposition greed, at the negotiation of the last-named treaty, to be inserted in such eaty, and which right of possession and occupancy and of all interest, any Indian tribes, bands, or persons, in said lands, and in the pro- eds thereof, became and were absolutely terminated upon the termina- on of the occupancy of said lands by any Indian tribe, band, or person ho might, by the United States, be colonized or settled upon said lands nder the reserved rights named in said fifth proposition hereinabove t forth; and therefore, and by reason of the premises aforesaid, all the ghts of the said Wichitas and affiliated bands in said lands and their oceeds were and are cut off and terminated by and upon the occurrence the disposition of said lands under the homestead laws as provided in e said act of March 2, 1895, and all interest of said Wichitas and filiated bands in the moneys arising from said sale thereof are absolutely and forever extinguished.

Claimants further aver and show to the court that if the United States have come under any obligations, by contract, treaty, or herwise, with said defendants, the Wichitas and affiliated bands, whereby id last-named tribe and bands will be entitled to any compensation or quities, owing to their being deprived of the possession of said lands re in controversy, or of any or all of the moneys arising from the sales ereof, then such claim of the Wichitas and affiliated bands inure to them against the United States and are so held, and are not held gainst these claimants, or against the moneys required by said act of larch 2, 1895, to be deposited in the Treasury.

Claimants further aver and charge that the said claimant nations are ntitled, as against the said Wichita and affiliated bands, to be compen- ated for the value of the lands which by said act of the 2d of March, 895, are to be allotted to the members of the Wichita and said affiliated ands, and also as against the United States, and are further entitled, as gainst the United States, for the value of all lands reserved from the nds here in controversy by said act of March 2, 1895, for the use of ommon schools, university, agricultural college, normal school, and pub- c buildings of the Territory and future State of Oklahoma, and that he provisions of the act of Congress under which this suit is brought re such as to entitle this court as a court of equity to ascertain the uantity and the value of the said lands so allotted and reserved, and to ive to these claimants a decree for the said value of said allotted and eserved lands as well as for said proceeds of the sale of lands required y said act to be deposited in the Treasury.

PRAYER.

Wherefore, all the premises aforesaid considered, the Choctaw and Chickasaw nations pray as follows:

37 1. That proper process and notice be given, as provided by said act of March 2, 1895, to the defendants herein, to wit, to the United States and to the Wichita and affiliated bands of Indians, which are hereinabove named and set forth, and who are made defendants herein, notifying them to make answer hereto as provided by said act of March 2, 1895.

2. That the court will pass its decree in favor of these claimants decreeing that they are in law and equity entitled to the proceeds of the sale of all lands here in controversy as to which proceeds it is provided in the said act that the same shall be deposited in the Treasury subject to the judgment of the court in this suit, and also are entitled to the just and full value of all lands which shall be allotted and reserved under the provisions of the said act and of the agreement which by said act is accepted, ratified, and confirmed, as therein provided, as such value shall be ascertained under an accounting made under the order and direction of this court.

3. That this court will from time to time, as said sales are made, and the proceeds thereof deposited in the Treasury, as provided by said act, pass its order and decree directing the payment out of said proceeds so deposited to the Choctaw Nation three-fourths of said proceeds of sale so deposited, and to the Chickasaw Nation the other one-fourth.

4. That when the quantity and value of said lands to be allotted as aforesaid to the members of the Wichita and affiliated bands and reserved for school and other purposes, as hereinbefore set forth, are ascertained and determined, the court will decree the claimants aforesaid in said proportions of three-fourths to the Choctaws and one-fourth to the Chickasaws, of the entire value of said lands so allotted to said several and respective members of the Wichita and affiliated bands and reserved for school and other purposes.

38 5. And for all such other and further relief as may be demanded by justice and equity, including the reform of the terms of said article 3 of said treaty of the 28th of April, 1866, provided the court shall find that these claimants are not entitled to the rights and equities herein prayed for in the absence of such reform by the decree of this court.

THE CHOCTAW AND CHICKASAW NATIONS,
By JAMES G. STANDLEY,
Delegate Choctaw Nation.

J. H. McGOWAN,
Att'y of Chickasaw Nation,
629 F Street N. W., Washington, D. C.

SAM'L SHELLABARGER and
J. M. WILSON,
SHELLABARGER & WILSON,
Of Counsel for Choctaws,
No. 1416 F Street N. W., Washington, D. C.
ROB'T L. OWEN.

DISTRICT OF COLUMBIA, *ss:*

Before me, the undersigned, a notary public in and for the District aforesaid, personally appeared James S. Standley, the delegate and agent of the claimant the Choctaw Nation for the purpose of conducting and transacting the business of said nation in the city of Washington and elsewhere relating, amongst other things, to all the matters and premises set forth in the above and foregoing petition, who, being duly sworn, on solemn oath says:

1. That no assignment or transfer of the claims set forth in the foregoing petition, or any part thereof, or any interest therein, has been made by the claimant the Choctaw Nation, except the assignment set forth in the foregoing petition to the Chickasaw Nation.

39 2. That the claimant the Choctaw Nation is justly entitled, as herein shown and set forth, to the rights, equities, property, and moneys set forth and claimed in the said foregoing petition against the defendants, the Wichita and affiliated bands of Indians, and also against the United States, after allowing all just credits and set-offs.

3. That affiant has fully read and knows the contents of the foregoing bill in equity and petition; that all the matters and things therein set forth as matters known to affiant of his own knowledge are true in substance and in fact, and that all the other matters therein set forth as upon information and belief he believes to be true.

JAMES S. STANDLEY.

Subscribed and sworn to before me this 21st day of March, A. D. 1895.

[SEAL.] EDMUND VANDYKE,
Notary Public.

DISTRICT OF COLUMBIA, *ss:*

At the same time and place personally appeared Jonas H. McGowan, who, being duly sworn, deposes and says that he is an attorney for the Chickasaw Nation, one of the parties complainant in the above petition, and that he has duly read the same, and that the same is true upon his information and belief; that no assignment or transfer of the claim set forth in the foregoing petition, or any part thereof, or any interest therein, has been made by the claimant, the Chickasaw Nation; that the claimant the Chickasaw Nation is justly entitled, as herein shown and set forth, to the rights, equities, property, and moneys set forth and claimed in the foregoing petition against the defendants, the Wichita and affiliated bands of Indians and the United States, after allowing all just credits and set-offs.

JONAS H. MCGOWAN.

40 Subscribed and sworn to before me this 21st day of March, A. D. 1895.

[SEAL.] EDWARD VANDYKE,
Notary Public.

EXHIBIT A.

[Copy.]

The United States of America, to all to whom these presents shall come, greeting:

Whereas, by the second article of the treaty began and held at Dancing Rabbit Creek on the fifteenth day of September, in the year of our

Lord one thousand eight hundred and thirty (as ratified by the Senate of the United States on the 24th day of February, 1831), by the commissioners on the part of the United States, and the Mingoes, chiefs, captains, and warriors of the Choctaw Nation, on the part of said nation, it is provided that "the United States, under a grant specially to be made by the President of the United States, shall cause to be conveyed to the Choctaw Nation" a tract of country west of the Mississippi River, in fee simple, to them and their descendants, to inure to them while they shall exist as a nation, and live on it, beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning, the boundary of the same to be agreeably to the treaty made and concluded at Washington city in the year 1825:

Now, know ye that the United States of America, in consideration of the premises, and in execution of the agreement and stipulation in the aforesaid treaty, have given and granted, and by these presents
41 do give and grant, unto the said Choctaw Nation the aforesaid "tract of country west of the Mississippi;" to have and to hold the same, with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, as intended "to be conveyed" by the aforesaid article, "in fee simple to them and their descendants, to inure to them, while they shall exist as a nation and live on it," liable to no transfer or alienation, except to the United States, or with their consent.

In testimony whereof I, John Tyler, President of the United States of America, have caused these letters to be made patent, and seal of the General Land Office to be hereunto affixed. Given under my hand, at the city of Washington, the twenty-third day of March, in the year of our Lord one thousand eight hundred and forty-two, and of the Independence of the United States the sixty-sixth.

By the President:

JOHN TYLER.
DAN'L WEBSTER,
Secretary of State.
JOHN C. SPENCER,
Secretary of War.
T. HARTLEY CRAWFORD,
Commissioner of Indian Affairs.

Recorded, volume 1, page 43.

J. WILLIAMSON,
Recorder of the General Land Office.

Executed in the Bureau of Topographical Engineers.

JOHN J. ALBERT,
Col., Corps T. Engineers.

Returned to the War Department for the Choctaw Nation, March 24, 1842.

[L. S.]

E. M. HUNTINGTON,
Commissioner of the General Land Office.

42 In the Court of Claims of the United States.

THE CHOCTAW NATION AND THE Chickasaw Nation, claimants,
vs.
THE UNITED STATES AND THE Wichita and Affiliated Bands of Indians, defendants.

No. 18932.

II. *Answer of defendant Indians.—Filed August 14, 1895.*

The answer of the defendants, the Wichita and Affiliated Bands of Indians, to the petition of the claimants, respectfully represents:

First. They admit the allegations in the first paragraph of the claimants' petition contained.

Second. They neither admit nor deny the allegations of the second paragraph thereof.

Third. They neither admit nor deny the allegations of the third paragraph of the petition so far as they refer to the possession of certain lands east of the Mississippi River and the cession thereof; they admit that the United States, by the treaty of October 18, 1820, recited in the said paragraph, attempted to cede to the Choctaw Nation certain lands, among which are the lands at issue in this cause.

But they deny that the United States did legally so cede the
43 said lands to the said Choctaw Nation, for the reason, as these defendants aver, that the United States possessed no title to the same, the aboriginal title of these defendants therein not having been extinguished at the time of such attempted cession.

They aver that the said lands as far west as the limits of the United States were ceded to the United States in the year 1803 by France, being a portion of the Territory of Louisiana, said cession being subject to the possessory rights of the aboriginal tribes; that by a treaty entered into between the United States and the Quapaw tribe of Indians, which treaty was proclaimed July 5, 1818 (7 Stat. L., p. 176), and by reference thereto is made a part of this answer, the said Quapaw tribe of Indians attempted to cede to the United States certain lands, among which are those contained in the subsequent alleged cession to the Choctaw Nation, which lands are described in the second article of the said Quapaw treaty, as follows:

"Beginning at the mouth of the Arkansaw River, thence up the Arkansaw to the Canadian Fork, and up the Canadian Fork to its source; thence south to the Big Red River, and down the middle of that river to the Big Raft; thence a direct line so as to strike the Mississippi River thirty leagues in a straight line below the mouth of the Arkansaw."

All of that portion of the Quapaw cession lying west of the western boundary of the now State of Arkansas composed the attempted cession to the Choctaw Nation.

But these defendants deny that the said Quapaw tribe possessed, or that the United States received from it, any title to the lands west of the extreme eastern portion of what is now the Indian Territory, the said Quapaw Indians never having occupied the said lands, nor had they any

possessory right thereto, being settlers of comparatively recent date upon the portion of the said cession contained in the present State of Arkansas, whither they had come from their former habitat east of the Mississippi River.[1]

44 These defendants, therefore, deny that the United States ever legally ceded to the claimants herein, or either of them, or to any person or persons whomsoever, the lands which are the subject of this action, or any part thereof or interest therein, or ever so ceded any of the lands occupied by these defendants under their aboriginal right of occupancy, as hereinafter more fully set forth.

The said Quapaw Indians retained, in the aforesaid treaty, certain lands for their own occupancy, which they thereafter ceded to the United States by a treaty proclaimed February 18, 1825, which by reference is made a part of this answer. (7 Stat. L., 232.) In the fourth article of this second Quapaw treaty it is provided that "the Quapaw tribe of Indians will hereafter be concentrated and confined to the district inhabited by the Caddo Indians, and form a part of said tribe." And defendants aver that the said Caddo Indians are the same as the Caddo Indians, the defendants herein. The above provision was rescinded by a treaty with the Quapaws proclaimed April 12, 1834, and made a part of this answer by reference thereto (7 Stat. L., 424), the Quapaws being settled in the Indian Territory.

Fourth, fifth, sixth, and seventh. They admit the execution of the treaties recited in the fourth and fifth paragraphs of petition, the patent recited in the sixth paragraph, and the convention recited in the seventh paragraph, but subject to the same exceptions as to the title conveyed thereby as are set forth in the third paragraph of this their answer; and deny that the aboriginal possessory right of these defendants was affected thereby. These defendants aver that the United States derived its authority to agree to convey, and to actually convey, the lands

45 attempted to be conveyed by patent as set forth in the 5th and 6th paragraphs of claimants' petition under and by virtue of the act of Congress approved May 28, 1830, being "An act to provide for an exchange of lands with the Indians residing in any of the States or Territories and for their removal west of the river Mississippi" (4 Stat. L., 411), whereby it was provided as follows:

"SECTION 1. That it shall and may be lawful for the President of the United States to cause so much of any Territory belonging to the United States west of the river Mississippi, not included in any State or organized Territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there; and to cause each of said districts to be so described by natural or artificial marks as to be easily distinguished from any other.

* * * * * * *

"SEC. 3. That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them and their heirs or successors, the country

[1] "Dictionary of Indian Tribes" in manuscript, Bureau of American Ethnology; Caption: Siouan Family, Quapaw Tribe.

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so exchanged with them; and if they prefer it that the United States will cause a patent or grant to be made and executed to them for the same: Provided always, That such lands shall revert to the United States if the Indians become extinct or abandon the same."

They further charge and aver that no authority of law existed for the conveyance, by patent or otherwise, of the lands attempted to be conveyed to cla'mants, as set forth in the sixth paragraph of claimants' petition, whereof the Indian title had not been extinguished, and that in truth and in fact the title of these defendants to the lands at issue in this suit had not been extinguished by the United States when said attempted conveyance was made, and that the same is and was void as against these defendants.

Eighth. They admit the allegations in the eighth paragraph of the petition contained so far as to admit the execution of the agreement set forth in the said paragraph, but deny that the legal force and effect of the said agreement in any manner impairs the rights of these defendents; and they aver that the lands thereby leased to the United States
46 were intended for the occupancy of these defendants, and of them alone. Denying that any legal right on the part of the United States to contract with the claimants existed at the date of said agreement respecting the lands, the subject-matter of this suit, and denying any and all right of the claimants to the said lands, these defendants allege that, even under the terms of the agreement of June 22, 1855, referred to, the leasing of said lands for a permanent settlement of these defendants did not contemplate the after removal or separation of these defendants from the lands assigned to them west of the 98th degree of longitude, or any portion thereof, or a separation of interest in the proceeds of the sale or disposition of the whole or part of said lands, and so far as these defendants were affected by the terms of said agreement, to which they were not a party directly or indirectly, and to which their consent was never requested or obtained, the permanent settlement of these defendants by the United States gave to these defendants, and it was so intended thereby to give to these defendants, a permanent right in and to the lands upon which they were so permanently settled, and the allotment of a portion of said lands in severalty to these defendants and their consent to hold said allotment to carry out a settled policy of the United States respecting Indians, is in no degree an abandonment of the right of these defendants, in their tribal capacity, to the proceeds of the sale of the unallotted portion of said lands if the same shall be sold, or the enjoyment in common of the same if they shall remain undisposed of. Defendants further answer and aver that while at the time of the said agreement between the United States and the Choctaw and Chickasaw Indians, the needs of these defendants may have been supplied by their location on lands the subject of that agreement, and they, therefore, accepted the same, these defendants did not then understand that
47 they were being settled on lands that had been leased for their occupancy, but, on the contrary, they believed that they were being given a permanent home upon lands whereof they had always enjoyed a possessory right, subject only to the paramount title of the United States.

Ninth. They admit the execution of the treaty set forth in ninth paragraph of the petition that the paramount title to all lands held by Indian tribes is in the United States, the Indians possessing only the right of occupancy, but they aver that by the said treaty the Choctaw and Chickasaw nations ceded and surrendered to the United States all their right and title in said lands, either legal or equitable, if any they ever had, which these defendants deny. They further aver that the unconditional retrocession by the claimants to the United States of all the territory west of the 98th degree of west longitude, as provided for in the 3d article of the treaty of April 28, 1866, between the Choctaw and Chickasaw nations of Indians and the United States (14 Stat. L., 769) was essential to correct the error into which the United States had fallen in, theretofore attempting to convey to claimants the lands involved in this suit, along with other lands to which defendants had also the right of occupancy, which attempted conveyance was made in violation of law and the rights of these defendants.

Tenth. They admit the accuracy of the description of the lands set forth in the tenth paragraph of the petition, as the lands at issue in this cause, but deny, as before, that the claimants have any interest, either legal or equitable, therein.

Eleventh and twelfth. They deny the allegations in the eleventh
48 and twelfth paragraphs of the bill contained. They deny that the interest of claimants in and to said land and premises is the full ownership of the equitable beneficial interest and title in and to the same in the event contemplated by and provided for in the act of March 2, 1895, referred to in claimants' petition; they deny that the allotment of lands in severalty to these defendants and the application of the proceeds derived from the sale of unallotted lands is, in fact, a ceasing to appropriate said lands to the colonizing of Indians thereon, and, on the contrary, aver that the application of the proceeds of the sale of said unalloted lands to these defendants is essential to the full enjoyment by these defendants of the lands on which they have heretofore been permanently settled, and deny that said lands are still held by the United States, subject to the trust set up in the twelfth paragraph of claimants' petition, or subject to any trust of any name or nature, except as the same are held in trust for these defendants.

Thirteenth. Answering the thirteenth paragraph of the petition, these defendants deny that any action of their codefendant, the United States, in relation to the lands of the Creeks or Seminoles or any other tribe of Indians, can be legally or equitably binding on these defendants; nor can any such action respecting the lands in the so-called leased district formerly held as a reservation for the Cheyennes and Arapahoes. And in connection with these last-named lands these defendants aver that the said tribes were located thereon in defiance of the understanding had between these defendants and the United States, at the council held at Fort Arbuckle, in 1859, hereinafter set forth, and of the treaty of 1855, between the United States and the claimants herein, whereby the tribes ranging north of the Arkansas River were expressly excluded from set-
tlement thereon; wherefore these defendants aver that the acknowl-
49 edgment of an interest in the Choctaws and Chickasaws as against tribes not having a shadow of interest can not be argued to the

detriment of these defendants, who are not in like case; and these defendants deny that the treaty of April 28, 1866, by the terms whereof the land involved in this suit was ceded to the United States by the claimants herein, was executed by the said claimants or by the United States, in the understanding and under the assurance from the United States that the purchase by the United States of the rights of claimants in the lands involved in this suit was made subject to the trust and for the purpose of setting apart the lands embraced in said cession for the friendly tribes then in Kansas and elsewhere, on such terms as may be agreed upon by the Government or such as may be fixed by the Government, except in so far as by the language used in said treaty it was announced as the policy of the Government and so understood by the claimants to cancel any shadow of title of the claimants in and to said lands that the same might be employed fully and wholly by these defendants and other friendly tribes of Indians to whom the Government had theretofore, or subsequently might, rightfully grant it, after extinguishing the Indian title as required by law. These defendants further deny that any settled Executive policy of the United States has recognized a legal or equitable right of claimants in and to the lands involved in this suit since the treaty of 1866, by which the claimants retroceded the same to the United States; and these defendants allege that any Executive action which may be construed into a recognition of a legal or equitable right of claimants in and to said lands, since the date of said treaty of 1866, if any such in fact exists, was without authority of law and resulted from error on the part of the Executive Office so recognizing the same. Defendants deny that it was or is the intent or meaning of said treaty of
50 1866 to restore to the Choctaw and Chickasaw nations any alleged right they may have once erroneously acquired from the United States in and to said lands; and these defendants charge and aver that it was the intent of the parties to said treaty of 1866 to wholly divest the claimants of any and all shadow of right in and to the said lands by them retroceded to the United States. And respecting any legislative action by the Congress of the United States which may be attempted to be construed into a recognition of a right, legal or equitable, of claimants in and to said lands, these defendants aver that any and all such action has been taken under a misapprehension of the facts and environments of the claimants herein with relation to said lands and the retrocession thereof, and resulted, in truth and in fact, in the concession of a gratuity to said claimants on the part of the Congress of the United States given for reasons unknown to these defendants, if not erroneously through a want of knowledge of the limitations to claimants' rights in the premises as hereinbefore alleged.

And in relation to the payment for the alleged interests of the Choctaw and Chickasaw nations in the Cheyenne and Arapahoe Reservation, these defendants, by reference thereto, make a part of this their answer, the message of the President of the United States, sent to the Senate and House of Representatives on February 17, 1892, in which he informed the Congress that he would have vetoed the provision for the payment for said alleged interests had it come to him in the form of a separate measure; but attached, as it was, to the Indian appropriation bill, he could not do so without far-reaching and disastrous consequences;

the reason given being that the President thought that all the interests of the claimants had been ceded to the United States by the treaty of 1866. Said message is printed in Senate Executive Document No. 42, of the first session of the Fifty-second Congress.

51 Fourteenth. These defendants deny that any action of the Executive branch of the Government, legally exercised in the line of official duty, has recognized a right of claimants of any nature in and to the lands the subject of this suit since the date of the treaty of 1866. They deny that the action of the various officials of the United States Government, as set forth in the fourteenth paragraph of the petition, is binding on these defendants, who have never been parties to any of the treaties, conventions, or agreements heretofore made between the claimants and the United States affecting the lands at issue in this cause. Even if the United States has recognized the rights of claimants, which is denied, these defendants deny that such action has been of such a nature as to command the recognition of this court as involving the correct construction of said treaty under the laws of the United States and the usages of the Government of the United States in dealing with the aboriginal possessory rights of Indians. And while continuing to deny any right, title, or interest now, or heretofore claimed by the claimants or the United States to, or in the possession of the said lands, they now show to the court that, on the 19th day of October, 1872, an agreement was entered into, at the city of Washington, between the Commissioner of Indian Affairs and certain Indians on behalf of these defendants, the ratification of which agreement by Congress was recommended by the said Commissioner in his report for the year 1872 (page 101), said agreement giving and granting to these defendants, as a home, the lands at issue in this cause.

And in this connection these defendants also show to the court that the President of the United States, on the 17th day of December, 1883, forwarded to Congress a draft of a bill to confirm the aforesaid agreement, at the request of the Secretary of the Interior and the

52 Commissioner of Indian Affairs. (Senate Ex. Doc. No. 13, 48th Cong., 1st Sess.)

And defendants submit that the acts of the aforesaid officials in connection with the said agreement, as well as the message of the President, set forth in the thirteenth paragraph of this their answer, are not consistent with the averments of the claimants that they have an equitable interest in the lands at issue in this cause.

And defendants further submit that it was the intention of Congress in conferring upon this court jurisdiction in this cause that it should take such jurisdiction free from any entanglement that might arise from any action of one of the defendants, the United States, or its agents, so that upon consideration thereof the court might determine under said act and the laws of the United States all the rights, legal and equitable, of these defendants.

Fifteenth. Answering the fifteenth paragraph of the petition, these defendants deny that the claimants in making the treaty of April 28, 1866, were moved, influenced, or induced in a large degree to make said treaty, as to the third article thereof, by assurances held out to them and their representatives that the Indian country was to be set apart for the

of such Indians in Kansas or elsewhere as the Government might onize therein, in the sense that such use was a mere temporary use and upancy coupled with a reversion to said claimants if said lands should se to be used in common by said friendly tribes; they deny that lan- ge was ever used by any representative of the United States at the e of negotiating said treaty implying an intent on the part of the ited States to recognize a right of any name or nature on the part of imants in and to the lands retroceded by the terms of said treaty; they deny that the cession of said lands by claimants was made sub- ject to any trust or condition from and by which any benefit would ever accrue to claimants out of said lands, or whereby any legal equitable right, title, or interest in and to said lands remained in said imants. While it is true that the "friendly tribes now in Kansas," ferred to in the fifteenth paragraph of the petition, were these defend- ts, who had been driven from their pristine habitats by the disloyal rces during the war of the rebellion, and were then desired by the nited States to be returned thereto, these defendants charge and aver at the claimants herein were a part of the armed forces engaged in bellion against the authority of the United States between the years 860 and 1865, by whom these defendants were driven from their home pon the lands involved in this suit into the State of Kansas, these efendants having always been loyal to the United States and at peace herewith, and that at the time of negotiating the treaty of April 28, 1866, he said claimants, by reason of their bad faith to the United States in iolating their treaty obligations by taking up arms against the authority f the United States, had forfeited all treaty rights therewith, and that nly such rights now remain to them, the claimants, as were restored to hem by the terms of said treaty of 1866 and by the laws of the United States operating to restore to them their rights theretofore forfeited by uch violation of their treaty obligations as herein set forth.

Sixteenth. Answering the sixteenth paragraph of the petition, these defendants deny that the practical construction given to the treaty of April 28, 1866, at the time of its being negotiated for, at the time of its actual negotiation, and ever since its ratification by Congress, by the commissioners, agents, and officers of the United States whose 54 duties connected them with said negotiations and with the making of the said treaty and with the interpretation and the execution of the provisions thereof, has at all times been a construction which gave and secured to claimants any rights or equities in the said lands embraced in article 3 of said treaty, and especially any right to the lands the sub- ject of this suit, and they deny that a failure to admit rights, legal or equitable, in the claimants in and to the said lands would be a departure from the construction heretofore given to said treaty by the Government of the United States, and they aver that the treaty of 1866, herein referred to, can not equitably be construed to the detriment of these defendants, who were not parties thereto; and these defendants deny that they should be detrimentally affected by any action of their codefendant, the United States, or the agents thereof, but aver that this cause should be decided upon its merits, and that any official action which may be construed into a recognition in claimants of any right, title, or interest in and to the lands involved in this suit should not be allowed by this honorable court

to impede the equitable allowance of the rights of these defendants. They admit the decision of the Supreme Court of the United States, cited in the said paragraph, and aver that the most "cogent reasons" do exist for upholding the claims of these defendants as the same are set forth in this their answer.

Seventeenth. Answering the seventeenth paragraph of the petition, they deny that to cut off and debar claimants from any and all rights in and to said lands involved in this suit would be a violation of the property rights of the claimants; deny that said claimants have any legal or equitable rights in and to said lands and property; deny that appropriating and disposing of said property by the United States under the homestead laws and applying the proceeds from such disposition
55 to the use and benefits of these defendants would be a violation of the treaty obligations existing between the claimants and the United States; and they deny that the forty-third article of the treaty of 1866 applies to the lands west of the 98th meridian, which they claim were ceded absolutely to the United States by the third article thereof, but aver that said 43d article applies rather to the territory east of said meridian retained by the said treaty to the use of the claimants.

Eighteenth. Answering the eighteenth paragraph of claimants' petition, these defendants deny that if the court should find and hold that said article 3 of said treaty of the 28th of April, 1866, does make and constitute an absolute conveyance of the title in and to the lands involved in this suit, divested of all equities and trusts forever, then still claimants will be entitled to the decree of this court securing to them all the rights and equities by them in their petition claimed; they deny that said article 3, retroceding said lands to the United States, is in any manner inconsistent with proposition 5, as disclosed in the speech of Hon. D. N. Cooley, as set forth in the petition of claimants, but aver that the retrocession of said lands to the United States is the only action that could have been taken whereby their purchase by the United States could have been accomplished as proposed in said proposition 5; they deny that it was the intent of said proposition 5 to hold out to claimants the hope of retaining any right, title, or interest in the territory to be ceded, but aver that the treaty itself, as signed by the contracting parties and finally promulgated as approved, is the best evidence of the terms thereof and the only evidence; they deny that any inadvertence or mistake existed on the part of the commissioners and officers of the Government of the United States who procured the making of said
56 treaty of April 28, 1866, and the third article thereof, at the time of the making thereof, in omitting to insert provisions which would reserve and secure to claimants an interest, trust, and equity in said lands as set forth and claimed by claimants in their petition herein; they deny that the same was promised to be secured to claimants by the commissioners who negotiated said treaty on the part of the United States, and they deny that any mistake or inadvertence existed at the time of the making of said treaty on the part of the representatives of claimants who negotiated said treaty by their omission to reserve equities in said lands in favor of claimants; these defendants deny each and every of the allegations in the petition of claimants going to show to this court the existence of such mistake or inadvertence as alleged in said

tition; they aver that the alleged matters and things set up in the claimants' petition as going to show inadvertence and mistake, do not, in fact, ow the same, and deny that said article 3 of said treaty of 1866 ought justice and equity to be reformed so as that it will extinguish the alleged ghts and equities of the claimants in and to the lands in this suit volved and the other lands embraced in said cession. They deny that e claimants are entitled to the relief asked in the eighteenth paragraph the petition, for the many reasons elsewhere set up in this answer.

Nineteenth. These defendants deny that they have no rights to or terests in the proceeds of the disposition and sale of the lands the subct of this action; they deny that the whole or any part of money derived om such sale or disposition of said lands is the property of claimants pon the grounds set forth in claimants' petition or upon any other grounds; ey deny that it has heretofore been beyond the competency of the United States to grant unto the Wichitas and Affiliated Bands of Indians any title to or interest in the lands in controversy, or in the proceeds thereof, except a mere right of occupancy subject to a reverion in the claimants; they deny that the rights of these defendants in nd to said lands became and were absolutely terminated upon the termination of the occupancy of said lands by any Indian tribe, band, or erson who might be colonized or settled thereon by the United States; hey deny that the fifth proposition referred to by claimants is in any espect subject to the construction sought to be placed thereon by claimnts in their petition, and deny that in any way or manner all or any of he rights of these defendants in and to said lands and their proceeds are ut off or terminated by and upon the disposition of said land under the omestead laws as provided for in the act of March 2, 1895, and further leny that all interest of these defendants in the moneys arising from said ale of said lands are absolutely and forever extinguished; while admitting that these defendants have a claim or demand against the United States for and on account of their possessory rights in and to the lands involved in this suit and other lands not herein involved, they deny that such claim or demand exists only as against the United States for compensatory damages as distinguished from their right to the soil or the proceeds of the sale thereof, and they allege that their absolute right to the soil embraced in the lands involved in this action is good as against the United States, the claimants, and the entire world, and that any and all money derived from the sale or disposition of said lands, or any part thereof, or any interest therein, must be held and applied to the use of these defendants. Further answering, defendants deny that claimants are entitled to compensation for any part of the lands allotted to these defendants as charged in claimants' petition. These defendants admit that they comprise the remnants of the ancient tribes, the Wichitas, Wacos, Towaconies, Caddos, Ionis (not mentioned in the petition), Keechies, and Delawares.

Defendants deny, as elsewhere in this answer, any right by the claimants herein to compensation, as claimed in said paragraph, for either the surplus lands of the so-called Wichita Reservation, being the lands at issue in this cause, or to the lands which have been or may be allotted to these defendants in severalty in the said reservation. But they aver that whatever may be the receipts by the United States from the sale of the

lands at issue herein, they justly belong to the Wichita and Affiliated Bands of Indians, these defendants, and should legally and equitably be paid to these defendants or held and applied to their use.

Further answering, these defendants say as to the facts on which they rely for compensation in, to, and out of the lands involved in this suit, as they are required to answer under the terms of the act of Congress approved March 2, 1895, conferring jurisdiction herein upon the Court of Claims, that by reason of the prior and ancient title to the said lands in these defendants and the defective nature of the title thereto in the United States, as set forth in the third paragraph of this answer, it was beyond the competency of the United States to grant unto the Choctaw and Chickasaw Indians any title or interest in the lands in controversy or in the proceeds thereof, and they aver that the rights of these defendants in and to the said lands can only be terminated by and in accordance with the agreement entered into between these defendants and the United States on the 4th day of June, A. D. 1891, and ratified by Congress in the act approved March 2, 1895, being the same act which conferred jurisdiction on this court for the trial of this cause.

Defendants further submit that if the United States have, by treaty, convention, or otherwise, entered into any obligation to the claim-
59 ants touching the lands at issue in this cause it is a matter beyond the knowledge of these defendants and that the claim thereunder inures to them against the United States, and not against these defendants or against any moneys that may be received from the sale of the said surplus lands required by the act of March 2, 1895, to be deposited in the Treasury of the United States to be disposed of in pursuance of the judgment of this court.

And, for the same reasons, these defendants deny that the claimants have any right to compensatfon for the lands allotted to these defendants in severalty or for those set apart for educational or other uses of the Territory of Oklahoma.

In order that this honorable court may be fully informed as to the claims of these defendants and the grounds therefor, these defendants state as follows:

. The pristine habitats of these defendants (except the Delawares) were in Louisiana, Arkansas, Texas, Indian Territory, and Oklahoma. The similarity of the languages spoken by them leads ethnologists to class them together as the Caddoan lingual family (7th An. Rept. Bu. of Am. Ethn., pp. 60–61). Northeast of them lived the Siouan lingual family, with the Quapaw tribe as its southern representative. The boundary between these families is given in the aforesaid report (p. 113) as "extending from the west side of the Mississippi River in Louisiana, nearly opposite Vicksburg, Mississippi, and running northwestwardly to the bend of the Red River between Arkansas and Louisiana." Attention is called to the similarity of the same portion of the boundary of the Quapaw cession recited in paragraph three of this answer: "From the Big Raft in a direct line so as to strike the Mississippi River thirty leagues below the mouth of the Arkansaw."

60 From the Red River in southwestern Arkansas the boundary between the Caddoan and Siouan families followed the watershed between the Red and Arkansas river systems, which west of longitude

ninety-eight runs closely to the Canadian Fork. The major portion of the lands at issue in this cause are thus included in the territory of the Caddoan lingual family. The southern limit of Caddoan lands was on a line running from the above-mentioned point on the Mississippi River southwestwardly through Louisiana and Texas to the junction of Tawakonay Creek (note the name) and the Brazos River; thence following that river to Palo Pinto, Texas; thence northwest to the mouth of the North Fork of the Red River, and thence to join the northerly line near the Antelope Hills in Oklahoma. (See said Report, p. 61.)

The Caddo tribe, together with others since extinct, but belonging to the same lingual family, occupied the eastern portion of Texas, and western Arkansas and Louisiana. By a treaty with the United States, made in 1835 (7 Stat. L., 470), which by reference is made a part of this answer, this tribe ceded to the United States what are Miller County, Arkansas, and, essentially, Caddo Parish, Louisiana, and agreed to leave the United States forever. They retired into Texas, not then a portion of the United States, and were residing there when that republic was annexed to the Union. Their right to be there was recognized by the United States in the treaty of 1846, made with the Caddos and other Indians (9 Stat. L., 844), which treaty, by reference thereto, is made a part of this answer, whereby the signatory tribes were declared to be under the protection of the United States. About one-half of the Caddos remained in northern Texas until 1859, when they were brought into the Indian Territory under the agreement made in that year at Fort Arbuckle, as hereinafter set forth. The other half of the tribe, on the breaking out of the Mexican war, went to live on Caddo Creek, in the Choctaw Nation, where they remained until moved, with the others, to their present location in 1859.[1]

The Wichita tribe have ever lived along the Red River, their habitat for more than a hundred and fifty years having been west and south of the Washita River, and hence west to the one hundredth degree of west longitude. The early white explorers found this tribe as far east as Arkansas, where they have given their name to the Ouachita River, upon which they once lived. They were driven therefrom early in the eighteenth century by the more powerful tribes from the east, and retreated up the Red River.[2]

Their ancient towns were situated on this river near the 98th meridian. Here they were attacked, in 1759, by the Spaniards under Parilla, whom the Indians, 6,000 strong, defeated, capturing two bronze cannons.[3]

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[1] "Dictionary of Indian Tribes," supra; caption: Caddoan Family, Caddo Tribe. Affidavits of Caddo Indians, pp. 33 and 34, Senate Executive Document, No. 13, 48th Congress, 1st session.

[2] "Dictionary of Indian Tribes," supra; caption: Caddoan Family, Wichita Tribe; reference to writings of La Harpe (1700), Le Page Du Pratz, Tonti (1690), and Jeffries (1761).
LeClerc's "Establishment of the Faith," translated by Shea, vol. 2, p. 265.
"Relation of Joutel," Margry, vol. 3, pp. 390-412.

[3] Extracts and letters of Lieutenant-Colonel Mezieres, taken from books 27 and 28, General Archives of Mexico, copies of which are in the Bancroft Pacific Coast Library, at San Francisco, Cal. An English translation of these is found on pages 860 et seq., of the Record in Original Cause, No. 4, October Term, 1894, Supreme Court of U. S., The United States vs. The State of Texas; the reference to Parilla is on page 893.
See also History of the North American States, Works of Hubert Howe Bancroft, Vol. XV, page 627, line 30; also quoted in said Record, p. 733.

Here they were visited, in 1778, by Atanacio de Messieres, commanding a Spanish expedition;[1] in 1788, by Francisco Xavier Fragoso,[2]
62 and again in 1803, by Francis Grappe.[3] Tradition of the tribe says that they removed from these ancient towns, after a fight with the whites, and settled on Cache Creek, where they lost one-half of their people from smallpox. Later they lived at the mouth of Otter Creek.[4] In 1834 they were visited at their town, then near the present site of Fort Sill, by Col. Dodge, U. S. A., said to be the first United States official ever among them.[5] Later they removed to Rush Springs where they were found by a party of United States surveyors in 1858. In the latter year a Comanche party, brought in by Wichita scouts for a conference with the authorities at Fort Arbuckle, were attacked and wiped out of existence by Major Van Dorn, U. S. A. (who had followed them from the west without knowing of the proposed negotiations), and the Wichitas, fearing the venge'nce of the Comanches, sought protection at Fort Arbuckle where they remained until after the conference at that post in 1859. In the fight mentioned all the crops of the Wichitas were destroyed and their means of subsistence for the year taken away.[6]

The Wichita Indians were always industrious, peaceful, and non-nomadic. They were an agricultural people, raising crops of corn, melons, and pumpkins which they traded with the Comanches and other roving tribes.[7] With these peaceful habits they united hunting, and
63 while living near the Red River, they have always hunted over all of the lands contained in the so-called leased district, and their right to these as the hunting grounds of the tribe have, from time immemorial, been recognized by all other Indians living near them.

On the 24th of August, 1835, the United States entered into a treaty with the Comanches and Wichitas, and the Comanches and Wichitas with the tribes mentioned in the preamble, in which this right is fully recognized by all the signatories, which treaty, by reference thereto, is made a part of this answer. (7 Stat. L., 474.)

Its preamble recites that it was made "for the purpose of establishing and perpetuating peace and friendship between the United States of America and the Comanche and Wichetaw nations and their associated bands or tribes of Indians, and between these nations or tribes and the Cherokee, Muscogee, Choctaw, Osage, Seneca and Quapaw nations or tribes of Indians," etc. It contains the following provisions:

Article 3. "There shall be a free and friendly intercourse between all the contracting parties hereto, and it is distinctly understood and agreed

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[1] See second report of Messieres, supra; p. 890 et seq., of above-mentioned record.

[2] Itinerary, etc., of Fragoso, published in "Report of Texas Boundary Commission," House of Representatives, Executive Document, No. 21, 50th Congress, 1st session, p. 48 et seq.

[3] John Sibley's "Historical Sketches of the Several Indian Tribes in Louisiana south of the Arkansas River, and between the Mississippi and the river Grande," American State Papers, vol. 5; Indian Affairs, vol. 2, p. 721 et seq. See also letters of Sibley to General Dearborn, Secretary of War, published on pages 747 et seq., of the Record aforesaid.

[4] Affidavits of Wichita Indians, p. 32, Senate Executive Document, No. 13, 48th Congress, 1st session.

[5] Report of the Secretary of War for 1834, Ex. Doc., No. 2, H. R., 23d Congress, 2d session, p. 70 et seq.

[6] Report of Commissioner of Indian Affairs, 1868, p. 267 et seq.

[7] See second report of Messierres, supra.
Report of Secretary of War, 1834, supra.

by the Comanche and Witchetaw nations and their associated bands or tribes of Indians, that the citizens of the United States are freely permitted to pass and repass through their settlements or hunting grounds without molestation or injury on their way to any of the provinces of the Republic of Mexico or returning therefrom." * * *

Article 4. "It is understood and agreed by all the nations or tribes of Indians, parties to this treaty, that each and all of the said nations or tribes have free permission to hunt and trap in the Great Prairie west of the Cross Timbers, to the western limits of the United States."

Article 5. "The Comanche and Witchetaw nations and their associated bands or tribes of Indians, severally agree and bind themselves to pay full value for any injury their people may do to the goods or other property of such traders as the President of the United States may place near to their settlements or hunting ground for the purpose of trading with them."

Article 6. "The Comanche and Witchetaw nations and their associated bands or tribes of Indians agree that, in the event of any of the Red people belonging to the nations or tribes residing south of the Missouri River and west of the State of Missouri, not parties to this treaty, should visit their own towns or be found on their hunting grounds that they will treat them with kindness and friendship and do no injury to them in any way whatever."

64 Article 9. "The Comanche and Witchetaw nations and their associated bands or tribes of Indians agree that their entering into this treaty shall in no respect interrupt their friendly relations with the Republic of Mexico, where they all frequently hunt and the Comanche Nation principally inhabit."

From the above it is evident that the "great prairie west of the cross timbers, to the western limits of the United States" was the subject-matter of this treaty, and that the Wichitas and the Comanches were called upon by the United States to agree with them and the other signatory tribes in respect to that particular country and none other.

The treaty operated and still operates as an estoppel against the United States and the Choctaws in favor of the Wichitas.

By calling upon the Wichitas to enter into a treaty speaking of their settlements, towns, and hunting grounds in that country, and asking them to agree to refrain from doing certain things and to permit others to do certain other things therein, the United States and the Choctaw Nation most solemnly and conclusively recognized that the Wichitas had such towns and hunting grounds and dominion, and had thereby the usual or customary Indian title, by occupation, to that country. The treaty, therefore, forever estops the United States and the Choctaw Nation from denying that the Wichitas then had such a title thereto.

The "cross timbers" mentioned in the fourth article of this treaty are situated at 97° west longitude, and the western limits of the United States at 100° west longitude, and as Texas was not admitted to the Union at that time, the territory covered by the said treaty lay entirely north of the Red River and included the whole of the Choctaw so-called leased district, together with a strip of land one degree east thereof, thus affirming the title of the Wichita Indians to the lands at issue in this cause. And these defendants aver that the title so affirmed has

65 never been extinguished except so far as it has been extinguished in relation to the lands at issue herein by the agreement of 1891.

And defendants especially call attention to the ninth paragraph of the said treaty, in which it is asserted that the said Comanche Indians then lived principally in the Republic of Mexico, and aver that they had no right of occupancy in the lands north of the Red River, though they were permitted to hunt there by the Wichitas, the proprietors of the land. And defendants aver that this permission was not accorded because of any right thereto existing in the said Comanches, but because rather than make the said Comanches their enemies, they had from time immemorial permitted the said tribe to cheat and rob them in their barter and trade.[1]

Of the other defendant Indians, the Towaconis and Wacos are closely related to the Wichitas, and prior to 1859 lived in northern Texas. The village of the latter tribe was at the site of the present city of Waco. The Ionies were more nearly akin to the Caddos, and lived in the southern portion of the Caddoan territory, as above set forth. The Kichais were in 1859 brought, as hereinafter related, from northern Texas where they had resided from the time of the earliest visits by white men in 1541 and long before.

All of these Indians, and others of their kindred now extinct, have from time immemorial resided in Texas, north and east of the Brazos River. They have been known generally as the "Tejas" or "Texas" Indians, although the name is more accurately applied to the Ionies. They were visited by the whites in 1536 (by Alvar Nunez Cabeca de Vaca) and in 1540 (by Francisco Vasquez de Coronado), and have ever since been well known to the Spaniards and Texans.

66 In 1854, after the annexation of Texas to the Union, that State authorized the setting apart of a reservation, and one was selected on the Brazos River at the mouth of the Clear Fork thereof, containing eight square leagues, or about 46,000 acres. Here the Texas Indians were gathered to some extent, although no Delawares or Kichais were among them, and one-half of the Caddos were in the Choctaw Nation, as heretofore related.[2]

Aggressive action by the whites of the neighborhood caused trouble, and the superintendent, Robert S. Neighbors, obtained the consent of the Indian Department to remove these Indians to the so-called leased district in the Indian Territory.

Superintendent Rector, of the Southern Superintendency, gathered together the scattered Indians into a camp near Fort Arbuckle, and on the 30th day of June, 1859, Superintendent Neighbors arrived with the chiefs of the tribes living on the Brazos River and elsewhere in northern Texas, and a council was held with the chiefs of the Wichitas and with Messrs. Neighbors, Rector, and Pike (Albert), as representatives on behalf of the United States.

At this council the Government representatives distinctly and unequivocally told the Indians that it was the desire of the Government to settle them in a permanent home, and to bring the Texas Indians out of their unpleasant surroundings; that the latter would be given a much larger

[1] Second Report of Messierres, supra.
Report of Secretary of War, 1834, supra.
[2] See reports of superintendents of Southern and Texas superintendencies, in reports of Commissioner of Indian Affairs, 1855 to 1860.

territory than they possessed in Texas; that they were to occupy it with the Wichitas, and it was to be theirs and their children's home forever. The territory set apart for them, as the Indians were then told, was bounded east and west by the 98th and 100th meridians, and north
67 and south by the Canadian and Red rivers. By natural objects it was described to them as running from the Red River to the Canadian, and from the creek below the Cottonwood Grove on the Washita to a point six miles west of the Antelope Hills. The Indians were told they could live anywhere within these bounds, and that the Government would build them an agency and a fort on the Washita River for their protection against the whites and the hostile plains Indians; that the Government would build them houses to replace those that they must leave behind on the Brazos, and would compensate them for the loss of any property they could not bring with them.

Relying on these representations on behalf of the United States, the Texas Indians came north and joined the Wichitas in the so-called leased district in the Indian Territory, giving up their old homes and the lands on which they had been promised by the Government of the United States, in 1854, they could live forever,[1] under the protection of the treaty of 1846, which they had made with the United States, and which has already been referred to in the early portion of this paragraph. The result of these negotiations was that these defendant Indians were comfortably and happily settled in the so-called leased district between the Washita and Canadian rivers, on the lands at issue in this cause, with the assurance that the whole of that district belonged to them and to them alone, as indeed it had been confirmed to the Wichitas by the treaty of 1835.

In 1861, at the breaking out of the civil war, the country of these defendants was invaded by troops of the so-called Confederate States, hostile to these defendants, who were always loyal to the United States, causing them to retreat into Kansas, abandoning their homes and crops, and helpless, sick, and needy, to remain in a strange country, among
68 strange people, for nearly seven years. In 1867 they were returned to their old home, where they have ever since resided.

The failure on the part of the United States to confirm by treaty the promises made at Fort Arbuckle, as hereinbefore related, has been the cause of much trouble, and left it in the power of the United States to little by little take from these defendants the lands then and there confirmed to them "for their use and their children's use so long as grass should grow and water should run." In pursuance of this policy the United States, in 1867, set apart, by treaty with the Kiowas and Comanches, all the southern half of the so-called leased district, containing 3,549,440 acres, but excluding "Greer County," now in dispute between the United States and the State of Texas. To this treaty these defendants were not parties and their consent thereto was neither solicited nor obtained. The said treaty, by reference thereto, is made a part of this answer. (15 Stat. L., 581.) By an executive order, dated August 10, 1869, the President of the United States reserved all the rest of the so-called leased district, except Greer County, to the Cheyennes and Arapahoes, who, by the treaty of 1855 with the Choctaws, were expressly

[1] Affidavits of various Indians, Senate Ex. Doc. No. 13, 48th Cong., 1st sess., p. 30 et seq.

excluded from participation therein. The aforesaid executive order was based upon a misunderstanding of the recommendations of Gen. W. B. Hazen, U. S. A., their superintendent at that time, who proposed that the Cheyennes and Arapahoes should be entirely located north of the Canadian River and these defendants south thereof.[1]

Because of the repeated recommendations of the agent in charge of the Indians in the so-called leased district, among whom were these defendants, and depredations made by Indians other than these defendants, commissioners were sent in 1872 to the Indian Territory, from whence,
69 in that year, were taken to Washington City certain of the chiefs and head men of the tribes and bands composing these defendants. These chiefs and head men were hastily selected by the Indian agent prior to the departure of the Commissioner and were not in any way delegated or empowered to act for these defendants in the cession of any lands.

To this body of chiefs and head men was presented by the Commissioner of Indian Affairs, who persuaded them to sign it, as they did under protest, an agreement in the words and figures following:[2]

"Articles of agreement made and concluded at Washington City, District of Columbia, this nineteenth day of October, A. D. 1872, by and between Francis A. Walker, Commissioner of Indian Affairs, representing the United States, of the one part, and the undersigned chiefs, head men and members of the Wichitas and affiliated bands of Indians duly authorized to act for their people, of the other part, witnesseth:

"ARTICLE 1. The United States hereby give and grant to the said Wichitas and other affiliated bands, for a home, the tract of country bounded as follows, to wit: Commencing at a point in the middle of the main channel of the Washita River where the 98th meridian of west longitude crosses the same, hence up the middle of the main channel of said river, to the line of 98° 40′ W. L., thence on said line of 98° 40′ due north to the middle of the main channel of the main Canadian River, thence down the middle of said main Canadian River to where it crosses the 98th meridian, thence due south to the place of beginning.

"ARTICLE 2. In consideration of the reservation provided for in the preceding article the said Wichitas and other affiliated bands hereby cede and relinquish to the United States all right, title, interest or claim of any nature whatsoever, in and to any lands in Texas, Louisiana, Indian Territory, or elsewhere within the limits of the United States."

In his annual report for 1872 the Commissioner of Indian Affairs (p. 101) recommends the ratification of this agreement, but no action was taken by Congress upon this recommendation.

On the 17th of December, 1883, the President of the United States, in a special message, presented to Congress a draft of a bill to, among other things, confirm the aforesaid agreement. No action was taken by Congress thereon. The said message and the accompanying doc-
70 uments, including the affidavits of Indians belonging to the Wichitas and affiliated bands, is referred to in this answer, to be incorporated as a part of the record in this action, and it is prayed the same

[1] Letter of W. B. Hazen, Sen. Ex. Doc., No. 13, supra, p. 40.
[2] Statement of Wm. Shirley, and affidavits of J. J. Sturm and Philip McCusker, Sen. Ex. Doc., No. 13, supra, p. 37 et seq.

will be read and considered as such, being embraced in and made a part of Senate Executive Document, No. 13, 48th Congress, 1st session, comprising printed pages 1 to 41 thereof, with accompanying maps.

An act of Congress was passed in 1887, and amended by a subsequent act in 1891 (24 Stat. L., 388 and 26 Stat. L., 794) for the allotment of lands in severalty to Indians and for the purchase by the United States of the surplus lands of the Indian reservations after such allotment. This act limited these reservations to those "created for their use by treaty stipulation or by virtue of an act of Congress or Executive order." Under the provisions of these acts an agreement was made on June 4th, 1891, between the United States and these defendants, for the sale of the surplus lands of the "Wichita Reservation," which are the lands at issue in this cause, and the said agreement was ratified by Congress by the act of March 2, 1895 (28 Stat. L., 876), the same act which conferred jurisdiction upon this honorable court to hear this cause.

The above premises considered, these defendants aver that the Wichita Indians were the aboriginal owners of the lands at issue in this cause; that this aboriginal possessory right has never been extinguished, and that it is confirmed to them in the lands involved in this suit by the setting apart to them of said lands by the United States as their permanent home and by other acts of the United States, and that under the laws of nations and of the United States relating to aboriginal possession they were entitled prior to the agreement of 1891 to the sole occupancy thereof,

71 subject, however, to the rights acquired therein by the other tribes and bands of these defendants, through the acquiescence by the said Wichitas in their joint occupancy of the said lands since 1859.

And these defendants further aver that the aboriginal rights of the said Wichitas were acknowledged by the United States and the Choctaw Nation in the treaty of 1835, which has never been abrogated nor in any way changed with the consent of the said Wichitas, which consent was necessary to the validity of such a change.

And those defendants further aver that the whole of the so-called leased district was confirmed to these defendants in 1859, thus securing the occupancy of the lands at issue in this cause to these defendants forever.

And these defendants further aver that although the agreement of 1872 did not receive the ratification of Congress, yet the acts of 1887 and 1891, heretofore recited, limiting the allotment of lands in severalty and the purchase of surplus lands to reservations legally held by Indian tribes, the subsequent acts of the United States in making such allotments to these defendants and in agreeing to purchase their surplus lands, are to be construed in favor of the claim of these defendants that the said reservation was held by them in due form of law.

And these defendants further aver that their title to the lands at issue in this cause, whether held under their aboriginal rights, or under the treaty of 1835, or under the agreement of 1859, or finally under the agreement of 1872, as ratified by the subsequent acts of the United States as aforesaid, has never been alienated by them or quieted in any way whatever, except by the agreement of 1891, as ratified by the act of March 2, 1895.

72 PRAYER.

Wherefore, all the aforesaid premises considered, these defendants, the Wichita and Affiliated Bands of Indians, pray as follows:

(1) That the petition of the claimants herein may be hence dismissed, and the relief prayed for by them may be in every respect denied;

(2) That this court will decree that these defendants, in law and in equity, are entitled to all the proceeds of the sale of all the lands at issue in this cause, and that this court will pass a decree that, from time to time, as the said sales are made, and the proceeds thereof deposited in the Treasury, as provided by the act of March 2, 1895, the same may be paid to these defendants in the manner required by law;

(3) And for such other and further relief as shall seem proper to the court in the premises.

JOSIAH M. VALE,
ANDREW A. LIPSCOMB,
Attorneys for the Wichitas and Affiliated Bands of Indians.

PHILIP WALKER,
WILLIAM C. SHELLEY,
Counsel.

73 DISTRICT OF COLUMBIA, *ss.*

We, Josiah M. Vale and Andrew A. Lipscomb, being duly sworn, do state on oath that we have read the foregoing answer of the Wichita and Affiliated Bands of Indians, and that we know the contents thereof; that we are the attorneys of said Indians, and we state on information and belief that the facts set forth in said answer by us subscribed are true; that no assignment or transfer of the claims of the defendants, the Wichita and Affiliated Bands of Indians, as set forth in said answer, has ever been made or any part thereof or interest therein; that the said defendant Indians are justly entitled to the rights, equities, properties, compensation, and moneys, as claimed in their said answer as against the Choctaw and Chickasaw nations, and also against the United States after the allowance of all just credits and set-offs.

JOSIAH M. VALE.
ANDREW A. LIPSCOMB.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 10th day of August, A. D. 1895.

[SEAL.] SAMUEL A. DRURY,
Notary Public.

74 In the Court of Claims of the United States, December term, 1897.

THE CHOCTAW NATION AND THE CHICKASAW Nation
v.
THE UNITED STATES AND THE WICHITA AND Affiliated Bands of Indians. } No. 18932.

Answer of the United States.—Filed February 12, 1898.

Now comes the Attorney-General, in behalf of the United States, and answering the petition of the claimants and the answer of the defendant Indians herein, respectfully represents:

The allegations contained in the first nine sections of the petition are admitted, except as to the last paragraph of the ninth section, the allegation of which is denied.

The allegations contained in the last ten sections of the petition are denied, except as to the first two paragraphs of the nineteenth section.

The allegations contained in the answer of the defendant Indians are denied in so far as they assert, or tend to assert, that the defendant
75 Indians, or any of them, had any right of occupancy within the district between the Canadian and Red rivers and the ninety-eighth and one-hundredth meridians of west longitude prior to 1859, and in so far as they assert, or tend to assert, that the said Indians were promised or given in 1859 more than 154,240 acres within the said district, and in so far as they assert that the agreement of October 19, 1872, was executed without authority and under duress.

And in further answer to the said petition and the answer of the defendant Indians thereto, the Attorney-General respectfully represents:

I. The country ceded by the Quapaws to the United States by the treaty of August 24, 1818, did not extend west of the one-hundredth meridian, the understanding of the United States, and of the Quapaws as far as they had any definite ideas on the subject, being that the source of the Canadian Fork was east of that line, and their intention being that the cession should extend up the Canadian Fork to where they understood the source to be.

II. The country ceded by the United States to the Choctaws by the treaty of October 18, 1820, was the western portion of the country ceded by the Quapaws in 1818, and did not extend west of the one-hundredth meridian, the understanding and intention of both parties to the treaty of 1820 as to the location of the source of the Canadian Fork and of the western boundary of the cession being the same as the understanding and intention of the parties to the treaty of 1818.

III. The first time of which there is any record or suggestion
76 that the Choctaws claimed that the treaty of October 18, 1820, had granted them land west of the one-hundredth meridian was on July 11, 1854, pending the negotiations to the treaty of 1855. The United States did not admit the validity of this claim, but insisted that a formal relinquishment should be coupled with the so-called lease of the country between the ninety-eighth and one-hundredth meridians.

IV. Early in 1861 the Choctaw and Chickasaw nations declared themselves in sympathy with the Southern States. On July 12, 1861, they made a formal treaty with the so-called Confederate States of America, and for nearly four years thereafter they were actively engaged in hostilities against the United States.

V. The Choctaws, Chickasaws, and other Indian tribes who were represented at the Fort Smith council in September, 1865, were informed by the United States commissioners that in consequence of their participation in the war of the rebellion new treaties would be required of them, to contain substantially the following stipulations:

"1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.

"2. Those settled in the Indian Territory must bind themselves, when called upon by the Government, to aid in compelling the Indians of the

plains to maintain peaceful relations with each other, with the Indians in the Territory, and with the United States.

"3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and
77 for their incorporation into the tribes on an equal footing with the original members, or suitably provided for.

"4. A stipulation in the treaties that slavery or involuntary servitude shall never exist in the tribe or nation, except in punishment of crime.

"5. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government or such as may be fixed by the Government.

"6. It is the policy of the Government, unless other arrangements be made, that all the nations and tribes in the Indian Territory be formed into one consolidated government, after the plan proposed by the Senate of the United States for organizing the Indian Territory.

"7. No white person, except officers, agents, and employees of the Government, or of any internal improvement authorized by the Government, will be permitted to reside in the Territory, unless formally incorporated with some tribe, according to the usages of the band."

VI. The cession of the leased district by Article III of the treaty of April 28, 1866, was in no way affected or controlled by the fifth stipulation presented at the Fort Smith council.

VII. In pursuance of Article III of the treaty of April 28, 1866, $225,000 have been paid to the Choctaw Nation, besides $7,125 interest. Sixty thousand dollars have been advanced to the Chickasaw Nation, but as the Chickasaw legislature has not yet enacted the necessary
78 laws, rules, and regulations in relation to persons of African descent, the balance of the share of the Chickasaw Nation in the purchase money of the leased district has not yet been paid.

VIII. At the time of the making of the treaty of April 28, 1866, the people of the Choctaw and Chickasaw nations were not unlettered, but they had for many years been living as civilized communities under organized governments, and at the making of this treaty they had the aid of able and experienced counsel.

IX. Until the year 1890, or shortly before, it does not appear to have been doubted, either by any officer of the United States or by the Choctaws and Chickasaws, that the latter had made, by the treaty of 1866, an absolute cession of the previously leased district.

X. For several years past the Choctaw and Chickasaw nations have permitted white persons, not members of their tribes, to reside within their respective districts. The United States census of 1890 reports the number of white persons residing within the territory of the Choctaw Nation as 28,345, and the number of those residing within the territory of the Chickasaw Nation as 48,421, the number of the citizens of those nations being reported as 10,017 and 3,941, respectively.

XI. In 1850 neither the Wichita tribe nor the bands affiliated therewith had any right of occupancy in any portion of the district between the Canadian and Red rivers and the ninety-eighth and one hundredth meridians.

III. In 1859 two reservations, aggregating 154,120 acres, were set t within the said district for the Wichita and affiliated bands of Indians, and they were located on the two said reservations being given to understand that these reservations were to constitute their permanent homes, and that none of them could leave the reservas without permission of the agent.

PRAYER.

Wherefore, all the premises aforesaid considered, the Attorney-General vs as follows:

. That the petition of the claimants herein may be dismissed.

. That the court will decree that the Wichita and affiliated bands of ians are entitled to so much land in the present Wichita Reservation may be allotted to them under Article IV of the agreement of June 1891.

. That no decree be made in favor of the Wichita and affiliated bands Indians for the proceeds of the sales of unallotted or surplus lands in said Wichita Reservation, unless it shall be also decreed that the said chita and affiliated bands of Indians shall execute to the United States elease and quitclaim of all right, title, interest, and claim of any nature atsoever in, to, or for any lands outside of the limits of the said Wichita servation.

. That the court will decree that unless such release and quitclaim be cuted as aforesaid, the proceeds of the sales of unallotted or surplus ds in the said Wichita Reservation shall be and remain the exclusive perty of the United States.

L. A. PRADT,
Assistant Attorney-General.

Evidence for the claimants.

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81 *Deposition of Halbert E. Paine, for claimants, taken at Washington, D. C., on the 25th day of April, A. D. 1896.*

Claimants' counsel, J. M. Wilson and others; defendants' counsel, C. C. Binney and others.

Deposition of a witness produced, sworn, and examined at the hour of 11 o'clock a. m., on the 25th day of April, 1896, at room 128, Washington Loan and Trust Building, Washington, D. C., before me, the undersigned, a notary public, in a certain cause now pending in the Court of Claims, wherein the Choctaw and Chickasaw nations are claimants and the United States and the Wichita and affiliated bands of Indians are defendants; when were present J. S. Standley, delegate appearing for the Choctaw and Chickasaw nations; Charles C. Binney, Assistant Attorney-General, appearing for the United States; and J. M. Vale and Philip Walker, appearing on behalf of the Wichita and affiliated bands of Indians.

HALBERT E. PAINE, having been produced as a witness on behalf of the claimants, was by me sworn, before any question was put to him, to tell the truth, the whole truth, and nothing but the truth relative to the said cause; and thereupon deposed and said that his name is Halbert E. Paine; that his occupation is that of attorney at law; that he is 70 years of age; that his place of residence is Washington, D. C.; that he has an interest in this case; that the Chickasaw legislature enacted a law, without his knowledge or request, directing the governor to employ him to assist in the prosecution of the case for a contingent compensation not exceeding 5 per cent on any amount that the Chickasaw Nation might recover; that this contract was made between the governor of the Chickasaw Nation and himself, but the Commissioner of Indian Affairs, as he is informed, thinks that the contract should contain in the body of the instrument a statement that he is an attorney at law, and also, in the body of the instrument, a statement of the time and place where he executed the contract, and the time and place where Governor Mosely executed it, these statements being, in the contract, only shown in the certificates of the judges before whom the contract was executed; that he is further informed that the Commissioner thinks that the rate of compensation should either be reduced or a maximum limit fixed; to all of these things he assents cheerfully, and is informed that when the contract shall be modified to meet the views of the Commissioner it will be approved; that such is the nature of his interest in the case; that

ere are other minor details which the Commissioner thinks should be ubodied in the contract; that he is not in any way related to the gov- nor of the Chickasaw Nation or to any of its members, to his nowledge.

And thereupon the said Halbert E. Paine was examined by J. S. andley, the counsel for the claimants, and, in answer to interrogatories, stified as follows:

1. Question. Has any evidence been filed, with your knowledge, in he case of the Choctaw and Chickasaw nations, claimants, against the nited States and the Wichita and affiliated bands of Indians, defend- nts, in the Court of Claims?

Answer. Such evidence has been filed.

2 2. Question. By whom, and when?

Answer. By myself, on Tuesday, the 21st instant.

3. Question. How many items of such evidence have you filed?

Answer. Fifty-four, numbered, respectively, from 1 to 54.

4. Question. Of what does such evidence consist?

Answer. Of printed or typewritten extracts from certain books and ocuments now in the Library of Congress, the library of the Senate, the brary of the House of Representatives, and in certain Executive Depart- ents of the Government of the United States; also of tracings from aps, which maps are, for the most part, now in the Library of Con- ress. A few of them are in the third volume of the record of the case f The United States v. The State of Texas, which was tried and decided s an original case by the Supreme Court. That third volume has not et been bound; when it is bound it will also be in the Library of Congress.

5. Question. Have you compared the extracts which were filed, as tated, with the documents from which they have been copied?

Answer. I have.

6. Question. Are they accurate and correct copies of the items?

Answer. They are now; I carefully compared them. In two or three f them I found slight verbal inaccuracies which I corrected with a pen, s will be found upon inspecting the extracts.

7. Question. By whom were the tracings from maps made, as stated?

Answer. I made them myself.

8. Question. Are those tracings all accurate?

Answer. I think they are; I took very great pains to make them so. The tracings do not purport to show everything on the maps; only designed to show those things that are put on pertinent to this case. They do show, I believe, everything that is pertinent to this case in favor of either party.

9. Question. Whose affidavits are prefixed to the several items of evi- dence filed by yourself, as stated?

Answer. Mine.

10. Question. Are the statements of facts contained in each and all those affidavits correct and true?

Answer. They are. I should say this, that on a few of the maps the Ferro longitude is given, which is longitude east from Ferro, I have in one case, possibly in two, not only given the Ferro longitude, but have introduced in brackets the Greenwich longitude corresponding to the

Ferro longitude, but I have only done that in one or, at most, two cases, it being very easy to reduce Ferro longitude to Greenwich longitude.

(The witness now makes the statements of facts contained in these several affidavits a part of his testimony in this disposition.

The claimants offer these fifty-four different items of evidence to which witness testified as evidence in chief on their behalf in this case.)

Objection by Mr. BINNEY: Counsel for the United States, not having any previous knowledge of these papers and tracings referred to by the witness, nor any opportunity to examine them, reserves all right to make objection thereto, and also the right to cross-examine witness as to such statements as may appear in his affidavits.

Objection by Mr. VALE: Objection is made on the part of the defendant Indians, the Wichita and affiliated bands, for that the extracts,
83 tracings, and other documents proposed to be offered in evidence are irrelevant, incompetent, and immaterial, and the same are not admissible under the stipulation filed in this cause between the litigant Indians.

Cross-examination by Mr. WALKER:

1. Question. You said that the tracings of maps contained everything in the original that was pertinent to the cause. The tracings, as I understand it, cover a section only of the territory covered by the map itself, and that section the section containing the territory at issue. Do I make myself understood? You have not filed the tracing of the whole map in any case?

Answer. In only a few cases; in only those cases where the map was small enough to be embraced in the paper which I used.

2. Question. On the portions of the maps which you have traced are all of the data referring to rivers and names included?

Answer. I believe so; I mean, of course, all the data referring to rivers and names pertinent to this case.

3. Question. I especially apply that to the names of villages and Indian tribes.

Answer. I have aimed to include not only the names by which the Wichita and affiliated bands are ordinarily known, but also all the numerous names by which they have been designated at different times by different nations.

4. Question. Have you included, also, the names which evidently apply to tribes of Indians who are not litigants herein, where those names may possibly appear on such maps?

Answer. Not all, I presume, but very many of them.

5. Question. Do the tracings contain such memoranda as will show to the court the author of map, the place of publication, and the date?

Answer. They do in all cases in which those data could be ascertained. There are some maps in the Library of Congress published without any dates showing when they were published or when they were made. In those cases I have been compelled to give approximate dates when I have given any dates at all, but there has been no great difficulty in ascertaining approximately when the maps were made, because the time in which the map makers lived is known.

6. Question. In cases where the approximate dates are given is it ted upon the tracing that they are approximate dates and not accurate tes?

Answer. I think it is.

The examination by counsel being concluded, the witness, in compli- ce with the rule of the court requiring him to state whether he knows any other matter relative to the claim in question, and if he do to state , says:

I have no further knowledge respecting the particular matters to which have testified.

H. E. PAINE.

I, S. G. Hopkins, a notary public in and for the District of Columbia, ertify that at the time and place aforesaid Halbert E. Paine, witness on ehalf of the Choctaw and Chickasaw nations in the above-entitled cause, was by me sworn, before any question was put to him, to tell the 4 truth, the whole truth, and nothing but the truth relative to the said cause; and that his answers were taken down in my presence, nd his deposition as above set forth was read over to and signed by him, efore me, at the time and place aforesaid.

In witness whereof I have hereunto set my hand and official seal this 25th day of April, 1896.

[SEAL.]

S. G. HOPKINS,
Notary Public, District of Columbia.

[Exhibits to this deposition, Nos. 1 to 20, inclusive; also Nos. 41, 42, 43, and 44, and Nos. 50, 51, 52, and 54 are omitted by order of court from this record, being extracts from public documents which are the subject of judicial notice in the argument of the case.]

Deposition of Cyrus Bussey, for claimants, taken at Washington, D. C., on the 23d day of July, A. D. 1896.

Claimants' counsel, J. M. Wilson and others; defendants' counsel, C. C. Binney and others.

Depositions of witnesses produced, sworn, and examined at the hour of 11 o'clock a. m. on the 23d day of July, 1896, at the office of Messrs. Shellabarger & Wilson, No. 1416 F street NW., in said city, before me, the undersigned, a notary public, in a certain cause now pending in the Court of Claims, wherein the Choctaw and Chickasaw nations of Indians are claimants and the United States and the Wichita and affiliated bands of Indians in the Indian Territory are defendants. There were present on behalf of the claimants the Hon. Halbert E. Paine and James S. Standley, esq.; on behalf of the United States the Hon. Charles C. Binney, and on behalf of the defendants, the Wichita and affiliated bands, Messrs. J. M. Vale and Andrew A. Lipscomb, as attorneys, and Messrs. Philip Walker and William C. Shelley, as of counsel for said last-named defendants.

CYRUS BUSSEY, having been produced as a witness on behalf of the claimants, was by me sworn, before any question was put to him, to tell the truth, the whole truth, and nothing but the truth relative to the matters at issue in said cause; and thereupon deposed and said that his name is Cyrus Bussey; that his occupation is that of an attorney at law; that

he is 62 years of age, and that his place of residence is No. 1204 M street NW., Washington, D. C.; that he has no interest, direct or indirect, in the claim which is the subject of this inquiry, and that he is not related to any of the parties hereto.

And thereupon the said Cyrus Bussey was examined by counsel for the claimants, and, in answer to interrogatories, testified as follows:

Direct examination by Mr. PAINE:

1. Question. What offices, civil or military, if any, have you held under the Government of the United States?

Answer. I was colonel of the Third Iowa Cavalry at the beginning of the war; was a brigadier-general and brevet major-general of United States Volunteers, and in 1889 was appointed Assistant Secretary of the Department of the Interior, which office I held for four years.

2. Question. What was your occupation in the year 1865?

Answer. I was a brigadier-general of United States Volunteers, in command of the Third Division of the Seventh Army Corps, with headquarters at Fort Smith, Ark. My command embraced Western
85 Arkansas and the Indian Territory, with troops stationed at Clarksville, Van Buren, Fayetteville, and Fort Smith, Ark., and a brigade stationed at Fort Gibson, in the Cherokee Nation.

3. Question. When and by whom were you assigned to that command?

Answer. I was assigned to that command by Gen. J. J. Reynolds, commanding the Department of Arkansas and the Seventh Army Corps, on the 6th of February, 1865.

4. Question. Had you any personal knowledge of the proceedings of the council held by the commissioners of the United States and of different Indian nations at Fort Smith in 1865?

(Question objected to by counsel for defendants for the reason that the official records are the best obtainable evidence respecting the treaty of 1865, and that the knowledge of this witness, unless he is shown to have been a member of the commission, or officially connected with the treaty named, is incompetent, irrelevant, and immaterial.)

Answer. I had official correspondence, while in command at Fort Smith, with Winchester Colbert, governor of the Chickasaw Nation, and Governor P. P. Pitchlynn, principal chief of the Choctaw Nation, and with Col. Lewis Downing and others of the Cherokee Nation, concerning the meeting of an Indian council. This correspondence began as early as July 6, 1865, and continued until the council met. I furnished the commissioners, when they arrived there, with a meeting place and was present at their meetings every day.

5. Question. Had you any personal acquaintance with any of the commissioners on the part of the Indians and the United States?

(Objected to by counsel for the defendants for the reason that the testimony is incompetent, irrelevant, and immaterial.)

Answer. I was personally acquainted with all of the commissioners on the part of the Government, except Mr. Worcester, and was personally acquainted with many of the Indians. All the rebel Indians who served under General Cooper surrendered to me prior to the meeting of this council. I knew many of the Cherokees, Creeks, and Chickasaws, having three Indian regiments in my command.

6. Question. Did you perform any duties in connection with that council of 1865?

Answer. The only duties I performed were to be present in my official capacity—to preserve order and supply their wants as far as possible. I occupied no official position as a member of the council.

7. Question. Will you state what proceedings were had by the commissioners under your personal observation?

(Objected to by counsel for defendants for the reason that the record of the proceedings is the best evidence thereof, and that the statements of this witness, not officially connected with the commission, are incompetent, irrelevant, and immaterial.)

Answer. The commissioners of the United States notified the Indians that they had forfeited their rights to lands and annuities because of the treaties that they had made with the rebels and the active part they had taken in the war, but that the Great Father did not desire to take advantage of the forfeiture, but did desire to reestablish the treaty of peace with all the Indians there in council, in which event they would be forgiven for having gone into rebellion against the Government.

86 8. Question. Did the commissioners, with your knowledge, reach any agreement as to the main points to be embraced in the proposed treaty between the United States and the Indian nations?

(Objected to by counsel for the defendants for the reasons assigned in the objection to the last preceding question, and further that any agreement then reached is merged in the treaty.)

Answer. The council reached an agreement so far as the treaty of peace was concerned, but the Indians there present disclaimed authority to enter into any specific agreement about anything else, and asked time to report to their people, saying that when they did so commissioners would be appointed to make a future treaty. That, I believe, was the final agreement reached.

9. Question. In what condition did you find the Indians, and their stock and property, when you assumed command at Fort Smith?

(Objected to as incompetent, irrelevant, and immaterial.)

Answer. I was sent to Fort Smith to take command of that district because of reports that had been made to the War Department that a state of demoralization existed among the troops, and that the people in western Arkansas and the Indian Territory had been plundered of a large amount of property. A large number of cattle had been stolen and driven out of the country. The Government desired to break up that policy and sent me there for that purpose. I made a thorough investigation, arrested and tried by court-martial a number of officers who were engaged in the frauds, and reached the conclusion that about 300,000 head of cattle had been stolen and driven out of the Indian country prior to that time. When I arrived there the troops of that command had been supplied by wagon trains from Fort Leavenworth, Kans., requiring from 200 to 300 men to guard each train. The trains going from the army to Fort Leavenworth hauled the plunder that was picked up by the parties, and after assuming command I stopped a train part way on the road and sent it back. There was no further communication between Fort Gibson and Fort Leavenworth by train during the

time I was in command, and the army was afterwards supplied from Little Rock.

10. Question. Had the loyal citizens of the Five Civilized Nations returned to the Indian Territory prior to the meeting of the council?

Answer. They had. They were all living at Fort Gibson and Tahlequah except the Choctaws and Chickasaws, who were in the Choctaw Nation.

11. Question. Did you hear the commissioners on the part of the United States submit to the Indians any points as those required to be embraced in the proposed treaty?

Answer. I was present and heard the commissioners make several addresses to the Indians.

12. Question. What points did you hear them present to the Indians as those which the Government of the United States would require to be embraced in the proposed treaty?

(Objected to by counsel for defendants for the reason that the record of the commission and the treaty constitute the best attainable evidence, and for the further reason that the testimony of this witness is irrelevant, incompetent, and immaterial on that subject.)

87 Answer. The Government required the Indians of each tribe to establish friendly relations among themselves and with the United States, and those in the Indian Territory, when called upon by the Government of the United States, were expected to compel the wild Indians and the Indians of their respective tribes to keep the peace and become good citizens. They were also required to consent to the abolition of slavery, and to agree that slavery should never again exist in the Indian Territory, and that certain Indian Territory lands should be set apart for friendly tribes of Indians in Kansas and elsewhere on terms to be agreed upon between the Government of the United States and the Indians, and they also desired that the Indian tribes should be formed into one consolidated government in the Indian Territory. I do not now remember any other points.

13. Question. Did these Indian delegates, to your knowledge, or did they not, assent to the proposition that a portion of the Indian country should be set apart for the settlement of other friendly Indians?

(Objected to by counsel for defendants for the reason assigned in the objection to the last preceding question, and for the further reason that it calls for an opinion of the witness upon a question of fact and also upon a question of law.)

Answer. The Indians did agree to allow a portion of their lands to be set aside for such purpose.

14. Question. Was a treaty embodying these points signed at Fort Smith in 1865?

(Objected to for the reason that the official records are the best attainable evidence.)

Answer. All the Indians who were present signed the treaty prepared there at the council.

15. Question. You do not understand me. I refer to the treaty embodying these points.

Answer. As I said before, the Indians there present disclaimed authority to enter into the final treaty, but agreed that commissioners, duly

authorized, should be sent to Washington to perfect a treaty embodying all that the Government desired.

16. Question. Well, then, that treaty was not signed at Fort Smith?

Answer. It was not, as I understand it.

17. Question. Why not?

(Objected to by counsel for defendants for the reason that this witness is incompetent to state the reasons for the action of the treaty-making power of the Indians, and for the further reasons assigned in the last two objections to interrogatories.)

Answer. The Indians claimed that they had been called to a council with the Government of the United States without having been notified for what purpose, and that they did not possess authority from their people to enter into a final treaty, but said that they would send delegates to Washington after conference with their different tribes.

18. Question. Was any treaty in fact signed at Fort Smith in 1865?

(Objected to for the reason that the official records and laws and treaties of the United States are the best attainable evidence.)

19. Question. Wait a moment; I will amend that question. Was any treaty in fact signed under your personal observation at Fort Smith in 1865?

88 Answer. A treaty of peace was signed by all the delegates who were present, or substantially all, I believe.

20. Question. What were your personal relations to, and what was your knowledge of, the Indian delegates who attended that convention?

(Objected to as incompetent, irrelevant, and immaterial.)

Answer. When I arrived at Fort Smith I found the Indians in the Indian Territory substantially destitute and starving, living almost entirely on beef. I went to their relief with a steamboat load of supplies, and found several thousand refugee Indians, representing several different tribes, encamped near Fort Gibson. I got these Indians together and talked with them, promised to aid them in any efforts they might make in agriculture, furnished them with seed corn and potatoes to plant, assured them that their property would be protected, issued stringent orders looking to that end, and in this way gained their confidence. I met and talked personally with all the headmen of all these tribes, and did everything in my power to encourage them to become self-sustaining. It was costing the Government a large amount of money to subsist them. There was no corn or provisions of any kind in the country except cattle. The rebel Indians were absolutely destitute and starving, and would have died but for the relief they received from the Government.

21. Question. What were your relations to these Indian delegates while the council was in session?

(Objected to as incompetent, irrelevant, and immaterial.)

Answer. I met all of these Indians, talked with them freely, tried to persuade them to consent to the wishes of the Government and to establish peaceable relations between the contending factions of their own tribes. I am sure I had their confidence so far as a commanding officer could have.

22. Question. While the council was in session, did these Indian delegates consult you as to the course they should take?

(Objected to for reasons assigned in last objection.)

Answer. Many of the delegates came to my office and talked with me as to what my interpretation was of their complying with the action of the Government.

23. Question. Did you learn from the commissioners on the part of the United States, and from the Indian delegates, the objects for which this treaty, which we call the "treaty of peace," was signed at Fort Smith?

(Objected to by counsel for defendants because any statements made by the commissioners to this witness are incompetent, irrelevant, and immaterial in this action.)

Answer. It was well understood by the commissioners that the Government was apprehensive that when the rebel Indians returned to their homes in a destitute condition they would be more or less demoralized, and that marauding parties would be organized among them to make war upon the white settlers throughout the West, and that the wild Indians would be incited to war; and it was the desire of the commissioners on the part of the Government to get these Indians to pledge themselves, not only to live in peace among themselves, but to aid the Government in compelling the wild tribes to keep the peace.

89 24. Question. Do you know whether this treaty of peace tended to preserve the peace among the Indians themselves, and between the Indians and the United States, until the treaty of 1866 was finally signed?

(Objected to for the reasons assigned in the objection to the last interrogatory.)

Answer. I am very sure that it had a salutary effect and caused a large majority of the Indians to become good citizens.

25. Question. Do you know who communicated to the Indians the wish of the Government for the meeting of this council and the making of the treaty?

(Objected to for the reasons assigned in the objection to the last preceding interrogatory.)

Answer. Early in August, 1865, there were a large number of Indians at Armstrong Academy, in the Choctaw Nation, who communicated with me their desire to secure transportation to Washington. I have before me a copy of a letter which I wrote to Governor Pitchlynn, the principal chief of the Choctaw Nation, and will read it. It is as follows:

"FORT SMITH, ARK., *Aug. 7th, 1865.*

"GOV. P. P. PITCHLYNN,
"*Principal Chief, Choctaw Nation.*

"SIR: An officer was appointed, and expected to start this morning, to meet you at Armstrong Academy on the 1st of September. He is quite sick this morning and will not be able to go. In consequence of the muster out of troops and the change now taking place in this command I have no other suitable officer to send. Lieut. Turner, late A. D. C. on Gen. Cooper's staff, is here as bearer of dispatches from Gen. Cooper and Gov. Colbert, and returns immediately to Armstrong Academy. I send by him letters to yourself, Gov. Colbert, and Gen. Cooper, which I think fully explains the matter.

"It is hoped a full delegation of all the Indian tribes will be here. I know you will do everything in your power to secure the cooperation and attendance of all the tribes who may be represented at Armstrong Academy. With the earnest hope that the approaching council will terminate in a permanent peace with all the nations, on terms satisfactory to all concerned, and with the assurance of my respect, I have the honor to be,

"Very respectfully, your obedient servant,

"CYRUS BUSSEY,
"*Brig. Genl., Comdg.*"

(Objection is here interposed by counsel for defendants, for the reason that the answer is not responsive to the interrogatory, and that the question and answer, so far as disclosed, are irrelevant, incompetent, and immaterial.)

The WITNESS (continuing his answer). I communicated to the Government the wish of the Indians who were assembled at Armstrong Academy to have a council. Certain Indians had applied to me for transportation to Washington, as I have already said. In view of the large number of tribes that would want to send delegates, and in view of the
90 expense of sending so many Indians to Washington, I represented to the Government that it would be better to have the council held at Fort Smith than to send the commissioners to Washington, which was agreed to. This correspondence with the Indians began about the 1st of July, 1855.

26. Question. At whose request did you communicate to the Indians this wish on the part of the Government?

Answer. I was notified, through General Reynolds, by the Commissioner of Indian Affairs, that if the Indians would convene at Fort Smith they would send commissioners there to confer with them.

27. Question. With what Indian tribes or nations did you communicate on this subject?

(Objected to for the reason that no official authority has been shown to have been lodged in General Bussey to open up negotiations with any Indian tribes, and for the further reason that it is incompetent, irrelevant, and immaterial.)

Answer. I have before me a letter-press copy of a letter dated September 12, 1865, written by me to the Hon. D. N. Cooley, Commissioner of Indian Affairs, which I will read:

"HEADQUARTERS FRONTIER DIVISION,
"*Fort Smith, Ark., Sept. 12, 1865.*

"Hon. D. N. COOLEY,
"*Commissioner of Indian Affairs.*

"SIR: I have the honor to transmit herewith, for your information, copies of correspondence marked A to S, inclusive, between myself, Winchester Colbert, gov. and prin. chf. Chickasaw Nation; P. P. Pytchlyan, principal chief of Choctaw Nation; Lewis Downing, actg. prin. chf. of Cherokee Nation, and Maj. Gen. J. J. Reynolds, comdg. Dept. of Ark., in relation to the appointment of a grand council of all the tribes in the Indian Territory for the purpose of meeting commissioners of the United States to negotiate a permanent treaty of peace.

"Also copies of correspondence marked AA to JJ, inclusive, between myself, Col. John A. Garrett, comdg. Ft. Gibson; Maj. Gen. Reynolds, comdg. Dept. of Ark.; Brig. Gen. D. H. Cooper, C. S. A., with accompanying papers (letter from Maj. Gen. Herron, Lt. Gen. Buckner, C. S. A., Brig. Gen. Stand Watie, C. S. A., Brig. Gen. Veatch, proceedings of Cherokee council, &c.), in reference to a temporary treaty of peace entered into between Lt. Col. A. C. Mathews, commissioner on behalf of the United States, and various Indian tribes in the Territory.

"Your special attention is called to this correspondence.

"In consequence of the delay and difficulty of communicating with the Department at Washington, I was compelled to act without instructions, except in one or two instances. I endeavored to represent what I believed to be the policy of the Government, and earnestly hope my action will meet your approval. With great respect, I have the honor to be,

"Your obedient servant,

"CYRUS BUSSEY,
"*Brig. Gen. Comdg.*"

I was authorized to get together all those Indians for the purpose of making this treaty, and my correspondence, as stated in the above
91 letter, was with Winchester Colbert, governor and principal chief of the Chickasaw Nation; P. P. Pitchlynn, governor and principal chief of the Choctaw Nation, and Lewis Downing, acting principal chief of the Cherokee Nation. I had written to these parties to communicate with all the tribes of Indians they could reach, and I learned from them that messengers were sent to various tribes inviting them to meet at Fort Smith. I stated to all these parties that the Government desired to establish a treaty of peace with the different tribes of Indians in the country, and the council met through my efforts as commanding officer at Fort Smith.

Mr. VALE. Did you know for what purpose the Government desired this meeting?

Answer. Beyond effecting a treaty of peace, I did not know what object the Government had in inviting them.

Mr. PAINE. That is, you did not know before the council met?

Answer. Yes; I did not know at the time I wrote this letter to the Commissioner of Indian Affairs. The council had not met then. In all my correspondence with the Indians I represented the Government, and asked the Commissioner to approve what I did.

Cross-examination of this witness was waived on the part of the United States, and also on the part of the Wichita and affiliated bands.

The examination of counsel being concluded, the witness, in compliance with the rule of the court requiring him to state whether he knows of any other matter relative to the claim in question, and if he does, to state it, says that he does not.

CYRUS BUSSEY.

Deposition of F. W. Hodge, for claimants, taken at Washington, D. C., on the 23d day of July, A. D. 1896.

Claimants' counsel, J. M. Wilson and others; defendants' counsel, C. C. Binney and others.

At the same place and on the same day, in the presence of the same counsel, F. W. HODGE was produced as a witness on behalf of the claimants, and, having been by me in like manner sworn, deposed and said that his name is F. W. Hodge; that his occupation is that of a Government ethnologist, and that he is employed in the Bureau of American Ethnology; that he is 32 years of age; that his place of residence is Garrett Park, Md.; that he has no interest, direct or indirect, in the claim which is the subject of inquiry in this cause, and that he is in no way related to any of the parties hereto.

And thereupon the said F. W. Hodge was examined by counsel for the claimant, and, in answer to interrogatories, testified as follows:

Direct examination by Mr. PAINE:

1. Question. Mr. Hodge, who wrote the article in the Seventh Annual Report of the Bureau of Ethnology relating to the Caddoan group?

Answer. Major Powell has the credit of preparing the entire article—that is, his name is signed to it—but he actually prepared only the introductory matter. The matter relating to the classification of the various linguistic stocks was prepared by Mr. H. W. Henshaw, assisted
92 by various members of the Bureau. In regard to the Caddoan stock, Mr. Henshaw prepared the matter relating to that the same as he did the other linguistic stocks, from notes made and prepared by the Rev. J. Owen Dorsey, so that the notes were practically furnished by Mr. Dorsey.

2. Question. Who prepared the article relating to the same subject in Johnson's Universal Encyclopædia?

Answer. That was prepared entirely by Mr. J. Owen Dorsey and signed by him.

3. Question. Which of these two articles was prepared first?

Answer. The one published in the Seventh Annual Report of the Bureau of Ethnology.

4. Question. What was the interval of time between the preparation of these two articles?

Answer. That would be impossible to say definitely. There does not seem to be any record in the Bureau as to the date of the transmission of the manuscript of the Seventh Annual Report to the Public Printer, but we have a record of the first proofs received. I made a note of that. The first proofs of the Seventh Annual Report were received on the 20th of April, 1891, but this particular paper of which you speak was prepared a good while before that. I remember quite distinctly that on returning from the field in Arizona and New Mexico, in the summer of 1889, I observed that this paper on the classification of the linguistic stocks had already been prepared.

5. Question. When was the article that appeared in Johnson's Encyclopædia prepared by Mr. Dorsey?

Answer. It was published in 1893, and was prepared in 1892 or 1893. It is impossible to tell just when, but there was not a very great lapse of

time between the time of the preparation of the article that was prepared for the encyclopedia and the date of its publication.

Cross-examination by Mr. WALKER (on behalf of the Wichitas and affiliated bands):

1. Cross-question. Where is Mr. Dorsey?

Answer. Mr. Dorsey is dead. He died in 1895.

2. Cross-question. Well, who was Mr. Dorsey?

Answer. He was an ethnologist in the Bureau of Ethnology, and his work was confined particularly to the Siouan tribes, to the Sioux themselves—or, as they are more properly called, the Dakotas—Omahas, and other Siouan tribes.

3. Cross-question. Are the Caddoan Sioux tribes?

Answer. No; they belong to a different stock.

4. Cross-question. Did Mr. Dorsey prepare the article in Johnson's Encyclopædia in his official capacity?

Answer. As I understand it, Major Powell, by reason of his well-known scientific standing, and owing to his general knowledge of the American Indians, was asked by the editors of the encyclopedia to prepare or to superintend the preparation of a series of articles relating to the North American Indians, which he did. The articles were arranged by linguistic stocks, and there was a general article on the Indians of North America, prepared by Major Powell himself, assisted by members of the Bureau. The preparation of these articles on the various linguistic stocks was assigned to the different members of the
93 Bureau whose knowledge best fitted them for the work. Mr. Dorsey, for instance, was assigned to the Siouan and Caddoan stocks, and also some of the linguistic stocks of the extreme Northwest, among the representatives of whom he had been.

5. Cross-question. Was the preparation of that article part of his official duties?

Answer. No; it was a private thing; but, as the Bureau of Ethnology is a part of the Smithsonian Institution, and as the Institution was established for the purpose of disseminating knowledge, Major Powell thought it eminently desirable to prepare this series of articles on account of their educational character; and, because the encyclopedia was one of standing, one that would have wide circulation, and the knowledge could best be disseminated in that way, he consented to do it. These articles are all of a popular nature.

6. Cross-question. You say that Mr. Dorsey was assigned to this work on the Caddoan stock because he was best informed on that subject. Was he acquainted with the Caddoan stocks from personal contact with the tribes or from literature?

Answer. I think he was acquainted with the Caddoan tribes more from the study of the literature on the subject than from personal contact with representatives of the different tribes. He may have seen and studied the Pawnees, who belong to the Caddoan stock, but of that I am not quite sure; and I also hesitate to say whether or not he had come in contact with any other Caddoan tribes. With the Sioux, however, he was intimately acquainted. He lived many years among them and understood the various dialects of their language perfectly. He was regarded

n authority on the Siouan tribes, and in the Bureau of Ethnology we ays looked to him for information regarding the Caddoan tribes.

ross-examination of this witness was waived on the part of the ted States.

he examination by counsel being concluded, the witness, in compli- with the rule of court requiring him to state whether he knows of other matter relative to the claim in question, and if he do, to state ays that he knows of nothing more on the specific line on which he been examined.

F. W. HODGE.

osition of Halbert E. Paine, for claimants, taken at Washington, D. C., on the 23d day of July, A. D. 1896.

laimants' counsel, J. M. Wilson and others; defendants' counsel, C. Binney and others.

t the same place, on the same day, and in the presence of the same nsel, HALBERT E. PAINE was produced as a witness on behalf of the mants, and having been by me in like manner sworn, deposed and , in answer to the preliminary questions required by rule of the court be propounded to him, that he has testified before in this cause, and that his answers to said questions are already on file herein.

And thereupon the said Halbert E. Paine was examined by counsel for the claimants, and, in answer to interrogatories, testi- as follows:

Direct examination by Mr. STANDLEY:

. Question. General, have you collected any proofs or documents of kind to be filed in this case as evidence in rebuttal?

Answer. I have.

2. Question. Please state what those documents are and file them with ur deposition.

Answer. I have collected certain documents, extracts from printed l written books and papers, and tracings from maps, which I now oduce and deliver to the notary to be filed as exhibits to this deposi- n and to be filed with my deposition in this case in the office of the rk of the Court of Claims. I also will deliver to the notary a list of se papers, to be added to my deposition and to be filed therewith in rt. The documents to which I refer number 163, and are numbered m 1 to 163, inclusive.

3. Question. Who made these extracts?

Answer. I made the extracts myself. They are all correct. There e some translations from the French into English, which translations I o made, and they are correct. There are many tracings and maps ong them, which tracings I also made, and they are correct. I have ned to italicise or underscore the parts of the testimony which seem me to be particularly relevant to this case. When my deposition is ed I request the notary to file these exhibits and list of documents.

Mr. VALE. Objection is made to the introduction of the exhibits ferred to because they are irrelevant, incompetent, and immaterial, and e not embraced within the terms of the stipulation entered into in this

case governing the introduction of evidence, and for the further reason that the same are not admissible as testimony in rebuttal.

Mr. BINNEY. Counsel for the United States concurs in the objection made by counsel for the Wichitas and affiliated bands, except so far as the stipulation is concerned, the United States not being a party thereto.

The WITNESS. I have not finished my answer. I have prefixed to each document a statement which I have signed. All of these statements are correct. The documents, written and printed books and papers, and the maps from which these extracts and tracings are made, are in the depositories named in the several statements prefixed to those documents, and will be produced on the trial if required by the defendants.

(The list above referred to is hereto attached, marked Exhibit A, and the documents and papers mentioned by the witness are also filed herewith, marked Exhibits H, E, P, Nos. 1 to 163, inclusive. Edmund Van Dyke, notary.)

Cross-examination by Mr. WALKER:

1. Cross-question. In your direct examination you stated that you underscored the portions which apply particularly to this case, or that you had attempted to do so. In Exhibit 9 I notice that you have underscored the word "Ouishitas," one of the several tribes mentioned in a list. Do you regard that as the only tribe of Indians of the number mentioned that is interested in this case?

Answer. It is possible that the Tonacaras and the Toayas may be interested in the case. I do not know how that is.

95 2. Cross-question. I notice among these exhibits a number of extracts in the French language. Who made those translations?

Answer. There is one there which shows upon its face that I did not make it. The rest of them I made.

3. Cross-question. There are a number of tracings and maps. What was your statement about them?

Answer. That they are correct tracings.

4. Cross-question. In making these tracings, did you include in them everything that was on the paper from which the tracing was made?

Answer. I aimed to include on these maps everything that in my judgment pertained to the case. I did not include everything.

5. Cross-question. In the exercise of that judgment, did you put upon those maps the name of every Indian tribe and village which appeared on the original?

Answer. Well, unless that Indian tribe or village related in some way to this case, it is not certain that I did.

6. Cross-question. Then you used your judgment in determining whether the name of the Indian tribe or village related to this case?

Answer. Yes; I had to do that.

Cross-examination on the part of the United States waived at this time.

Counsel for the Wichitas and affiliated bands and for the United States reserve the right to recall this witness for further cross-examination at any time, upon notice, before the printing of the record.

It was stipulated and agreed by and between counsel for the respective parties hereto that the signature of the witness Halbert E. Paine to

is above deposition be waived on account of his immediate departure om the city.

SHELLABARGER & WILSON,
For Claimants.

J. M. VALE,
For Wichitas and Affiliated Bands of Indians.
CHARLES C. BUNNEY,
For the United States.

I, Edmund Van Dyke, a notary public in and for the District of Columbia, certify that, at the time and place aforesaid, Cyrus Bussey, F. W. Hodge, and Halbert E. Paine, witnesses on behalf of the claimants in the above-entitled case, were each by me sworn, before any questions were put to them, to tell the truth, the whole truth, and nothing but the truth relative to the matters at issue in said cause; and that the answers of each of said witnesses were taken down by me in shorthand, and afterwards by me transcribed in typewriting, as above set forth, and that the deposition of each of said witnesses (except that of the said Halbert E. Paine, whose signature was waived by counsel for the respective defendants) was read over to and signed by them, before me, as follows: That of the said Cyrus Bussey on the 24th day of July, 1896, and that of the said F. W. Hodge on the 25th day of July, 1896.

In witness whereof I have hereunto set my hand and official seal this 25th day of July, A. D. 1896.

[SEAL.]

EDMUND VAN DYKE,
Notary Public, District of Columbia.

96 CLAIMANT'S EXHIBIT A TO DEPOSITION OF HALBERT E. PAINE.

List of papers referred to in the deposition of Halbert E. Paine, recalled, made exhibits thereto, and numbered from 1 to 163, inclusive.

No. 1. Extract from journal of commissioners, treaty of 1835.
No. 2. Extract from deposition of Lieutenant Beach.
No. 3. Extracts from report of De Mesieres.
No. 4. Extracts from H. H. Bancroft's work.
No. 5. Extracts from journal of Dodge's expedition.
No. 6. Extract from La Salle's statement.
No. 7. Extract from Tonti's statement.
No. 8. Extract from La Harpe's journal.
No. 9. Extract from La Harpe's journal.
No. 10. Extract from Du Pratz's history.
No. 11. Extract from Jeffery's history.
No. 12. Extract from Robin, 1775.
No. 13. Extracts relating to Fragoso's expedition.
No. 14. Extracts from Senate Ex. Doc. No. 13, Forty-eighth Congress, first session, pages 3 to 12, 30, 31, 32, 36, 44, 45, 46, 47, and map.
No. 15. Extract from Schoolcraft.
No. 16. Extracts from Account of Louisiana.
No. 17. Extract relating to Captain Sparks's expedition of 1806, and location of Co-ash-a-tay village, from account of Major Long's expedition.

No. 18. Extract from journal of Captain Marcy's expedition.
No. 19. Extract from Kennedy's Texas.
No. 20. Extract relating to location of Pawnee Picts, 1820, from account of Major Long's expedition.
No. 21. Extract from French's historical collections.
No. 22. Extract from deposition of Urbam Gebhart.
No. 23. Extract from American State Papers, Indian Affairs, volume 1, page 732.
No. 24. Tracing from Popple's map, 1741.
No. 25. Tracing from old American maps, volume 2, No. 21.
No. 26. Tracing from J. Palairet's map, 1759.
No. 27. Tracing from John Roque's map, 1761.
No. 28. Tracing from E. Bowen's map, 1772.
No. 29. Tracing from d'Amille's map, 1772.
No. 30. Tracing from John Mitchell's map, 1776.
No. 31. Tracing from Jeffer's map, 1777.
No. 32. Tracing from G. L. Le Rouge's map, 1778.
No. 33. Tracing from Pownall's map, 1794.
No. 34. Tracing from Des Bozieres's map, 1802.
No. 35. Tracing from Robin's map, 1805.
No. 36. Tracing from Arrowsmith and Lewis's map, 1812.
No. 37. Tracing from Pinkerton's map, 1818.
No. 38. Tracing from Mellish's map, 1818.
No. 39. Tracing from Dirwald's map, 1823.
No. 40. Extract from report of Indian agent, dated October 6, 1851.
97 No. 41. Tracing from Austin's map, 1830.
No. 42. Tracing from outline Indian localities, 1833.
No. 43. Tracing from Maj. S. H. Long's map, 1834.
No. 44. Tracing from E. F. Lee's map, 1836.
No. 45. Tracing from Young's map of Texas, 1836.
No. 46. Tracing from Austin's map of Texas, 1837.
No. 47. Tracing from Hunt and Randel's map, 1839.
No. 48. Tracing from outline, Hunt and Randel, 1839.
No. 49. Tracing from Kennedy's map, No. 1.
No. 50. Tracing from Kennedy's map, No. 2.
No. 51. Tracing from Melish's map, 1823.
No. 52. Tracing from new map of Texas, 1841.
No. 53. Tracing from Le Rouge's map, 1778.
No. 54. Extract from Dictionary of Indian Tribes.
No. 55. Tracing from State map of Texas.
No. 56. Tracing from H. S. Tanner's map, 1846.
No. 57. Tracing from R. Creutzbar's map, 1848.
No. 58. Tracing from Cordova map, 1848.
No. 59. Tracing from map in Adjutant-General's Office.
No. 60. Tracing from W. Darby's map.
No. 61. Tracing from Major Merrill's map.
No. 62. Tracing from P. Vandermaelen's map.
No. 63. Tracing from Creutzbar's map, 1856.
No. 64. Extracts from Breckinridge's work.
No. 65. Tracing from Mitchell's Atlas, 1776.
No. 66. Extracts from Moore's description of Texas.

No. 67. Extract from Martin's History of Louisiana.
No. 68. Extracts from notes, Marcy's expedition.
No. 69. Extract from report of Maj. S. H. Long, dated January 30, 1818.
No. 70. Extract from statement of John C. Carr, dated November 17, 1819.
No. 71. Extract from report of Superintendent of Immigration, November 12, 1839.
No. 72. Extract from statement of W. J. Raines, March 11, 1836.
No. 73. Extract from report of Capt. J. Brown, July 18, 1837.
No. 74. Extract from report of Indian agent, May 27, 1844.
No. 75. Extract from report of Commissioner of Indian Affairs for 1845.
No. 76. Extract from report of Commissioner of Indian Affairs for 1845.
No. 77. Extract from statement of P. P. Pitchlynn, January 19, 1846.
No. 78. Extract from report of P. M. Butler, Indian Commissioner, March 20, 1846.
No. 79. Treaty of Council Springs, May 15, 1846.
No. 80. Extract from file in Indian Office, July, 1846.
No. 81. Extract from report of Indian agent, October 27, 1846.
No. 82. Extract from report of Indian agent, May 16, 1847.
No. 83. Extract from report of Indian agent of June 22, 1847.
No. 84. Extract from report of Indian agent, dated July 15, 1847.
No. 85. Extract from report of Maj. George Andrews, September 3, 1847.
98 No. 86. Extract from report of Indian agent, dated September 14, 1847.
No. 87. Extract from report of Indian agent, dated October 12, 1847.
No. 88. Extract from report of Indian agent, dated March 2, 1848.
No. 89. Extract from report of Indian agent, dated March 16, 1848.
No. 90. Extract from report of Indian agent, dated April 28, 1848.
No. 91. Extract from report of Indian agent, dated June 15, 1848.
No. 92. Extract from report of Indian agent, dated August 10, 1848.
No. 93. Extract from report of Indian agent, dated August 10, 1848.
No. 94. Extract from report of Indian agent, dated September 14, 1848.
No. 95. Extract from report of Indian agent, dated December 26, 1848.
No. 96. Extract from report of Indian agent, dated March 7, 1849.
No. 97. Extract from statement of H. G. Catlett, dated May 12, 1849.
No. 98. Extract from report of Lieut. F. Hamilton, dated May 31, 1849.
No. 99. Extract from report of Maj. R. A. Arnold, dated June 18, 1849.
No. 100. Extract from report of Lieut. F. Hamilton, dated June 22, 1849.
No. 101. Extract from report of Indian agent, dated July 9, 1849.
No. 102. Extract from report of Indian agent, dated August 29, 1849.
No. 103. Extract from report of interpreter, dated October 9, 1849.
No. 104. Extract from report of Indian agent, dated November 2, 1850.
No. 105. Extract from statement of C. G. Todd, dated March 25, 1851.
No. 106. Extract from report of Indian agent, forwarded August 2, 1851.
No. 107. Extract from report of Indian agent, March 18, 1852.
No. 108. Extract from report of Indian agent, dated June 12, 1852.
No. 109. Extract from report of acting superintendent, dated June 14, 1852.
No. 110. Extract from report of Indian agent, dated October 8, 1852.

No. 111. Extract from report of Indian agent, supposed to have been made in 1853.
No. 112. Extract from report of Indian agent, dated November 22, 1853.
No. 113. Extract from report of Indian agent, dated September 16, 1854.
No. 114. Extract from report of Indian agent, dated September 20, 1854.
No. 115. Extract from report of Commissioner of Indian Affairs for 1856.
No. 116. Extract from report of Indian agent, dated December 27, 1856.
No. 117. Extract from report of Indian agent, dated March 6, 1857.
No. 118. Extract from report of Indian agent, dated April 30, 1857.
No. 119. Extract from report of Commissioner of Indian Affairs for 1858.
No. 120. Extract from report of Indian agent, dated December 19, 1858.
No. 121. Extract from order of Acting Commissioner of Indian Affairs, March 30, 1859.
No. 122. Extract from report of Superintendent of Indian Affairs, July 2, 1859.
No. 123. Extract from report of Superintendent of Indian Affairs, September 20, 1859.
No. 124. Extract from report of Commissioner of Indian Affairs for 1890.
No. 125. Extract from papers relating to Fort Smith council of 1865.
No. 126. Extract from report of Indian agent, dated October 1, 1863.
No. 127. Extract from report of Indian agent, dated August 20, 1877.
No. 128. Extract from report of Indian agent, dated August 28, 1871.
No. 129. Agreement with the Wichitas and other Indians, 1872.
No. 130. Extract from report of Commissioner of Indian Affairs for 1872.
99 No. 131. Extract from report of Commissioner of Indian Affairs for 1872.
No. 132. Extract from report of Indian agent, dated September 1, 1872.
No. 133. Extract from report of Capt. H. E. Alvord, October 10, 1872.
No. 134. Extract from report of Indian agent, dated September 1, 1873.
No. 135. Extract from report of Indian agent, dated September 1, 1874.
No. 136. Extract from report of Commissioner of Indian Affairs for 1875.
No. 137. Extract from report of Indian agent, dated August 21, 1876.
No. 138. Tracing from de l'Lisle's Atlas Nouveau.
No. 139. Extract from report of Indian agent, dated August 30, 1879.
No. 140. Extract from report of Indian agent, dated September 1, 1880.
No. 141. Extract from report of Indian agent, dated September 1, 1881.
No. 142. Extract from report of Indian agent, dated August 18, 1888.
No. 143. Extract from report of Indian agent, dated August 27, 1889.
No. 144. Extract from Senate Report No. 171, Thirtieth Congress, first session.
No. 145. Extract from report of Indian agent, dated September 16, 1890.
No. 146. Extract from report of Indian agent, dated August 10, 1891.
No. 147. Extract from report of Indian agent, dated April 19, 1860.
No. 148. Extract from Seventh Annual Report of Bureau of Ethnology.
No. 149. Extract from Johnson's Universal Cyclopædia.
No. 150. Extract from reports relating to Wichita population.
No. 151. Extract from American State Papers, Indian Affairs, volume 1, page 721.
No. 152. Extract from Gregg's Narrative, 1839.
No. 153. Extract from "The Pawnee Indian," by Dunbar.

No. 154. Extract from Journal of M. de Bienville's Voyage, 1700.
No. 155. Extract from report of Commissioner of Indian Affairs for 1870.
No. 156. Extract from deposition of Ta-wa-ko-nee Jim.
No. 157. Extract from deposition of H. P. Jones.
No. 158. Extract from deposition of Che-wa-stalk.
No. 159. Extract from deposition of A. J. Mears.
No. 160. Extract from deposition of James Mooney.
No. 161. Extract from letter of Stokes and Arbuckle, September 15, 1835.
No. 162. Extract from letter of Clark and Chouteau, September 6, 1816.
No. 163. Extract from Darby's description of Louisiana.

[Of the foregoing exhibits, Nos. 1, 3, 5, 13, 14, 17, 18, 20, 23, 71, 73, 75, 76, 77, 78, 79, 82, 83, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96, 97, 101, 102, 103, 104, 105, 106, 110, 113, 114, 115, 118, 119, 121, 122, 123, 124, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 139, 140, 141, 142, 143, 144, 145, 146, 148, 150, 151, 155, and 162 are omitted from this record by the order of the court, most of them being extracts from public documents which are the subject of judicial notice in the argument of the case, and others being extracts from, or duplicates of, papers previously filed as evidence by the defendant Indians and contained in this record.]

No. 40.

SPECIAL AGENCY FOR TEXAS,
ON PURDANALLAS, NEAR FREDERICKSBURG,
Oct. 6th, 1851.

SIR: I am this far on my way to the council grounds, on the San Saba, and have met here, seventy miles in advance of that point, several hundred Indians in almost a starved condition. The tribes and bands met here are Lapans, Comanches, Muscalaros, Apaches, Delawares, Cadoes, Toncoways, Wacoes, *Witchetaws*, and few of wandering tribes. * * *

I am, with respect, your mo. ob't svt.,

JNO. A. ROGERS,
Special Agent and Comr., etc.

LUKE LEA, Esq.,
Comr. of Indian Affairs, Washington, D. C.

100 No. 70.

Indian Office—Miscellaneous files.

NATCHITOCHES, *17th Nov., 1819.*

SIR: I have the honor of acknowledging the receipt of your circular letter and enclosure of the 17th Sept. last, and have only to observe that the order therein contained shall be implicitly obeyed.

The enclosed statement of Indian population in the Province of Texas I procured from an intelligent gentleman who has resided a considerable time in the Comanche Nation, and, from its coincidence with other statements in my possession, I believe it to be as nearly correct as under existing circumstances it would be possible to procure.

About fifteen days ago a detachment of about 250 Spanish cavalry, under the command of Don Ignatio Perez, surprised Nacogdoches, then occupied by a few of the followers of Dr. Long, who were nearly all made prisoners. The detachment then advanced to the Sabine River, burning and destroying all the settlements they found on the way, and afterwards divided themselves into small parties for the purpose of intercepting the Comanche traders, many of whom have fallen into their hands. Their main body, composed of about 1,000 men, is encamped on the Trinity River. It is presumed they intend to establish a post at Nacogdoches with the view of cutting off all intercourse between our traders and the Indian tribes within the province.

With great respect, I have the honor to be, sir, your obt. servt.,

JOHN C. CARR.

Hon'ble J. C. CALHOUN,
Secy. of War, Washington City.

No. 72.

Communication in report of commissioner for 1836.

WASHINGTON, D. C., *11 Mch., 1836.*

Hon. LEWIS CASS,
Secty. of War:

For the last five years I have had much communication with the Comanche Indians and their allies. They inhabit the country from lat. 33°, on the Red River, to the Rio del Norte, extending north to the road that leads from Saint Louis to S'ta Fe, south to the head waters of Trinity, Guadaloupe, Brazos, and Colorado rivers, of Texas, a country in length 600 miles and breadth from 250 to four hundred miles. The different tribes are Comanche, Kyawas, Towash or Southern Pawnees, Cados, Wacoes, and Skiddies. They number about thirty-five thousand, and can bring into the field about eight thousand warriors. Free as the buffalo themselves, they acknowledge no superior. Depredating upon the Mexicans of the interior states, ravaging their towns, carrying off large numbers of horses and mules, murdering their people, and taking prisoners and converting them into servants, naturally prompts these wandering hordes to look upon themselves as the most powerful of nations, which opinion the visits of our sick and exhausted troops among them, at different times, were not far from confirming.

I left their country on the 5 of December last for this place. They had then torn up the treaty made by the commissioners on the part
101 of the Govt., and said they had no treaty with us, and those that contracted had no right to enter into any such treaty. * * *

It is desirable to make a lasting peace with these people. They have from time to time murdered more than fifty of our people on the road from St. Louis to S'ta Fe and on the frontiers of Arkansas; and as Arkansas appears to be the place (and I hope a permanent home) for our friendly Indians, it is desirable, on their account also, that we cultivate a good understanding with these land pirates of the great West.

Respy., your most obt. servant,

AUSTIN J. RAINES.

No. 74.

CHICKASAW AGENCY, *May 27, 1844.*

SIR: * * * I have just heard that the two boys that were missing rom Trinity River, in the Republic of Texas, about the last of February r first of March ult. (at the time that their father, mother, and two chil-ren were murdered in the most shocking manner—the lady had her limbs ut off at her body) are now among the Wichitaw Indians, who live north f Red River and south of the False Washita, and are within the Chick-saw district of the Choctaw Nation. My information is certainly cor-ect. Capt. Ish-tie-i-u-ka-tubby, a Chickasaw in whom every confidence an be placed, brought in the information.

You will please excuse me for giving you my opinion of what ought o be done. It is this, that some discreet person should be sent there ith a tolerably strong command and induce those Indians to give up the prisoners and also the Indians who committed the murder, and 02 let them know distinctly that they will not be permitted to live in this country and go into Texas (a Republic that we are on the most riendly terms with) and commit murder and then flee into this for pro-ection.

I shall send a copy of this letter to the commanding general of this epartment, and also one to Maj. Wm. Armstrong, acting superintendent.

With high respect, I have the honor to be your mo. obed. servt.,

A. M. M. UPSHAW.

Hon. T. HARTLEY CRAWFORD,
Com. of Indian Affairs.

[Endorsement.]

Respectfully referred to the Secretary of War. The outrage was com-itted on Texas citizens, but by wild Indians, who are as much inhab-tants of that Republic as of our territory. The murderers should be elivered up to Texas and the lads liberated, and as they are now within ur limits, the matter is respectfully submitted.

T. HARTLEY CRAWFORD.

JUNE 26, 1844.

No. 80.

Names of the Indian delegation from the prairies of Texas.

hief Santa Anna and wife, Comanche.
" Cabah-mo, Comanche..... 3
" Reymond Castro, Lipan..... 2
" Jocko, Lipan.
" Placidore and wife, Tonkaway.
" 4 men and 3 women, Tonkaway..... 9
" Jose Maria and wife, Anadahko.
" Bincenti, Anadahko..... 3
" Tow-a-ash, 7 men, Cadoes and Ionies..... 8
" Ako-whe-dai, Keecheyes.

Chief Wah-dah-to, Keecheyes		2
" Yo-sa-quash, Wichitas.		
" Ish-ar-e-wah, Wichitas		2
" A-ka-quash, Wacoe.		
" Yshash-uts-have, Wacoe.		
" Kin-Sid-i-as-tets, Wacoe.		
" and wife Nancy, interpreter		4
" Keich-i-har-roque, Tiwaccarro.		
" Te-a-carra, Tiwaccarro		2
" Whe-tah-we-raht, Ponamahaw		1
Interpreter I. Shaw, Delaware.		
Do.	John Conner, Delaware	2
Do.	Jesse Chisholm, Cherokee	1
	Mariani, Spaniard bo't of Comanches	1
Total		4

WASHINGTON CITY, *July 17th, 1846.*

R. S. NEIGHBORS.

103 [Enclosure.]

WASHINGTON, D. C., *July 24th, 1846.*

W. MEDILL, Esq.,
Commr. Indian Affs.

SIR: Enclosed you will find a list of the chiefs that I think should have medals of a large and small size; also an estimate of expense hom of Indian delegation. I consulted Mr. Wilson, sec. to commissioners, and he is of the opinion that the estimate is not too large.

I would state, for your information, that by reference to any late map of Texas you will see that the route from Natchitoches, La., to Torrey's Trading House, Texas, a distance of 280 miles, is through a settled country, passing Fort Jesup, La., Gaines' Ferry, Sabine, San Augustine, Nacogdoches, Fort Houston, on Trinity River, &c., and from there through a thinly settled country to the Trading House, which is 25 miles above the Falls of Brazos. * * *

Very respectfully, your ob't servant,

ROBT. S. NEIGHBORS.

[Enclosure.]

GLOBE HOTEL, *Washington City, July 23d, '46.*

Major NEIGHBORS: * * *

The chiefs to whom I think 'twould be proper to give large medals are as follows, viz:

Santa Anna, Cabahmo, Reymond Castro, Placidore, Jose Maria, Tow-ash, A-ko-whe-dai, Yo-sa-quah, A-ka-quash, I-sash-ketch-haive, Keech-i-carroque, Pa-ha-en-ka, and the uncle of Nancy.

To the following small medals, viz: Biscenti, Jocko, Wah-dah-to, Ish-ar-ro-wah, Te-ac-car-ro, and one Yonk-a-way Capt.

Respectfully, yours,

THOMAS J. WILSON.

[Enclosure.]

Estimate of funds for return of the delegation of Prairie Indians from Washington City to Torry's Trading House, on the Brazos River, Texas, * * * $2,809.40.

* * * * * * *

R. S. NEIGHBORS.

To W. MEDILL, Esq.,
Commr. Ind. Affs., Washington, D. C.

[Enclosure.]

W. D. O. I. A., *24 July, 1846.*

SIR: With the approbation of the Secretary of War, you have been detailed to accompany the Texas Indians, now in this city, on their return home, via Natchitoches, as disbursing agent. * * *

Very, &c.,

W. M.

SAMUEL HEWES PORTER, Esq.,
Washington, D. C.

104 No. 81.

CITY OF AUSTIN, TEXAS,
Octo. 27th, 1846.

W. MEDILL, Esq.,
Commr. of Ind. Affs.

SIR: * * * The Wacos, Wichitas, and Keechies have stolen quite a number of horses on our northern frontier, but have spilled no blood. * * *

I have the honor to be, very respectfully, your obt. servant,

R. S. NEIGHBORS.

105 No. 84.

AUSTIN, TEXAS, *July 15th, 1847.*

SIR: * * * The Wacos, Tah wac carros, and Witchitas have thus far observed strictly the agreement made with me, as reported in my last, and, within my knowledge, no depredations have been committed by any of these tribes since that date. I feel every assurance, when the presents now promised them are distributed, and the few misunderstandings settled, which it is hoped will be accomplished at the contemplated council, our Indian relations on this frontier will be on as firm a basis as could be reasonably expected with those wild and uncivilized tribes. * * *

I have the honor to be, very respectfully, your obt. servt.,

ROBT. S. NEIGHBORS,
Special Indian Agent.

To Col. W. MEDILL,
Comr. of Indian Affairs, Washington, D. C.

No. 85.

[Extract.]

FORT WASHITA, C. N.,
September 4, 1847.

GENERAL: * * * Contrary to the impression which is generally entertained, I apprehend more from the erratic and trading Indians in the fall, winter, and early spring than at any other time of the year. * * *

The Indians I designate as "erratic and trading" who visit this post are parties of the Shawnee, Kickapoo, and Delaware tribes, together with renegade Cherokees. The Caddoes, Wichetaws, Kuchyes, Waccos may be added to them. The Delawares are, as far as I can learn, the only band whose fidelity and friendship can be depended upon. * * *

I am, sir, with great respect, yr. ob. servt.,

(Signed) GEO. ANDREWS,
Bt. Maj., Comg. Post.

Brig. Gen. R. JONES,
Adjt. Genl. U. S. A., Washington, D. C.

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No. 95.

[Enclosure.]

U. STATES SPECIAL IND. AGENCY,
Torrey's Trading House, Dec. 26, 1848.

Col. W. MEDILL,
Comr. of Ind. Affrs., Washington, D. C.

SIR: * * * In accordance with your order to "ascertain what would satisfy the Wichitas," I have endeavored to see them on several occasions, but have failed. During the whole fall they, as well as the Waccos and Keechies, have been absent from their villages, under the pretext of hunting. They have been, most of the time, on the head waters of Red River and in the neighborhood of the Wichita Mountains.

107 The only act of hostility attributable to them is horse stealing. There has been quite a number of horses stolen from the upper settlements on the Trinity River and from Capt. Fitzhugh's company of rangers stationed at that point, which stealing is charged to these bands. * * *

I have the honor to be, very respectfully, your obt. servant,

ROBT. S. NEIGHBORS,
U. States Special Ind. Agent.

No. 98.

FORT GRAHAM, TEXAS, *May 31st, 1849.*

MAJOR: I have the honor to state for the information of the Brevet Brigr. Genl. Commanding that Aquaquash, chief of the Wacoe Indians, arrived at this post on the 25th inst. with a small portion of his tribe. He informed me that he had succeeded in making the Wichitas deliver

up to him a portion of the horses they had stolen from citizens of this state. This he did in accordance with an agreement made at Camp Thornton (Towash village) during the month of March last, and which the general doubtless remembers. He also informed me that a small portion of his tribe, together with a large party of Taukarroos, were not far behind, were bringing in the stolen horses, together with Tad-[illegible] a-da, chief of the Wichitas, and a few of his warriors. About a week before I was informed by Chadeas, a chief of the Wacoes, that a band of Caddoes and Delawares had attacked the Wichitas' village, killed seven of their number, and wounded several more. The Caddoes and Delawares captured nearly one hundred head of their horses, together with some thirty stolen from the citizens. I have been informed that the horses were taken to Fort Washita. The horses that Aquaquash recovered were brought in on the 27th inst., accompanied by nearly one hundred Wacoes, Towakarros, and Witchitas. * * *

I had, at his request, a talk with the great Witchita chief Tad-a-da. He has promised in future to be friendly, and to do all in his power to prevent his tribe from stealing horses.

I am, Maj., very respectfully, your obt. servt.,

F. HAMILTON,
1st Lieut. 2d Dragns., Comdg.

To Maj. GEORGE DEAS,
A. A. Genl. 8th M. Dept., San Antonio, Texas.

No. 99.

FORT WORTH, WEST FORK TRINITY RIVER,
NORTHERN FRONTIER OF TEXAS,
June 18th, 1849.

SIR: In the absence of the Indian agent I have, by authority of army regulations, acted in that capacity, and have the honor to report to you that Neo-cho-se-ras, chief of the Tah-wah-carros, and Gideos, with two other chiefs of the Wicheta tribe, with a party of some hundred, are now visiting me. This is the party who lately came in to Fort Graham (on the Brazos, distant 60 miles) under Aqui-quosh, the Wacoe chief, bringing and delivering up some thirty-five horses and mules which they had taken from the Wichetas. These horses, &c., had been stolen from citizens by the Wichetas within the last year or two. I thought it best to treat these Indians hospitably, and as they had had much trouble in recovering these horses and had received no reward, I took the responsibility to purchase some tobacco and bread and give them as presents. I hope this will meet with your approval and that you will send me instructions how to treat with them hereafter. * * *

I have the honor to be, y'r most obt. svt.,

R. A. ARNOLD,
Bvt. Majr., 2d Dragoons, Commanding, and Acting Indian Agt.

SUPERINTENDENT INDIAN AFFAIRS,
Washington, D. C.

No. 100.

FORT GRAHAM, TEXAS, *June 22d, 1849.*

SIR: * * * Since this post has been established it has been visited by parties of the Delawares, Shawnees, Caddoes, Ionies, An-a-dah-kos, Lipans, Keechis, Wacoes, Wichitas, and Tow-a-harroes at different times. * * * Aquaquosh, chief of the Wacoes, visited this post on the 25th ult. and remained here nearly two weeks. I had frequent talks
109 with him. He has, as you know, always been friendly with the whites, and has, moreover, been instrumental in forcing the Wichitas to deliver at this post a number of horses they had stolen. * * *

I am, sir, very respectfully, your obt. servt.,

F. HAMILTON,
1st Lt., 2 Drgs., Comdg. Post.

To ROBERT S. NEIGHBORS,
U. S. Special Indian Agent, Fort Graham, Texas.

No. 107.

FORT GRAHAM, TEXAS, *March 18, 1852.*

SIR: * * * The Comanches, after mature deliberation, avowed a determination to take new and higher ground, as they represented it, than they had ever before taken. They say that most of the depredations on our frontiers are committed by the Wichitas and the Comanches north of the Red River, and they admit that most of the southern or friendly Comanches had been "blind" to these invasions; but they avow that hereafter they will stop such hostile parties and compel their
110 return, or report them immediately to the Govt.; that from the Brazos west the Comanches will assume this duty, and from the Brazos east it would be done by the Wacoes and their associates; that on their return to their people they will communicate this resolution and take immediate action to carry it into effect.

I have the honor to be, very respectfully, your obedt. servt.,

JESSE STEM,
Spl. Agt. for the Indians of Texas.

No. 108.

FORT BELKNAP, TEXAS, *June 12, 1852.*

SIR: As reported, under date of May 12 last, I have been making a tour in the Indian country and visiting the Indian villages on the Brazos. I find that the Wichita Indians, formerly of Texas, and associates of the Wacoes and Towaccawos, have recently been making very frequent depredations on the frontiers of Texas below this, and are now constantly engaged in stealing horses and passing through this vicinity on their way to their homes in the Wichita Mountains, beyond Red River.

These depredations are recently becoming so frequent, two or three small parties having passed along here with stolen horses since I left Fort Graham, that I have conceived it to be my duty to call on the military for a party of dragoons for the purpose of visiting the Wichitas at

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ir homes, recovering the stolen property in their possession, and taking
ie hostages, or other security, for the future. I apprehend no occa-
n to resort to force.

I am, very respectfully, your obt. servt.,

JESSE STEM, *Spl. Agt., &c.*

To Hon. L. LEA,
Comr. Ind. Affrs., Washington City, D. C.

No. 109.

Estimate of the different tribes of Indians in Texas.

RECAPITULATION.

	Souls.	Warriors.
rthern Comanches, including—	18,950	3,790
Kiowas	1,050	190
outhern Comanches	495	100
ipans	688	140
addoes, Anadakos, and Ionies	547	110
awaccawos, Wacoes, Keechies, and Wichitas	300	60
onkawas	750	150
lescaleros		
	22,780	4,540

FFICE OF THE TEXAS SUPERINTENDENCY,
San Antonio, 14th June, 1852.

GEO. T. HOWARD,
Actg. Supt. Texas Indians.

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No. 111.

No date, 1853.

o the Hon. GEO. W. MANYPENNY,
Commissioner of Indian Affairs, Washington, D. C.

SIR: * * * Having taken considerable pains to get information
ith regard to those associated bands of wild Indians, the Wacoes, Wishi-
aws, Towacarres, and Keechies, I submit it to the Department for what
is worth. These bands, although small in numbers, are more trouble
nd commit more depredations upon the people of Texas than all the
ther bands that roam through her territory, extending their predatory
xcursions down into the settlements as far as the San Antonio River;
travelling mostly on foot, avoiding the military posts, they swoop
12 down upon the settlers and drive off their animals with impunity,
not even sparing their enemies, the Delawares and other Indians
riendly to the whites. This leads to frequent hostile meetings, and
whilst with me a party of Delawares brought in the bleeding scalps of
ome Wacoes who were caught stealing their horses. Were proper steps
aken by the Government of the U. S. to settle these Indians upon a
eaceful basis, which may be easily done, Texas would be relieved from
early all Indian troubles, and the General Government be saved
housands.

Respectfully, your mo. obdt. servt.,

HORACE CAPRON,
Special Agent for Texas Indians.

No. 112.

SAN ANTONIO, TEXAS, *November 22d, 1853.*

SIR: I have the honor to inclose a report of Special Agent Hill, in answer to your communication, inclosing to Jesse Stem reports, &c., in regard to the Wacoes and Wachita Indians, which I would commend to your consideration.

These Indians left Texas immediately after that difficulty, and have not returned since. Our frontier has consequently been relieved from the worst and most thieving bands of Indians now in the United States, and the beneficial results to the frontier citizens of Texas since they were attacked by Maj. Sibley is clearly perceptible. Although this is the case, it is now time that they should be located and provided for; but I can not see any beneficial results likely to grow out of their return to Texas.

I would therefore respectfully suggest that measures be taken at as early a day as practicable by the Department to endeavor to procure a location for these small tribes on the Indian Territory, east of Red River, and that all the necessary means be adopted to induce them to remain permanently in that section of country. The Keechis, Wacoes, Tahwaccawos, and Wichitas are closely allied and associate the same as one tribe, and should properly occupy the same country or territory.

I do not approve of paying for the property taken from them, from the fact that they are notorious thieves and had no property but what they had stolen from some one else, and in that attack they have been taught a lesson that has so far proved beneficial; and now to give them indemnity will only encourage them to commence their old practices.

Very respectfully, your obt. svt.,

ROBT. S. NEIGHBORS,
Special Agent, &c.

Hon. G. W. MANYPENNY,
Comr. Indian Affairs, Washington City, D. C.

No. 116.

[Enclosure.]

BRAZOS AGENCY, TEXAS, *Dec. 27th, 1856.*

SIR: * * * On the 26th inst. we were visited by ten camps of Wichita Indians, who came in for the purpose of expressing their
113 sincere friendship for the Indians of the reserve. They show a strong desire to settle here and come under the rules and regulations of this agency. * * *

Your obdt. servant,

S. P. ROSS,
Spcl. Agent Tex. Indians.

To Maj. R. S. NEIGHBORS,
Supervising Agent Texas Indians.

No. 117.

WASHINGTON, D. C., *March 6th, 1857.*

SIR: * * * That country, for a number of years, has been a general ndezvous of horse thieves, viz, Wichitas, Keechies, Kickapoos, and negades from other tribes, who have carried on a very lucrative trade ith Indians and white traders, from the Creeks and Cherokees, and hite traders from Arkansas, and a large portion of the horses stolen om Texas have been disposed of in this very territory. * * *

Very respectfully submitted.

Your obdt. servt.,

ROBT. S. NEIGHBORS,
Supervising Agent Texas Indians.

Hon. GEO. W. MANYPENNY,
Comr. of Indian Affairs, Washington, D. C.

No. 120.

SAN ANTONIO, TEXAS, *December 19th, 1858.*

SIR: I have the honor to acknowledge the receipt of your letter of the th in relation to the letter of Col. Elias Rector, in regard to the Wichita ndians, and, in answer thereto, would state that the information received y him through F. P. Page is false from beginning to end, as no such missaries as those spoken of have ever been sent by me to the Wichitas; n the contrary the Wichitas have, on several occasions within the last hree years, been refused permission by me to emigrate to Texas and ettle on the reserve at Brazos Agency, and in no instance have either yself or the special agents under my control interfered, either directly r indirectly, with the Indians in the southern superintendency, except o report some cases of horse stealing to the commanding officer at Fort Arbuckle, or to Col. Cooper, agent of the Choctaws and Chickasaws. * * *

Very respectfully, your obt. svt.,

ROBT. S. NEIGHBORS,
Supervising Agent Texas Indians.

Hon. J. W. DENVER,
Commr. Indian Affairs, Washington, D. C.

114

No. 147.

WITCHITA AGENCY, L. D., *April 19, 1860.*

SIR: By order of Supt. Rector, of the southern superintendency, your circular, dated Nov. 17, 1859, directing that the proposition for surveying and allotting to them in severalty so much of their land as was necessary for their actual occupancy and cultivation, was submitted to the chiefs and headmen of the several bands who compose this agency in council early in January last.

Having had the subject under consideration for over three months, and again having assembled in council, they request me, as their agent, to say—

That there are nine different bands and parts of bands now resident in this district, viz, Caddos, Anahdahkos, Comanches, Tonkahuas, Ionies, Keechies, Witchitas, Wacos, and Tahuacarros. Of these only three bands

claim any right to speak in the premises, viz, Witchitas, Wacos, and Tahuacarros. These three bands are composed of a people having the same habits and speaking the same language, and claim to have had the same origin.

They say that this country (by which they mean all that country lying between the Red River and the Canadian River from the mouth of the False Washita on river to a point due north of the same on the Canadian as its eastern boundary and as far west as the west end of the Witchita Mountains) is exclusively their own; that they have held it in possession and cultivated as much of it as was necessary for their support from time immemorial; that they used to be powerful, and kept intruders, such as the Comanches and others, off of it; that they have by long wars
115 become enfeebled, and have sought and obtained the favor and protection of the United States Government; that they do not think it would be just in so powerful a Government to take and distribute their country to a people who had warred upon them without first paying for it; that in all the treaties which they have held with their Indian neighbors, whether civilized or wild, roving bands of the prairies, this right has never been disputed. * * *

Very respectfully, your obt. srvt.,

S. A. BLAIN,
U. S. Agent for Witchitas and others, L. D.

Hon. A. B. GREENWOOD,
Comr. Indian Affairs, Washington, D. C.

No. 125.

[From package marked "Papers relating to council held at Fort Smith, 1865."]

ADDRESS OF THE COMMISSIONERS.

Brothers: After considering your speeches made yesterday, the commissioners has decided to make the following reply and statement of the policy of the Government.

Brothers: We are instructed by the President to negotiate a treaty or treaties with any or all of the nations, tribes, or bands of Indians in the Indian Territory, Kansas, or of the plains west of the Indian Territory and Kansas.

The following-named nations or tribes have, by their own acts, by making treaties with the enemies of the United States, at the dates hereafter named, forfeited all right to annuities, lands, and protection by the United States.

The different nations and tribes having made treaties with the rebel government are as follows, viz:

The Creek Nation, July 10th, 1861; Chocktaws and Chickasaws, July 12th, 1861; Seminoles, August 1st, 1861; Shawnees, Delawares, Witchitaws and affiliated tribes, residing in leased territory, August 12th, 1861; the Comanches of the Prairie, Aug. 12, 1861; the Great Osages, Oct. 2d, 1861; the Senecas, Senecas and Shawnees (Neosho Agency), Oct. 4th, 1861; the Quapaws, Oct. 4th, 1861; the Cherokees, Oct. 7th, 1861.

By these nations having entered into treaties with the so-called Confederate States, and the rebellion being now ended, they are left without any treaty whatever, or treaty obligation, for protection by the United States.

Under the terms of the treaties with the United States and the law of Congress of July 5th, 1862, all these nations and tribes forfeited and lost all their rights to annuities and lands; the President, however, does not desire to take advantage of, or enforce the penalties for, the unwise actions of those nations.

The President is anxious to renew the relations which existed at the breaking out of the rebellion.

We, as representatives of the President, are empowered to enter into new treaties with the proper delegates of the tribes located within the so-called Indian Territory and others above-named living west and north of the Indian Territory.

116 Such treaties must contain substantially the following stipulations.

1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.

2. Those settled in the Indian Territory must bind themselves, when called upon by the Government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory, and with the United States.

3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes on an equal footing with the original members, or suitably provided for.

4th. A stipulation in the treaties that slavery or involuntary servitude shall never exist in the tribe or nation, except in punishment of crime.

5th. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by Government, or such as may be fixed by the Government.

6th. It is the policy of the Government, unless other arrangements be made, that all the nations and tribes in the Indian Territory be formed into one consolidated government, after the plan proposed by the Senate of the United States in a bill for organizing the Indian Territory.

7th. No white person, except officers, agents, and employés of the Government, or of any internal improvement authorized by the Government, will be permitted to reside in the Territory, unless formally incorporated with some tribe according to the usages of the band.

Brothers: You have now heard and understand what are the views and wishes of the President; and the commissioners, as they told you yesterday, will expect definite answers from each of you upon the questions submitted.

As we said yesterday, we say again, that in any event those who have always been loyal, although their nations may have gone over [to] the enemy, will be liberally provided for and dealt with.

The foregoing address bears the following indorsement:

We propose to renew the treaty stipulations that existed previous to, or at the breaking out of, the rebellion, so far as regards the annuities.

The Gov'm't will insist on purchasing a portion of their lands for the settlement of friendly Indians.

No part of any moneys expended by the President in providing for the relief of destitute Indians, which were reduced to want on account of their friendship to the Gov'm't, will be refunded.

A stipulation of general amnesty must be incorporated, and no individual shall be proscribed, or any act of confiscation or forfeiture passed, against those who remained friendly to the U. S.; but they shall enjoy equal privileges with the other members of the nations.

REPLY OF THE CHOCTAW AND CHICKASAW COMMISSIONERS.

FORT SMITH, ARK., *19th Sept., 1865.*

The committee on the part of the Choctaws and Chickasaws reply to the propositions made on the part of the United States as the basis of new treaties:

That we are pleased to learn that you propose to renew your previous relations with us, and we are willing to go into negotiations for
117 the making of a new treaty with the United States, and, as a basis of this new treaty, accept Art. 1st and 7th.

In reference to the requirements of the 2nd article, we desire to say that we wish, as far as possible, to avoid coming in conflict with our red brethren, should any of them be so unfortunate as to get into conflict with the United States authorities. We are willing to guarantee our influence in favor of peace, in all its bearings, with our red brethren, and will not object to any of our citizens volunteering for service, in any war in which the United States may become involved, for the aiding of the United States.

We are willing to enter into negotiations for the settlement of all the points contained in the 3d and 4th articles.

On certain terms, on which we can doubtless agree with you, we are willing to admit the settlement of other tribes within our territory, as proposed in the 5th article.

We are willing to submit the territorial bill, referred to in the 6th article, for the consideration of our respective councils, and for this purpose we request a copy of that bill for the principal chief of the Choctaw Nation and for the governor of the Chickasaw Nation.

We accept art. 7th, and are willing to have the provisions thereof incorporated into the treaty.

We are also willing to incorporate a provision that no individual shall be proscribed, or any act of forfeiture or confiscation passed, against those who remained friendly to the U. S., and that they shall enjoy equal privileges with other members of the nation.

R. M. JONES,
Chairman of the Committee of Choctaw and Chickasaw Comrs.

[From package marked "Papers relating to council held at Fort Smith, 1865."]

FORT SMITH, ARK., *Sept. 16th, 1865.*

The honorable commissioners on the part of the United States.

GENTLEMEN: The Southern Seminoles have considered the ultimate propositions so far laid down by you, and cordially assent to all but the third and sixth.

11154

We know the abolition of slavery to be a fact throughout the United States. We are willing to recognize that fact by the proper acts of our council.

But the proposition to "incorporate" the freed negro with us, on an "equal footing with the original members" of the Seminole tribe, is presented to us so suddenly that it shocks the lesson we have learned for long years from the white man as to the negro's inferiority. We honestly think that both the welfare of the Seminole and the freed negro would be injured, if not destroyed, by such "incorporation." The emancipated black man must, of necessity, be "suitably provided for." Such provision requires time and consultation as to how it shall best be done, and we consequently beg the indulgence of further time before we decide. We, however, bind ourselves to agree, in good faith, to any wise plan which shall be deemed just and equitable to all parties.

The proposition touching the consolidation of all the tribes and fragments of tribes into one government is one of so great moment
118 and interest to us that we must request time for its due consideration. The plan proposed by the United States Senate may be a good one. We have not seen it, but would like to do so and lay it before our council, so as to enable our people to determine thereupon. We will, however, cheerfully agree to any plan which may be adopted by the other nations of the Indian Territory and sanctioned by the President of the United States.

Our country is a small one and remote. It will neither bear a location within its borders of a numerous or an unruly tribe.

Our course during the past four years has been what we considered an honest one. We were in earnest in pursuing it. We shall be equally earnest in fulfilling all relations which we may enter into in this convention, or hereafter in others, with the United States; and we here announce to you and the Government that you may discover that a once earnest enemy can become a better citizen, a more faithful liege, than those who make pretense to fealty on account of interest.

We beg to assure you that we desire nothing more ardently than peace with the United States, peace with our brother Indians, peace among ourselves.

Very respectfully, your obt. servts.,

JAMES FACTOR (his x mark),
FOOSHATCHEE COCHUCME (his x mark),
GEORGE CLOUD (his x mark),
PA-SUCAH YOHOLA (his x mark),
JOHN BROWN (his x mark),

Seminole Delegates.

We, the delegation on the part of the loyal element of the Choctaw people, came here with the expectation of meeting our Southern brethren here, and to see what sort of a treaty would or could be made with the Government of the United States. We are not authorized to make, sign, or enter into any treaty stipulations with the Government of the United States on the part of the Choctaw Nation, but were selected by the agent for the Choctaw and Chickasaw Indians, by and with the advice and consent of the loyal portion of the Choctaw people, to represent and show to the commissioners on the part of the United States that there are some

loyal Choctaws yet, in order that we might not be forgotten or overlooke
by the commissioners, but that we might be properly provided for, &
In answer, therefore, to your propositions to the several tribes of India
we say that the 1st, 2d, 3d, 4th, 5th, and 6th articles meet our approv
We respectfully suggest that the 7th article may be modified or chang
to read thus:

No white person, except officers, agents, and employés of the Gover
ment, or of any internal improvement authorized by the Government
the United States; also, no person of African descent, except our form
slaves, or free persons of color who are now or have been residents
the Territory, will be permitted to reside in the Territory, unless
mally incorporated with some tribe, according to the usages of the la

WM. S. PATTON.
ROBT. B. PATTON

119 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, v. THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence, No. 21.—Tracing from De l'Isle's map, 1700.

(Filed Apr. 21, 1896. Court of Claims.)

120 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, on his said
deposes as follows:

The annexed map is an accurate tracing from G. De l'Isle's map,
lished in Paris, France, in 1700, being No. 5, in a volume of old Am
can maps now in the Library of Congress, and accessible, for inspec
and production in court, to all the attorneys and counsel in this ca
The annexed tracing contains everything shown on said map perti
to this cause.

H. E. PAIN

Subscribed and sworn to before me this 21st day of April, 1896.
[SEAL.] S. G. HOPKINS, *Notary Publi*
(Here follows diagram marked p. 121.)

122 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, v. THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence, No. 22.—Tracing from De l'Isle's map, 170

(Filed Apr. 21, 1896. Court of Claims.)

123 DISTRICT OF COLUMBIA, *ss:*

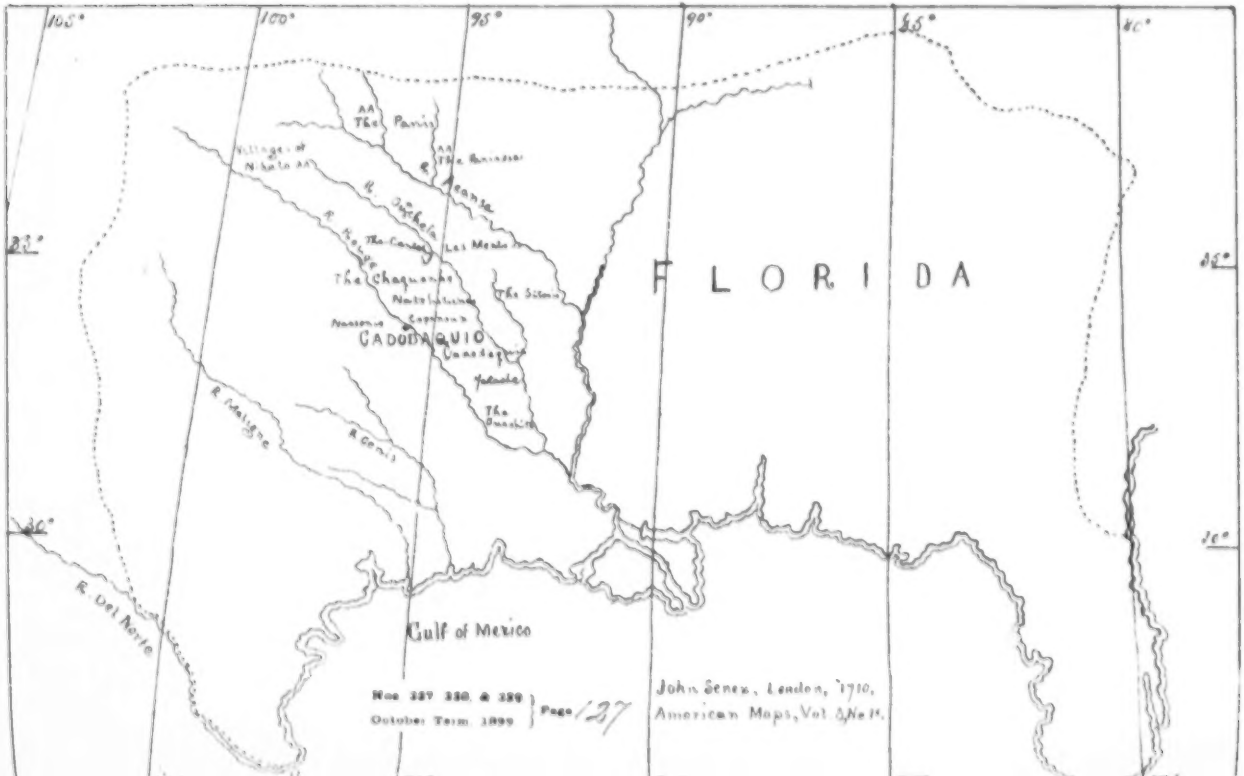
Halbert E. Paine, having been duly sworn, deposes as foll
The annexed map is an accurate tracing from a map published at
France, in 1703, by De Lisle, geographer of the Royal Academy.

De l'Isle. Paris, 1700.
Old American Maps, No. 5.
Library of Congress.

Nos. 337, 338 & 339, October Term, 1899 } Page 124

G. De l'Isle, Paris, 1703. Old Maps of America, Vol. I No 5. Library of Congress.

Ferro Longitude, Greenwich in brackets



Nos 329 330 & 329
October Term 1899
Page 127

John Senex, London, 1710.
American Maps, Vol 3 No 15.

map is No. 8 in Volume 1, of "Old Maps of America," now in the Library of Congress, and is accessible for inspection and production in court to all the attorneys and counsel in this cause. The annexed tracing includes everything shown on said map pertinent to this cause.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.

[SEAL.] S. G. HOPKINS, *Notary Public.*

(Here follows diagram marked p. 124.)

125 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, v. THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence, No. 23.—Tracing from John Senex's map, 1710.

(Filed Apr. 21, 1896. Court of Claims.)

126 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follows: The annexed map is an accurate tracing from the map of John Senex, published in London, England, in 1710, and being No. 14 in volume 3, of the "American Maps," now in the Library of Congress, accessible for inspection and production in court to all the attorneys and counsel in this cause. The annexed tracing includes everything shown on said map pertinent to the case.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.

[SEAL.] S. G. HOPKINS, *Notary Public.*

(Here follows diagram marked p. 127.)

128 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, v. THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence, No. 24.—Tracing from H. Moll's map, 1711.

(Filed Apr. 21, 1896. Court of Claims.)

129 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine having been duly sworn, deposes as follows: The annexed map is an accurate tracing from a map of H. Moll, published in London, England, in 1711, being No. 14 in volume 1 of the Old American Maps now in the Library of Congress, and accessible, for

inspection and production in court, to all the attorneys and counsel in this cause. The annexed tracing contains everything shown on said map pertinent to the case.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.
[SEAL.] S. G. HOPKINS, *Notary Public.*

(Here follows diagram marked p. 130.)

131 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.
No. 18932.

Claimants' evidence, No. 25.—Tracing from H. Moll's map, 1715. (Dedicated to Lord Somers.)

(Filed Apr. 21, 1896. Court of Claims.)

132 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follows: The annexed map is an accurate tracing from H. Moll's map dedicated to Lord Somers, published in London, England, in 1715. Said map is now in the Library of Congress, accessible, for inspection and production in court, to all the attorneys and counsel in this cause. The annexed tracing includes everything shown on said map pertinent to this case.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.
[SEAL.] S. G. HOPKINS, *Notary Public.*

(Here follows diagram marked p. 133.)

134 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.
No. 18932.

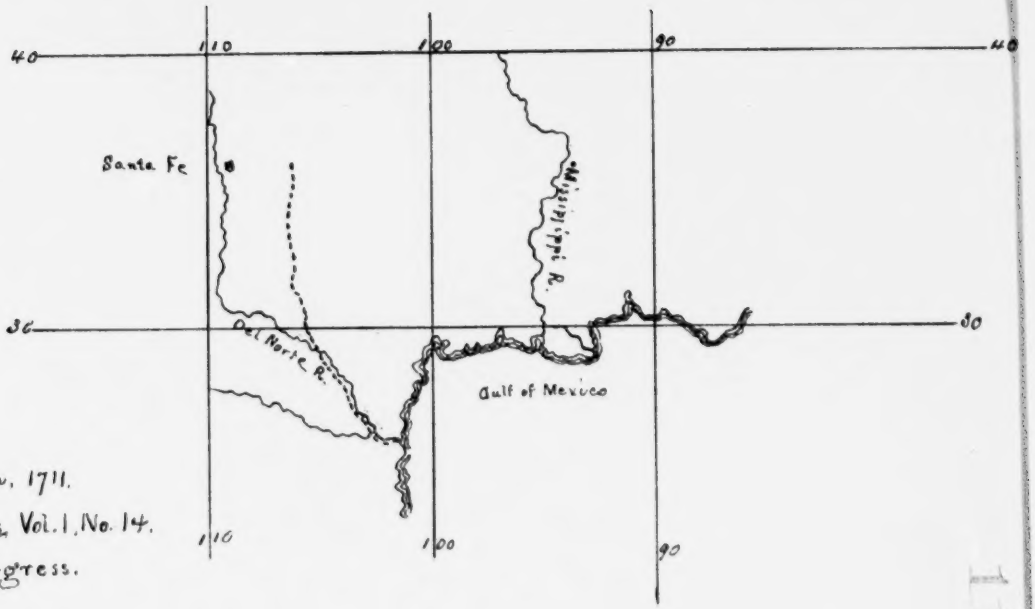
Claimants' evidence, No. 26.—Tracing from Moll's map No. 13, 1715.

(Filed Apr. 21, 1896. Court of Claims.)

135 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follows: The map hereto annexed is an accurate tracing from a map published in London, England, in 1715, by H. Moll, being No. 13 in volume 1 of

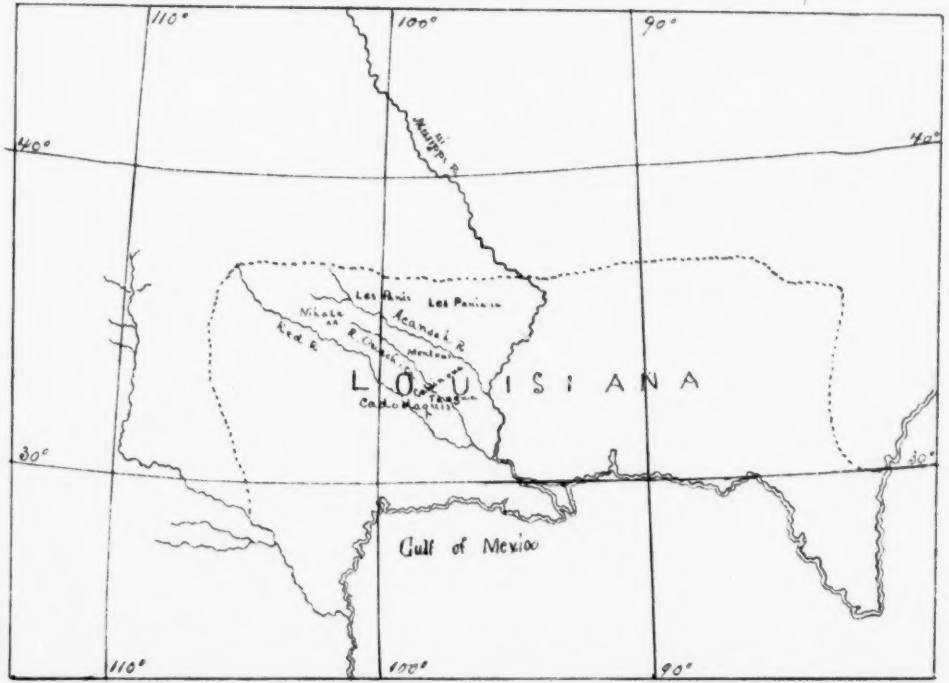
Nos. 337, 338, & 339,
October Term, 1899. } Page 130



H. Moll, London, 1711.
Old American Maps, Vol. 1, No. 14.
Library of Congress.

115

Library of Congress
(Detached)



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Nos. 337, 338, & 339
October Term, 1899. } Page 136

H. Moll. London, 1715

Old New Maps of America. Vol. No 13. Library of Congress

Nos. 337, 338 & 339.
October Term, 1899.
Page 139

H. Moll. London 1715.
Old Maps of America. Vol. I, No 16.
Library of Congress.

Old Maps of America," now in the Library of Congress, and accessible, inspection and for production in court, to all the attorneys and counin this cause. The annexed tracing includes everything shown on d map pertinent to this cause.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.
[SEAL.] S. G. HOPKINS, *Notary Public.*

(Here follows diagram marked p. 136.)

7 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, *v.* IE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence, No. 27.—Tracing from Moll's map No. 16, 1715.

(Filed Apr. 21, 1896. Court of Claims.)

8 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follows: The map hereto annexed is an accurate tracing from a map, published H. Moll, in London, England, in 1715, being No. 16, in volume 1, "Old Maps of America," now in the Library of Congress, and accesle, for inspection and production in court, to all the attorneys and counin this cause. The annexed tracing includes everything shown on d map pertinent to this cause.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.
[SEAL.] S. G. HOPKINS, *Notary Public.*

(Here follows diagram marked p. 139.)

0 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, *v.* IE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence, No. 28.—Tracing from De Lisle's map, 1741.

(Filed Apr. 21, 1896. Court of Claims.)

1 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follows: The annexed map is an accurate tracing from De Lisle's map, pubhed by Covens and Mortier, at Amsterdam, Netherlands, in 1718,

being No. 38, in volume 2, of the "Atlas Nouveau," now in the Library of Congress and accessible, for inspection and production in court, to all the attorneys and counsel in this cause. The annexed tracing includes everything shown on said map pertinent to this cause.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.

[SEAL.] S. G. HOPKINS, *Notary Public.*

(Here follows diagram marked p. 142.)

143 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, *v.* THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence, No. 29.—Tracing from G. De l'Isle's map, 1720.

(Filed Apr. 21, 1896. Court of Claims.)

144 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follows:

The annexed map is an accurate tracing from map No. 5, in the "Atlas Nouveau" of G. De L'Isle, published at Amsterdam in 1720. Said atlas is now in the Library of Congress and is accessible, for inspection and production in court, to all the attorneys and counsel in this cause. The annexed tracing includes everything shown on said map pertinent to this cause.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.

[SEAL.] S. G. HOPKINS, *Notary Public.*

(Here follows diagram marked p. 145.)

145*a* United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, *v.* THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence, No. 30—Tracing from De Lisle's map, 1722.

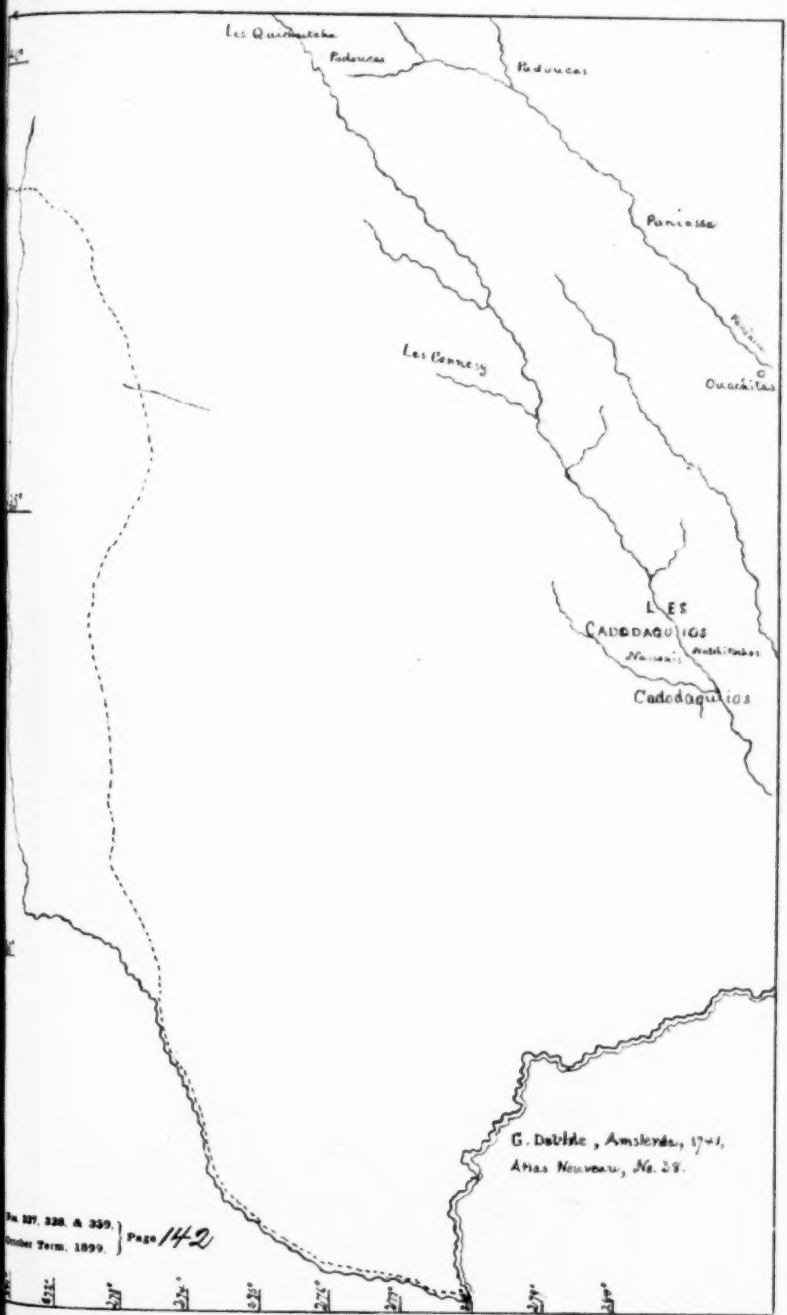
(Filed Apr. 21, 1896. Court of Claims.)

146 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follows:

The annexed map is an accurate tracing from a map of De Lisle, published by Covens and Mortier, at Amsterdam, Netherlands, in 1722, being No. 39 in "Atlas Nouveau," now in the Library of Congress,

11164

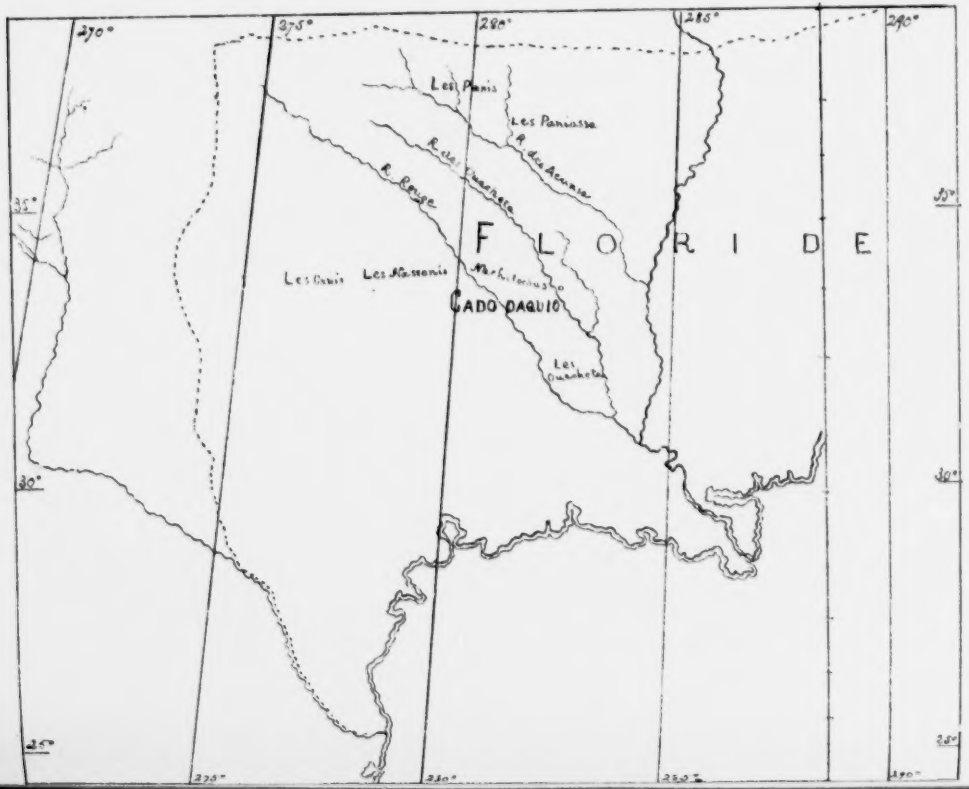


Pa. Rff. 338. & 339.
October Term. 1899.
Page 142

Nos. 337, 338, & 339,
October Term, 1899. } Page 145

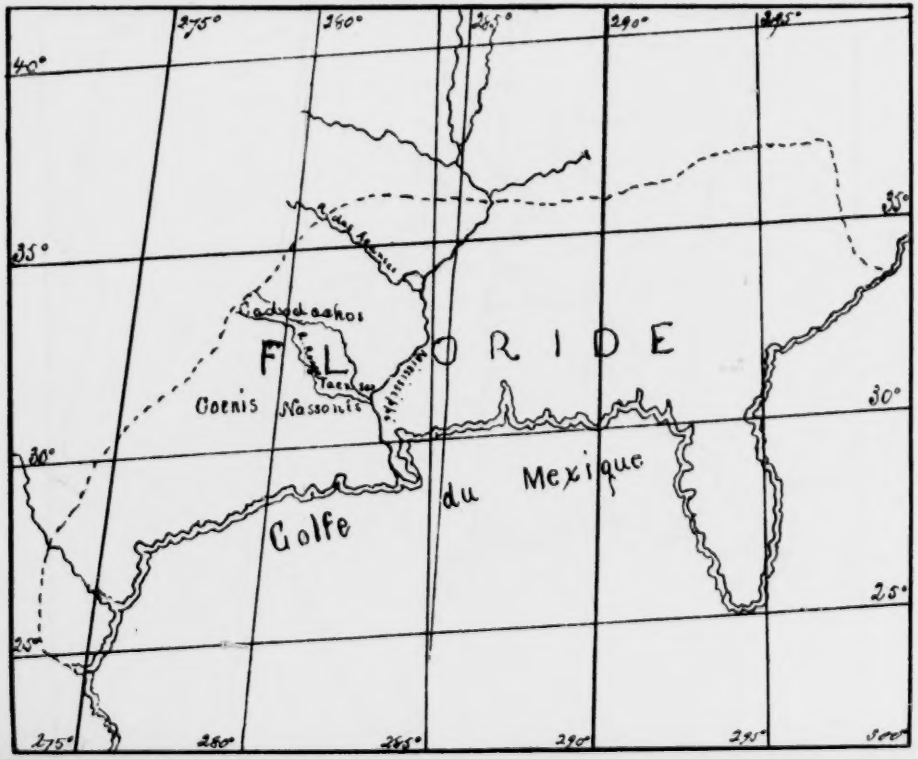
G. De l'Isle, Amsterdam, 1720,
Atlas Nouveau, No. 5.

1165



Nos 337, 338, & 339. October Term, 1899. Page 147

G. De l'Isle, 1722, Amsterdam, Atlas Nouveau, Vol. 2, No. 39.



G. Delisle, Amsterdam, 1733.

accessible, for inspection and production in court, to all the attorneys and counsel in this cause. The annexed tracing includes everything shown on said map pertinent to this cause.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.

[SEAL.] S. G. HOPKINS,
Notary Public.

(Here follows diagram marked p. 147.)

148 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, *v.* THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence, No. 31—Tracing from G. De l'Isle's map, 1733.

(Filed Apr. 21, 1896. Court of Claims.)

149 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follows: The annexed map is an accurate tracing from G. De l'Isle's Atlas Nouveau, volume 2, No. 29. Said atlas was published at Amsterdam, in 1733, and is now in the Library of Congress, accessible, for inspection and production in court, to all the attorneys and counsel in this cause. Said tracing includes everything shown on said map pertinent to this cause.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.

[SEAL.] S. G. HOPKINS,
Notary Public.

(Here follows diagram marked p. 150.)

151 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, *v.* THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence, No. 32—Tracing from Popple's map, 1733.

(Filed Apr. 21, 1896. Court of Claims.)

152 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follows: The annexed map is an accurate tracing from H. Popple's map, published in London, England, in 1733, which map is No. 17 in volume 1

of "Old Maps of America," now in the Library of Congress, and accessible, for inspection and production in court, to all the attorneys and counsel in this cause. The annexed tracing includes everything shown on said map pertinent to this cause.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.

[SEAL.] S. G. HOPKINS,
Notary Public.

(Here follows diagram marked p. 153.)

154 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence, No. 33—Tracing from H. Popple's map, 1735.

(Filed Apr. 21, 1896. Court of Claims.)

155 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follows: The annexed map is an accurate tracing from the map of H. Popple, published in London in 1735, being No. 8 in volume 2 of Old Maps of America, now in the Library of Congress, accessible, for inspection and production in court, to all the attorneys and counsel in this cause. The said tracing includes everything shown on said map pertinent to this case.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.

[SEAL.] S. G. HOPKINS,
Notary Public.

(Here follows diagram marked p. 156.)

157 United States Court of Claims.

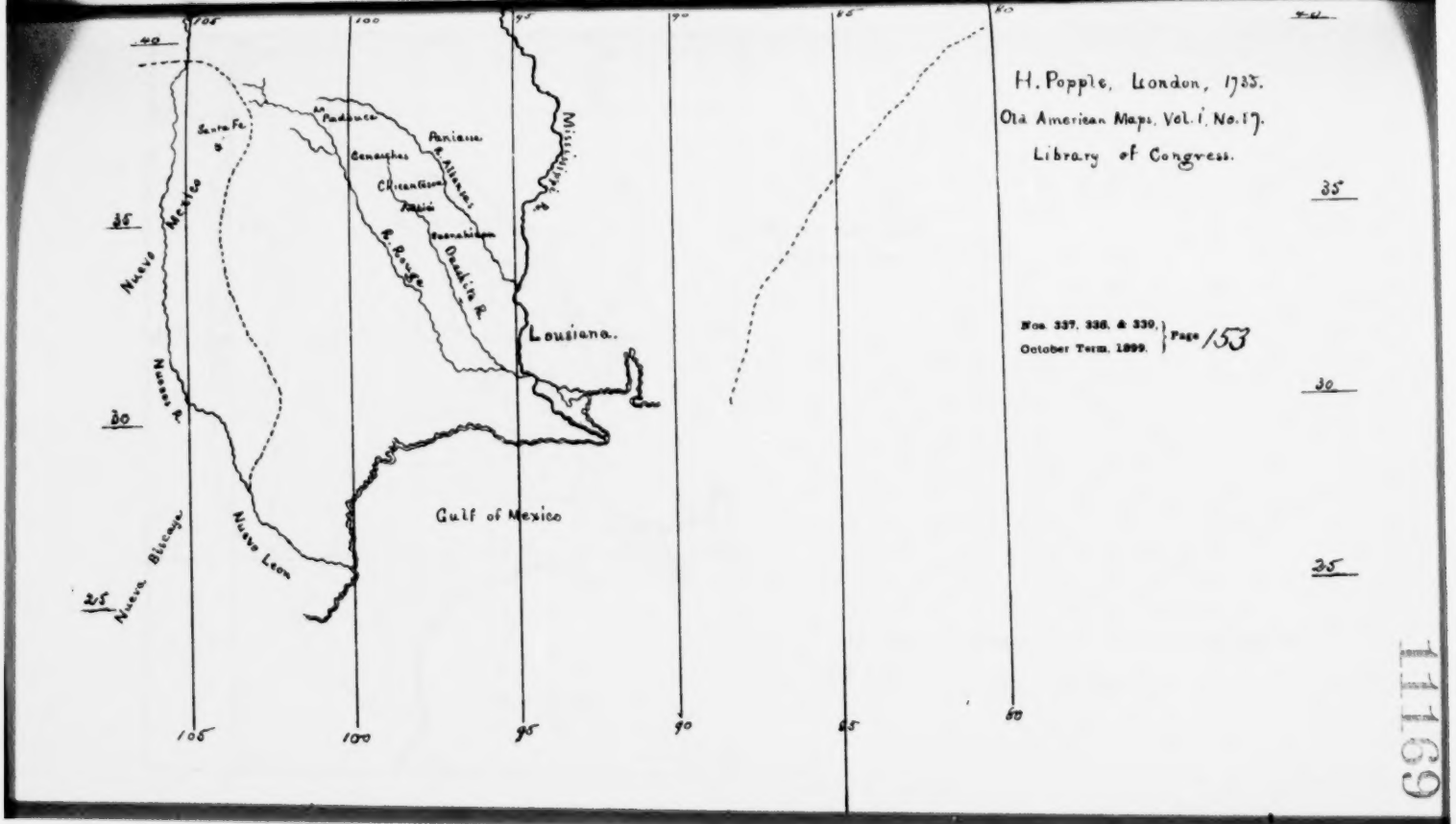
THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence, No. 34—Tracing from De Lisle's map, 1739.

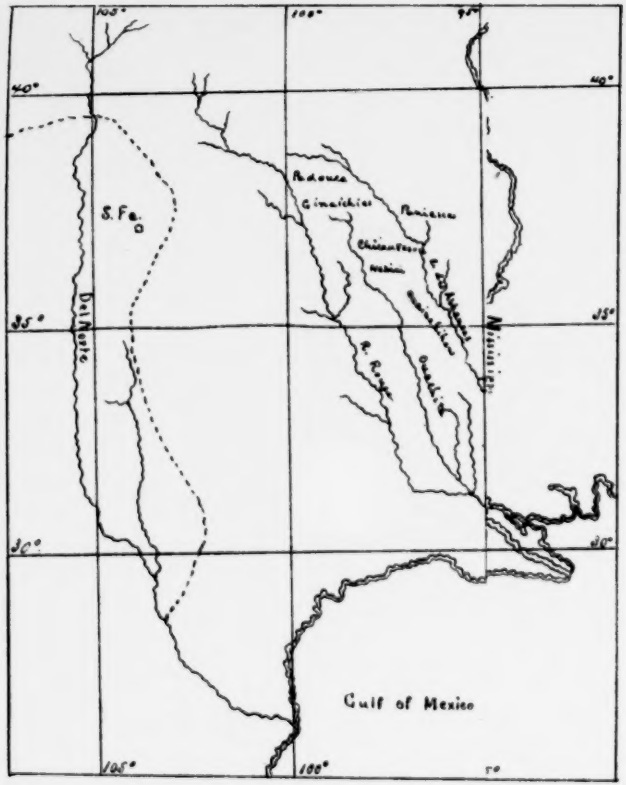
(Filed Apr. 21, 1896. Court of Claims.)

158 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follows: The annexed map is an accurate tracing from De Lisle's map, published at Amsterdam, Netherlands, in 1739. Said map is now in the Library of


H. Popple, London, 1735.
Old American Maps, Vol. I, No. 17.
Library of Congress.
Nos. 337, 338, & 339, October Term, 1899. Page 153
Santa Fe
Padouca
Panissa
Genesches
Chicantesca
Aquia
Quenchiana
R. Rouge
Ouachita R.
R. Alsensas
Mississippi R.
Louisiana.
Gulf of Mexico
Nuevo Mexico
Nuevo Leon
Nueva Biscaya
Nueces R.
105
100
95
90
85
80
40
35
30
25

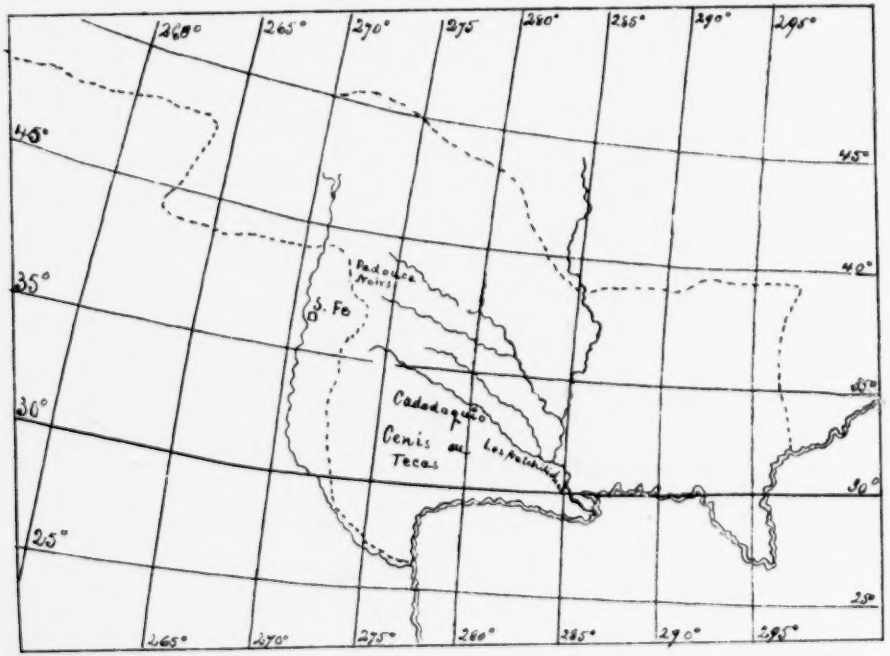
11169



Nos. 337, 338, & 339.
October Term, 1890. } Page 156

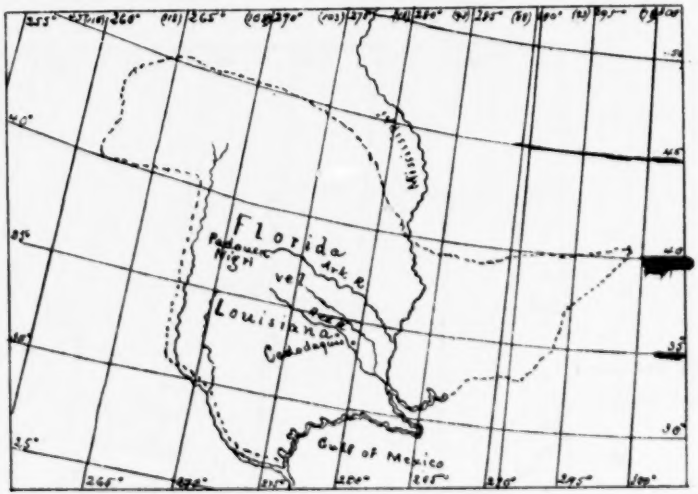
H. Popple, London, 1785. Old Maps of America, Vol. 2, No. 8, Library of Congress.

11170



Nos. 337, 338, & 339,
October Term, 1899. } Page 159

G. De l'Isle, 1739, Amsterd
Atlas Nouveau, Vol. 2, No. 2



A. G. Boehme, 1746. Old American Maps, Vol. 1, No. 18, Library of Congress.

Longitude east from Ferro.
Longitude west from Greenwich in brackets.
378° − F = O.

Congress, accessible, for inspection and production in court, to all the attorneys and counsel in this cause. The annexed tracing includes everything shown on said map pertinent to this cause.

H. E. PAINE.

Subscribed and sworn to this 21st day of April, 1896.

[SEAL.] S. G. HOPKINS,
Notary Public.

(Here follows diagram marked p. 159.)

160 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, v. THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence. No. 35.—Tracing from Boehme's map, 1746.

(Filed Apr. 21, 1896. Court of Claims.)

161 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follows: The annexed map is an accurate tracing from A. G. Boehme's map, published in 1746. Said map is now in the Library of Congress, accessible, for inspection and production in court, to all the attorneys and counsel in this cause. The annexed tracing includes everything shown on said map pertinent to this cause.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.

[SEAL.] S. G. HOPKINS,
Notary Public.

(Here follows diagram marked p.162.)

163 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, v. THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence. No. 36.—Tracing from volume 2, No. 10 "American Maps," 1753.

(Filed Apr. 21, 1896. Court of Claims.)

164 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follows: The annexed map is an accurate tracing from a map published in 1753, being No. 10, in volume 2 of "American Maps," in the Library of Congress, and accessible, for inspection and production in court, to all the

attorneys and counsel in this cause. The annexed tracing includes everything shown on said map pertinent to this cause.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.

[SEAL.] S. G. HOPKINS,
Notary Public.

(Here follows diagram marked p. 165.)

166 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence. No. 37.—Tracing from G. L. Le Rouge's map, 177

(Filed Apr. 21, 1896. Court of Claims.)

167 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follows The annexed map is an accurate tracing from map No. 1a, of th "Atlas Ameriquain Septentrional" of G. L. Le Rouge, published Paris, France, in 1778. Said tracing includes everything shown on sai map pertinent to this case. Said atlas and map are now in the Librar of Congress, accessible, for inspection and production in court, to all th attorneys and counsel in this cause. The annexed tracing include everything shown on said map pertinent to this case.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.

[SEAL.] S. G. HOPKINS,
Notary Public.

(Here follows diagram marked p. 168.)

169 United States Court of Claims.

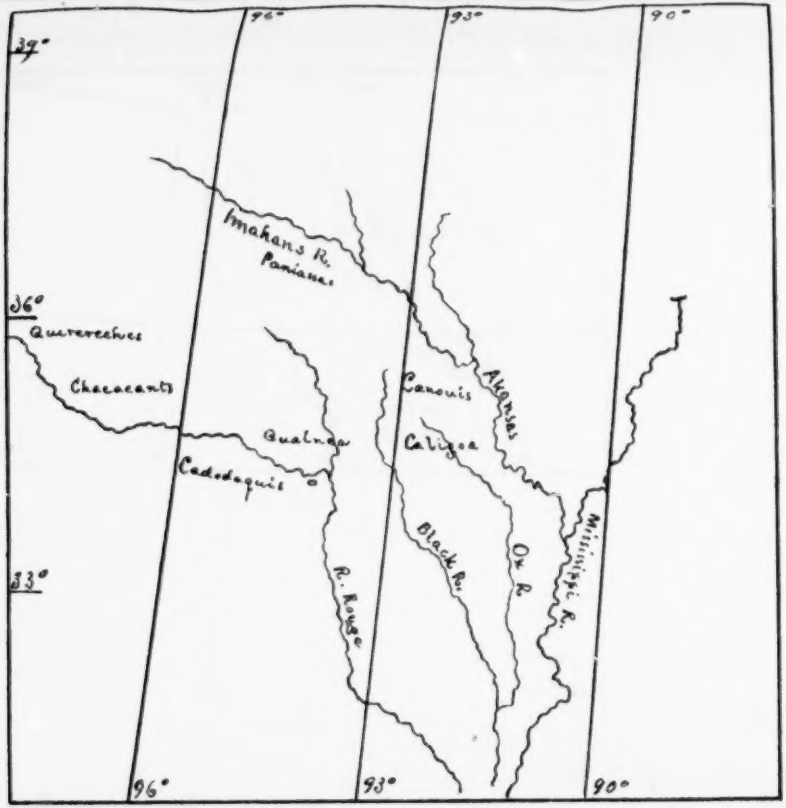
THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence. No. 38.—Tracing from map of Barbé-Marbois, 1820

(Filed Apr. 21, 1896. Court of Claims.)

170 DISTRICT OF COLUMBIA, *ss:*

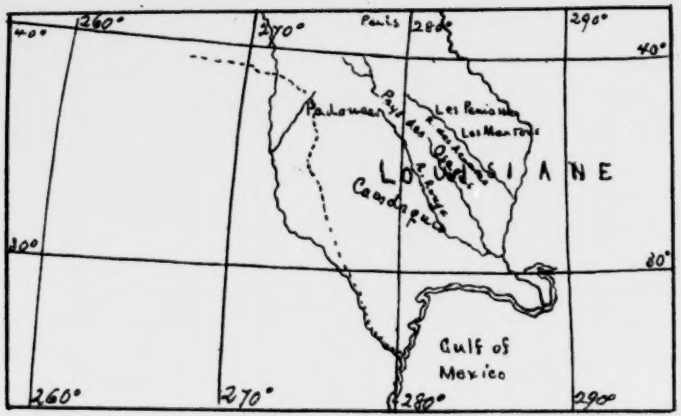
Halbert E. Paine, having been duly sworn, deposes as follows The map hereto annexed is an accurate tracing of the map attached t the "History of Louisiana," by Barbé-Marbois, the negotiator of th treaty by which Louisiana was ceded to the United States. Said histor



Nos. 337. 338. & 339.
October Term, 1899.
Page 165

American Maps, 1758,
Vol. 2, No. 10.

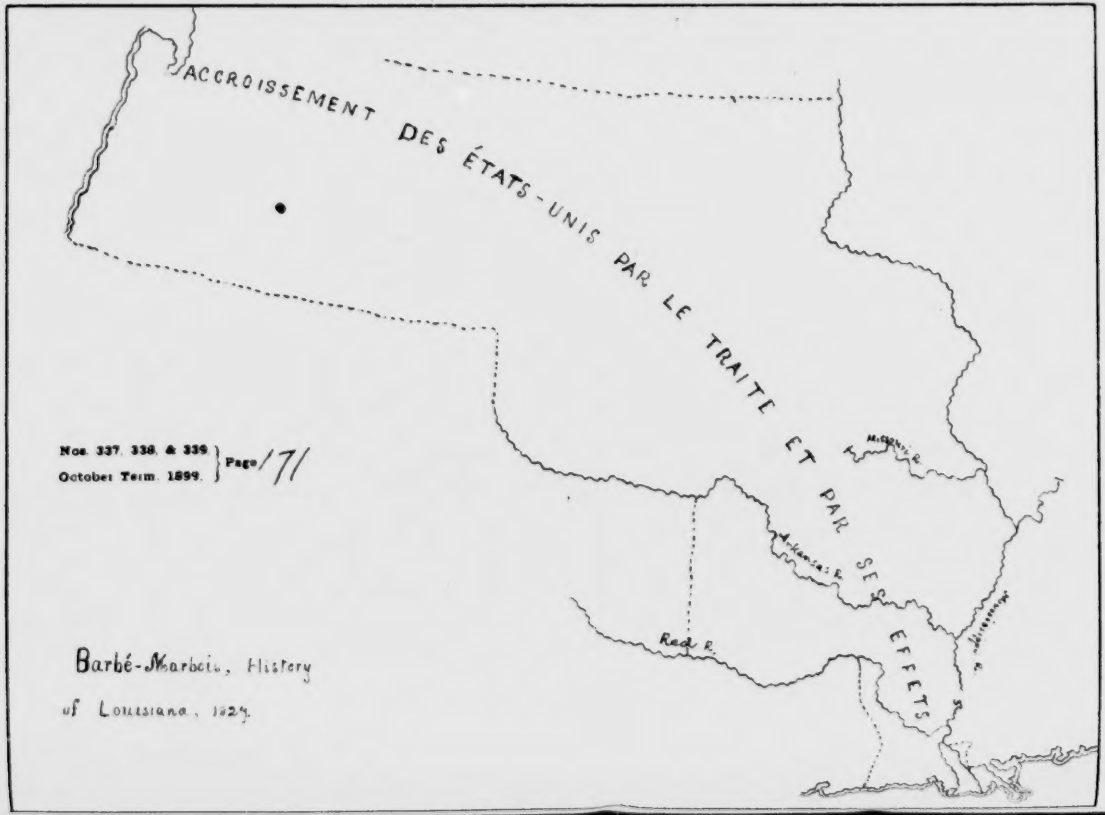
1174



Nos. 337, 338, & 339,
October Term. 1899. } Page 168

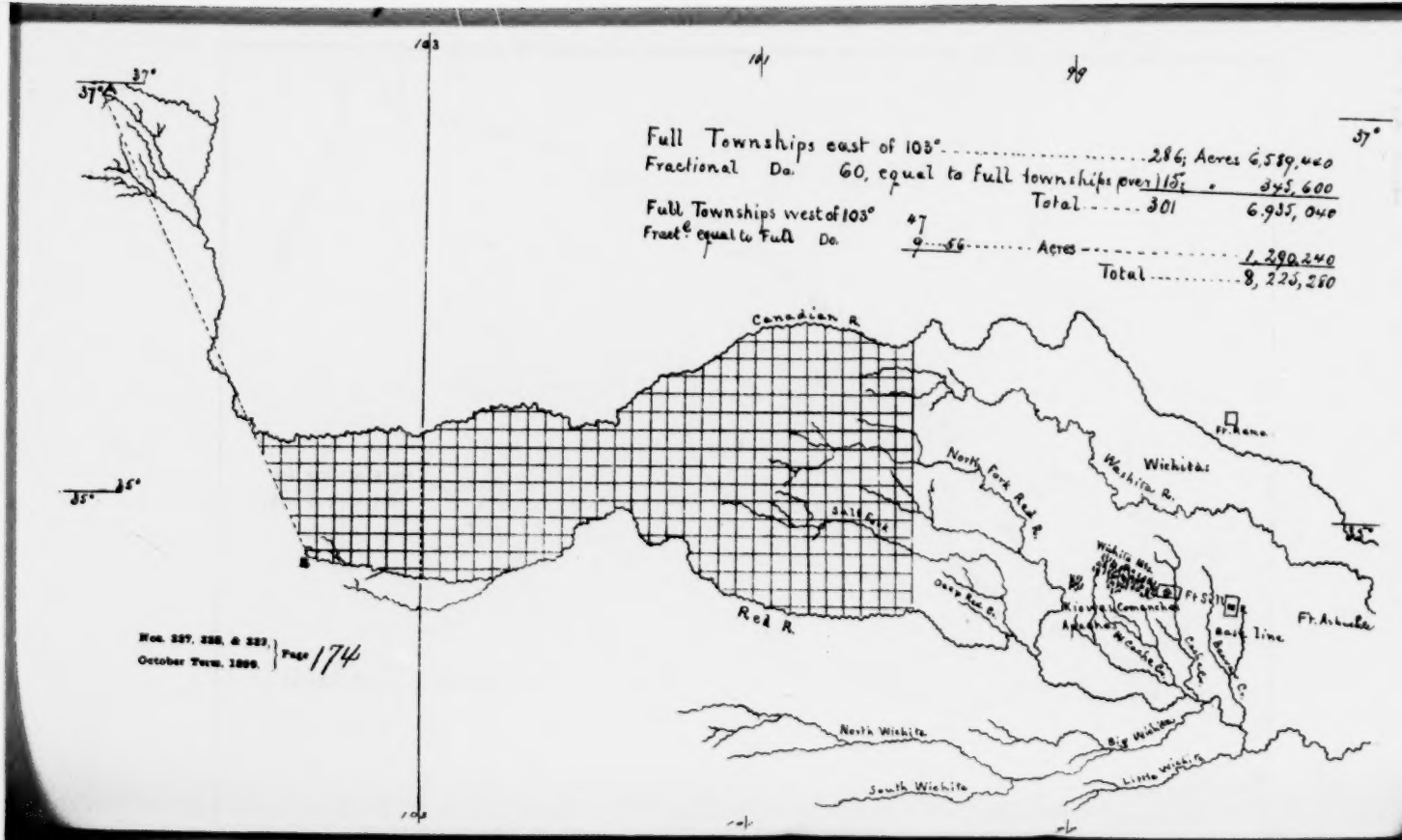
Atlas Ameriquain Septentrional,
G. L. Le Rouge, Paris, 1778. No. 1 A.

11175



Nos. 337, 338, & 339
October Term, 1899. } Page 171

Barbé-Marbois, History
of Louisiana, 1829.



Nos. 227, 228, & 229, October Term, 1899. | Page 174

as published in Paris, France, in 1829, and is now in the Library of Congress, accessible, for inspection and production in court, to all the attorneys and counsel in this cause. The annexed tracing includes everything shown on said map pertinent to this cause.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.

[SEAL.] S. G. HOPKINS, *Notary Public.*

(Here follows diagram marked p. 171.)

172 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, *v.* THE UNITED STATES AND THE WICHITA and affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence No. 39.—Tracing from Indian Office map, 1895.

173 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follows: The annexed map is an accurate tracing from the Indian Office map of 1895. The townships west of the meridian of 100° west longitude are laid off in the tracing on the scale on which the townships east of said meridian are laid off on the map. Said map is now in the Indian Office, accessible, for inspection and production in court, to all the attorneys and counsel in this cause. Said tracing includes everything shown on said map pertinent to this case.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.

[SEAL.] S. G. HOPKINS, *Notary Public.*

(Here follows diagram marked p. 174.)

175 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, *v.* THE UNITED STATES AND THE WICHITA and affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence, No. 40.—Extracts relating to source of Red River.

(Filed April 21, 1896. Court of Claims.)

176 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follows: The annexed type-written document is an accurate extract from the deposition of John W. Clous, taken in the case of The United States, plaintiff, vs. The State of Texas, No. 3, original, October term, 1895, and printed in the record of said case, which record is now in the Library

of Congress, accessible, for inspection and production in court, to all the attorneys and counsel in this cause.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.

[SEAL.] S. G. HOPKINS, *Notary Public.*

177 JOHN W. CLOUS, having been duly sworn, testified as follows:

Direct examination by Mr. ALLAN:

1. Q. Please state your residence, age, and occupation.

A. My legal residence is San Antonio, Texas; my station is West Point, New York; I am 54 years of age; I am major and judge-advocate U. S. Army and professor of law at the U. S. Military Academy at West Point. (Page 224.)

72. Q. How far from the confluence of these two streams is the most western point that you either crossed or stopped at on the South Fork of Red River?

A. Beyond the 103d meridian.

73. Q. How far beyond the 103d meridian?

A. Some miles—say from 15 to 20 miles or thereabouts; I do not remember exactly.

74. Q. In your computation how far from those points westward would be the source of the South Fork of Red River?

The WITNESS. From what point?

Mr. MAY. The 103d meridian westward.

A. About 15 or 20, as I said; thereabouts. (Page 232.)

96. Q. You said a while ago, in answer to a cross-interrogatory propounded by Mr. May, that you had been to the source of South Fork?

A. I did.

97. Q. Who was with you?

A. Gen. McKenzie's command of cavalry.

178 98. Q. Name two or three of the officers who visited the source of that river with you, please.

A. Major Wirt Davis and Capt. Thompson, of the 4th Cavalry.

99. Q. Name some others.

A. Wentz Miller, Henry W. Lawton, inspector-general of the Army, now in Washington, and Col. Latimer. That is all I can now remember without mentioning those who are dead.

179 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA and affiliated bands of Indians, defendants. } No. 18932.

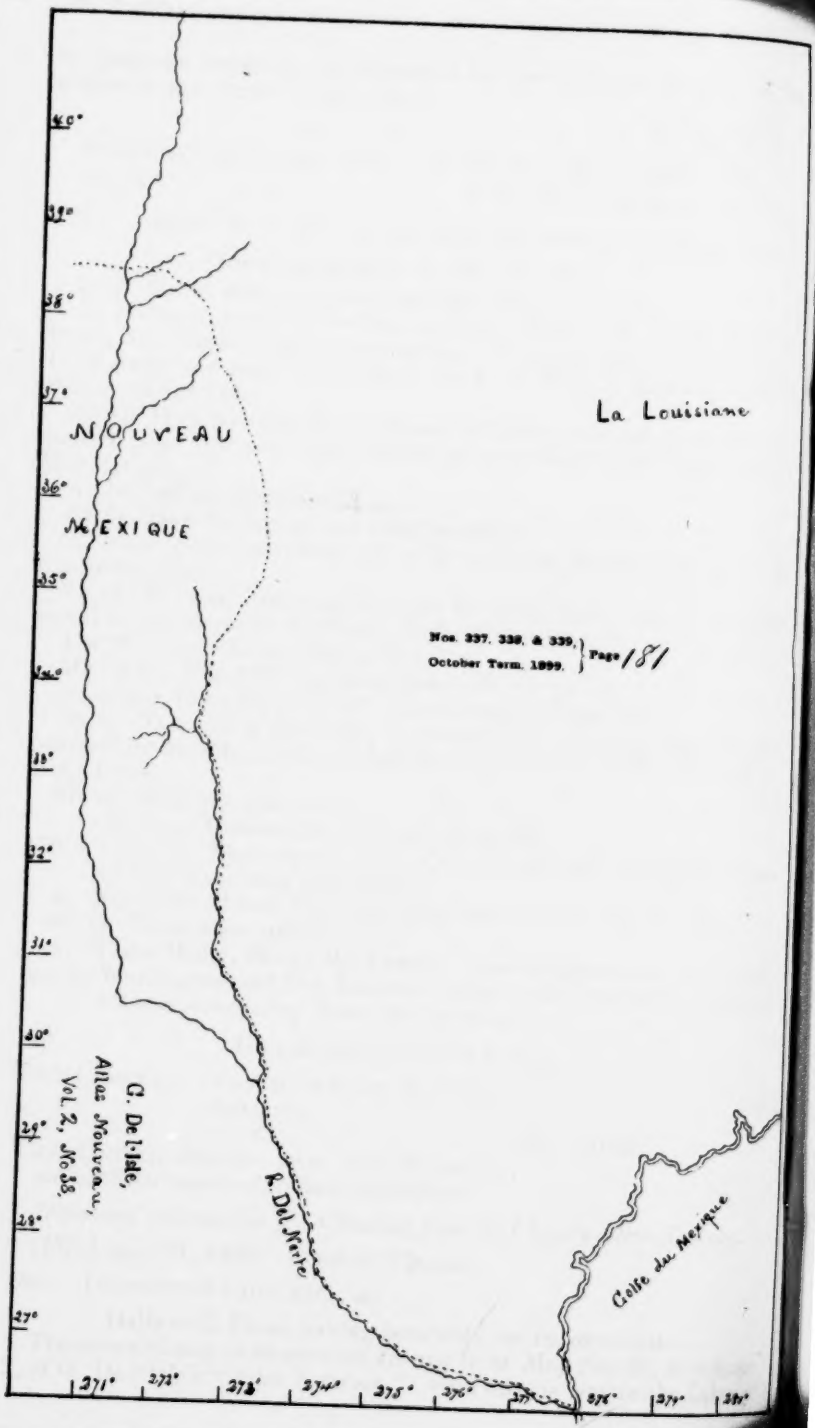
Claimants' evidence No 45.—Tracing from De l' Lisle's Atlas Nouveau.

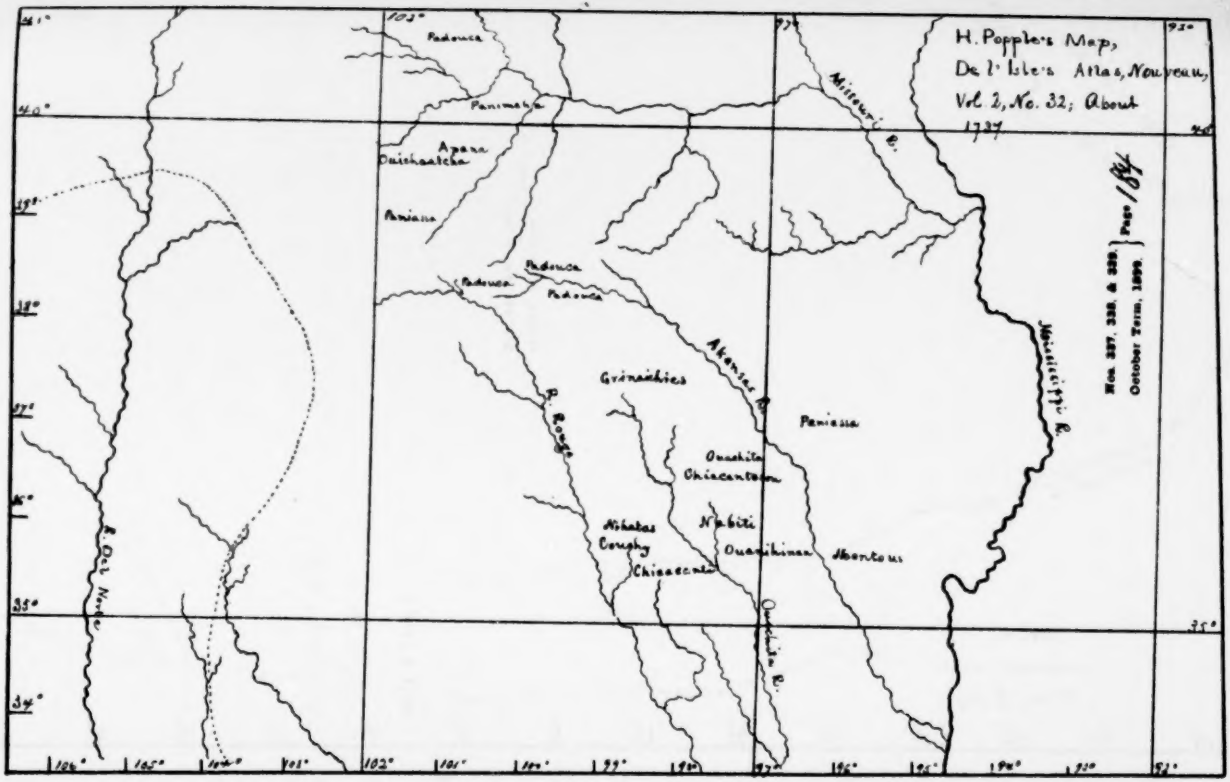
(Filed Apr. 21, 1896. Court of Claims.)

180 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, says that—

The annexed map is an accurate tracing from Map No. 38, in volume 2, of G. De l'Isle's "Atlas Nouveau." Said atlas is now in the Library


La Louisiane
NOUVEAU
MEXIQUE
R. Del Norte
Golfe du Mexique
C. De l'Isle,
Atlas Nouveau,
Vol. 2, No. 38.
Nos. 337, 338, & 339,
October Term, 1899.
Page 181


H. Popple's Map,
De l'Isle's Atlas, Nouveau,
Vol. 2, No. 32; About
1737
Nos. 337, 338, & 339.
October Term, 1899.
Page 184
Padouca
Panimaha
Apana
Ouichaatcha
Paniassa
Padouca
Padouca
Padouca
Grénaichies
Akansas R.
Paniassa
R. Rouge
Ouachita
Chiacantaou
Nabiti
Nohatas
Couchy
Chiacanti
Ouanihinan
Neontous
Ouachita R.
Missouri R.
Mississippi R.
R. Del Norte
40°
39°
38°
37°
36°
35°
34°
102°
101°
100°
99°
98°
97°
96°
95°
94°
93°
92°

of Congress, and is accessible, for inspection and production in court, to all the attorneys and counsel in this case. Said tracing includes everything shown on said map pertinent to this cause.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.
[SEAL.] S. G. HOPKINS, *Notary Public.*

(Here follows diagram marked p. 181.)

182 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, *v.* THE UNITED STATES AND THE WICHITA and affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence No. 46.—Tracing from Popple's map, 1737.

(Filed Apr. 21, 1896. Court of Claims.)

183 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follows: The annexed map is an accurate tracing from H. Popple's map, published in De l'Isle's "Atlas Nouveau," volume 2, No. 32, about 1737. Said map is now in the Library of Congress, accessible for inspection and production in court to all the attorneys and counsel in this cause. Said tracing contains everything shown on said map pertinent to this case.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.
[SEAL] S. G. HOPKINS, *Notary Public.*

(Here follows diagram marked p. 184.)

185 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, *v.* THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence, No. 47.—Tracing from Du Val's map, 1684.

(Filed Apr. 21, 1896. Court of Claims.)

186 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follows: The annexed map is an accurate tracing from P. Du Val's map, published in Paris France, in 1684, being No. 7 in the "Maps of America," now in the Library of Congress, accessible for inspection and production

in court to all the attorneys and counsel in this cause. Said tracing contains everything shown on said map pertinent to this case.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.

[SEAL.] S. G. HOPKINS, *Notary Public.*

(Here follows diagram marked p. 187.)

188 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, *v.* THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence, No. 48.—Tracing from Lea' Map, London, 1685.

(Filed Apr. 21, 1896. Court of Claims.)

189 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follow The annexed map is an accurate tracing from Phillip Lea's map, pul lished in London, England, about 1695, being No. 2 in the "Maps America," now in the Library of Congress, accessible for inspection an production in court to all the attorneys and counsel in this cause. Sai tracing includes everything shown on said map pertinent to the case.

H. E. PAINE.

Subscribed and sworn to before me this 21st day of April, 1896.

[SEAL.] S. G. HOPKINS, *Notary Public.*

(Here follows diagram marked p. 190.)

191 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, *v.* THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

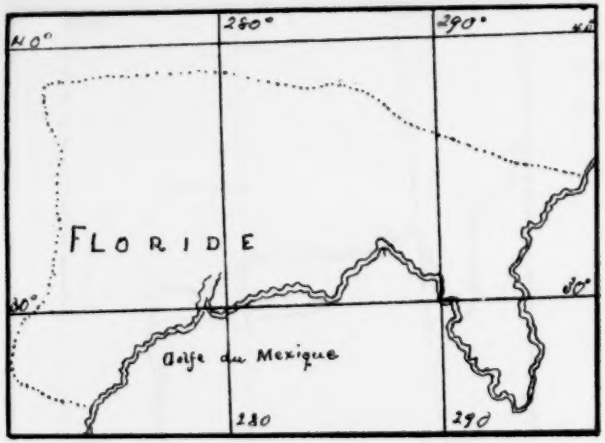
Claimants' evidence, No. 49.—Tracing from De l'Lisle's map, 1703.

(Filed Apr. 21, 1896. Court of Claims.)

192 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follows The annexed map is an accurate tracing from G. De l'Isle's map o 1703, being No. 8, volume 1 of "Old American Maps," in the Librar of Congress, accessible for inspection and production in court to all th attorneys and counsel in this cause. Said tracing contains everythin shown on said map pertinent to this case.

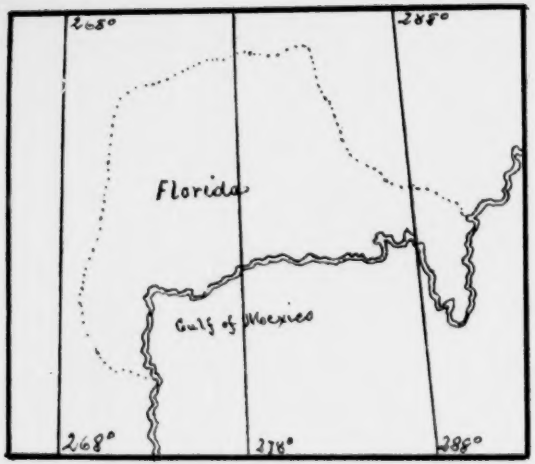
H. E. PAINE.



Nos. 337, 338, & 339,
October Term, 1899. } Page 187

P. Du Val, Paris, 1684
"Maps of America", No. 7

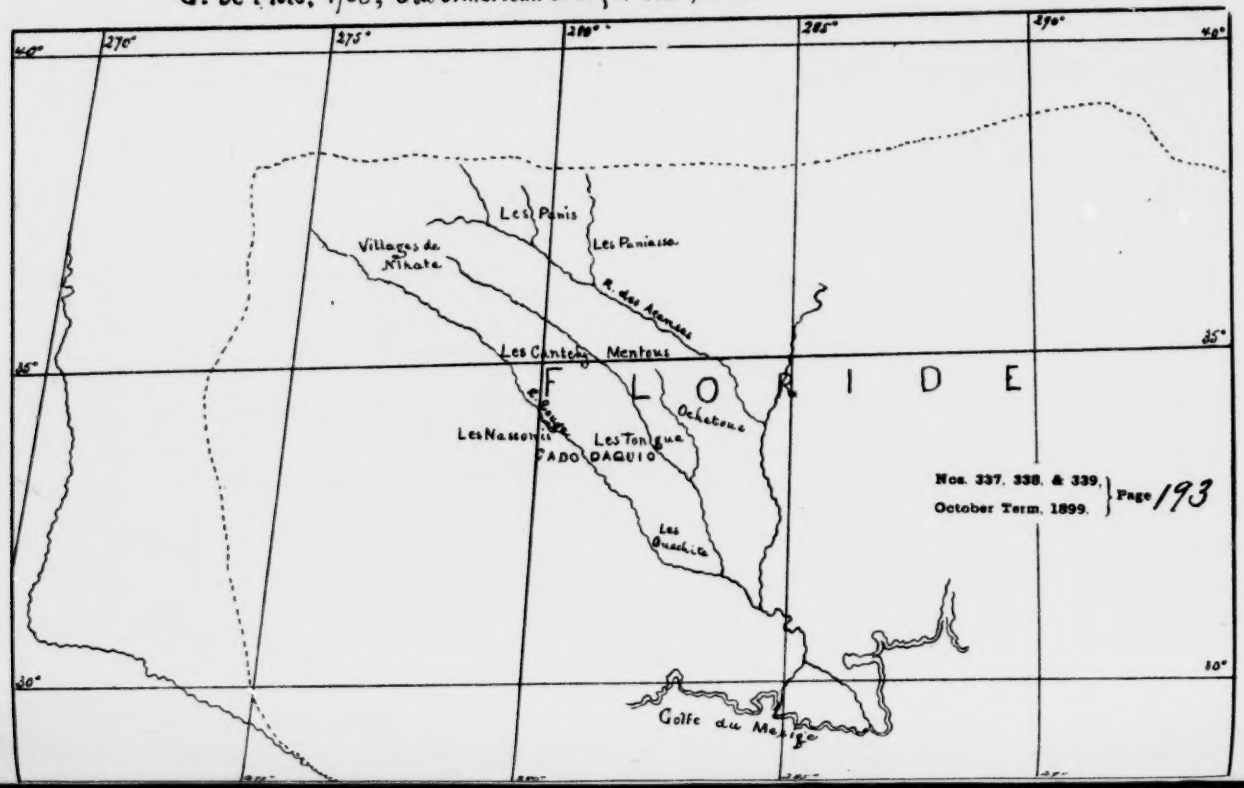
2811



Phillip Lea, London. About 1685.
Maps of America, No. 2.

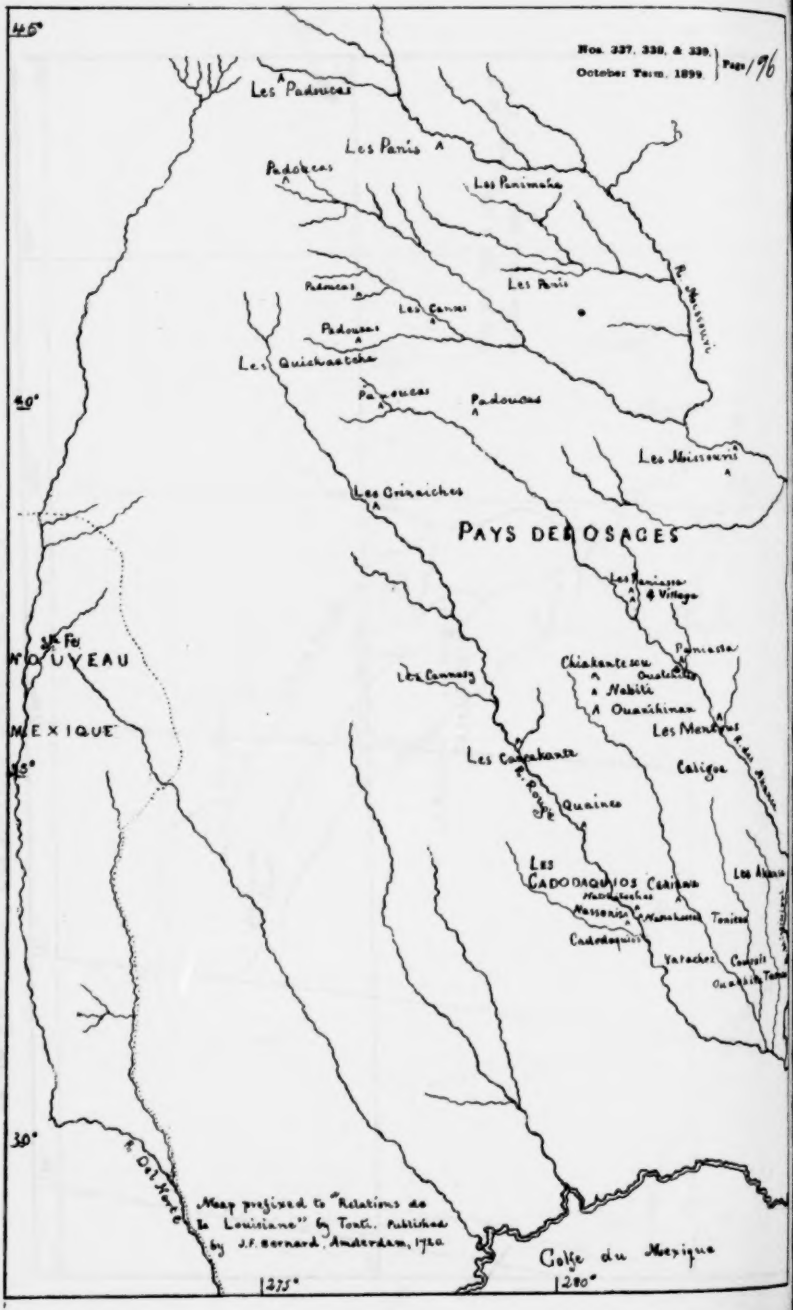
11183

G. De l'Isle, 1703; Old American Maps, Vol. I, No. 8.



Nos. 337, 338, & 339, October Term, 1899. } Page 193

11185



Map prefixed to "Relations de la Louisiane" by Tonti. Published by J.F. Bernard, Amsterdam, 1720.

Subscribed and sworn to before me, this 21st day of April, 1896.
[SEAL.] S. G. HOPKINS, *Notary Public.*

(Here follows diagram marked p. 193.)

194 United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, *v.* THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimant's evidence, No. 53.—Tracing from De l'Isle's map, Amsterdam, 1720.

(Filed Apr. 21, 1896. Court of Claims.)

195 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follows: The annexed map is an accurate tracing from the map prefixed to "Relations de la Louisiane," by Tonti, published at Amsterdam, in 1720. Said map is now in the Library of Congress, accessible for inspection and production in court to all the attorneys and counsel in this cause. Said tracing includes everything shown on said map pertinent to the case.

H. E. PAINE.

Subscribed and sworn to before me, this 21st day of April, 1896.
[SEAL.] S. G. HOPKINS, *Notary Public.*

(Here follows diagram marked p. 196.)

197 EXHIBIT H. E. P. No. 2.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, *v.* THE UNITED STATES AND THE WICHITA and affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal No. 2.—Extract from deposition of Lieut. Beach.

(Filed Jul. 30, 1896. Court of Claims.)

198 The typewritten document hereto annexed is an accurate extract from the deposition of Lansing H. Beach, given in the case of The United States v. Texas, No. 4, Original, printed at page 302, volume 1, of the record of said case. Said volume is now in the Library of Congress, and is accessible, for inspection and production in court at the trial, to all the attorneys and counsel in this cause.

H. E. PAINE.

199 [Deposition of Lieut. Lansing H. Beach, Record U. S. v. Texas, 302.]

84. Q. Have you such familiarity with the subject of maps connected with the western part of the country as would enable you to state how far the location of Indian villages upon earlier maps should be relied upon as an identifying fact of location?

A. I know that with the prairie Indians a village was never fixed, except for short periods of time, and that the same Indians are frequently shown on different maps in different places, and that any general information based upon locality of prairie Indians is very unreliable.

85. Q. Can you state any instance of different location of Indian villages by the same name by examination of any of the maps before you?

A. Humboldt's map (Exhibit map No. 4) shows a Quichicans village upon the Rio Rojo de Natchitoches, at 99 west longitude. De Cordova's map (Exhibit No. 7) shows a Kechi village upon the Brazos, just west of the 99th meridian. Melish's map of 1818 shows a "Panee" village upon Red River, just west of the 96th meridian. Darby shows a Panis village upon the Red River, at about 97° 31′ west longitude. Pike (Exhibit map No. 25) shows "Pawnee hunting ground" between the Arkansas and Negracka rivers, at about 103 west longitude. Disturnell, 1847 (Exhibit map No. 6), shows "Pawnies" upon Red River in
199½ two places, between 95 and 97 west longitude. Humboldt's map (Exhibit map # 4) shows, in the vicinity of the 100th meridian, the "Quirechas," as upon a branch of the Rio Rojo de Natchitoches, which name Quirechas, I believe, came from Coronado, and was copied on nearly all maps after his time. I find also on Humboldt's map, about latitude 36, longitude between 102 and 103, Indians called Tauaizes.

86. Q. Is that on Red River?

A. No. Humboldt breaks the Red River off. De Cordova's map (Exhibit map No. 7) shows a "Towash" village upon the Brazos near the 32nd parallel. Disturnell (Exhibit map No. 6) shows a "Toyask" village upon Red River, shortly east of the 97th meridian. These last three Indian names all mean the same tribe and are different spellings for the Spanish name of these Indians. The English name was very different, and I do not remember it.

200 EXHIBIT H. E. P. No. 4.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal No. 4.—Extracts from H. H. Bancroft's work.

(Filed, Jul. 30, 1896. Court of Claims.)

201 The annexed typewritten document is an accurate extract from page 733, volume 15, of Hubert H. Bancroft's work, which is

ow in the Library of Congress, and is accessible, for inspection and roduction in court on the trial, to all the attorneys and counsel in this ause.

H. E. PAINE.

02 Volume 15 of Hubert H. Bancroft's work, quoted on page 733 of the record in United States v. Texas, contains the following tatement:

"A conference of officers at Bexar in January, 1759, made plans for he campaign. The army of five hundred soldiers and volunteers, with large force of Apache auxiliaries, in the best of spirits, started in ugust, under the command of Parilla. After marching some hundred nd fifty leagues they surprised a rancheria, killing fifty-five of the foe nd making many captives. They then advanced against the towns of he Taovaiases and, in the region of what was later called San Teodoso, ound six thousand Indians of different tribes, in a strongly fortified osition, many of them armed with muskets, and displaying a French ag. The savages did not wait to be attacked, but made a sortie in force nd the Spaniards fled in a panic."

203 EXHIBIT H. E. P., No. 6.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA and affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 6.—Extract from La Salle's statement.

(Filed July 30, 1896, Court of Claims.)

204 The annexed typewritten document, in the French language, is an accurate extract from a statement of La Salle, made in 1682, nd recorded in Margry's work, volume 2, page 201. The English ranslation appended thereto is accurate. Said volume is now in the ibrary of the Bureau of American Ethnology, and is accessible, for nspection and production in court on the trial, to all the attorneys and counsel in this cause.

H. E. PAINE.

205 On page 201 of Margry, volume 2, occurs the following statement of La Salle, made in 1682:

"I'en ay un, de la nation des Pana, qui demeurent à plus de deux cent lieues à l'Ouest, sur une des branches du Mississippi, et y habitent deux villages l'un prez de l'autre."

"I have one of them (a boy), of the nation of the Pana, who live more than two hundred leagues westward, on one of the branches of the Mississippi, and inhabit there two villages near each other."

206 EXHIBIT H. E. P., No. 7.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 7.—Extract from Tonti's statement.

(Filed Jul. 30, 1896. Court of Claims.)

207 The annexed typewritten document, in the French language, is an accurate extract from a statement of Tonti, made in 1688, and recorded at page 188 of Barnard's work, published at Amsterdam in 1734. The English translation appended thereto is also accurate. Said Barnard's work is now in the library of the Bureau of American Ethnology, and is accessible, for inspection and production in court on the trial, to all the attorneys and counsel in this cause.

H. E. PAINE.

208 Relation de la Louisiane. Amsterdam, 1720, p. 191.

Bernard, 188; Amsterdam, 1734. Tonti, Decouvèrtes en Amérique, under date of February, 1688, says (p. 319, ed. of 1697):

"Etant arrivé chez les Taensas, les principaux de la Nation m'informerent de la querelle avec les Nachitoches, à raison du sel dont ceaux-ci ne leur vouloient point faire part, et me prirent de vouloir me mêler de leur accommodement. J' acceptai volontiers cette mediation; Trente Taensas se joignirent à notre troupe. Nous arrivâmes, après huit jours de marche au village des Nachitoches. Cette Nation ne fait qu'un peuple avec deux autres, qui sont les Ouasita et les Capichis. Ces Chefs destrois Nations s'étant assemblez, on me fit asseoir au milieu. Les trente Taensas, avant que de prendre leur place, demanderent la permission d'aller au Temple implorer le secours de leur Dieu pour en obtenir une bonne paix. * * Ces conventions faites, ils se jurerent une paix mutuelle, et l'on dansa le Calumet. Je pris ensuite congé des uns et des autres."

209 Bernard, 188; Amsterdam, 1734; Tonti, under date of February, 1688, says:

"When I arrived among the Taensas, the chiefs of that nation informed me of their quarrel with the Nachitoches on account of the salt, in which the latter would give them no share, and they prayed that I would intervene for their reconciliation. I willingly undertook this mediation. Thirty Taensas joined themselves to our company. We arrived, after a march of eight days, at the village of the Nachitoches. This nation makes but one people with two other nations, which are the Ouasita and the Capicis. These chiefs of three nations being assembled, I was made to take a seat in their midst. The thirty Taensas, before they took their places, asked permission to go to the temple to implore their God to aid them in securing a good peace. * * These conventions being made, they swear a mutual peace, and dance the Calumet. Then I took leave of them all."

210 EXHIBIT H. E. P., No. 8.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 8.—Extract from La Harpe's Journal.

(Filed Jul. 30, 1896. Court of Claims.)

211 The annexed typewritten document, in the French language, is an accurate extract from page 6 of La Harpe's Journal of September, 1719, published in Paris in 1831. The English translation appended thereto is also accurate. Said book is now in the Library of Congress, and is accessible, for inspection and for production in court on the trial, to all the attorneys and counsel in this cause.

H. E. PAINE.

212 [La Harpe's Journal, Paris, 1831, page 206, September, 1719.]

"Le 3, ils firent six lieues, et trouvèrent le chef des Touacaros, accompagné de six autres chefs de nations, qui venaient a leur rencontre; avertis de leur approche, ces chefs firent dire à M. de La Harpe, par un Naouidiche, qui parlait la langue nassonite, que la nouveauté de voir dans leur pays une nation inconnue ne lassait pas que de les surprendre, mais que la franchise, avec laquelle on venait, leur fasait croire que c'était dans le dessein d'être amis; que sur ce pied, ils voulaient bien les recevoir comme frères. M. de La Harpe leur fit répondre que le grand-chef de sa nation l'avait envoyé pour les assurer de la protection centre leurs enemis; qu'ils trouveraient dans cette alliance l'avantage de se rendre recommandables à toutes les nations dont la plus grande partie reconnaissait ce chef pour le leur; que son intention était qu'ils fussent tous en paix, étant leur père commun; que s'ils suivaient sa volenté, on leur donnerait les marchandises dont ils auraient besoin, et des armes à feu, a fin de pouvoir plus commodément à leur subsistence. Ces chefs avaient apporté du pain de maïs, et des viandes boucanées; ils regalerent les voyageurs, et les firent ensuite monter sur des chevaux, qu'ils avaient amenés pour se rendre à
213 leurs villages; le pays qu'ils traversèrent était uni; à une portée de fusil de leurs habitations ils virent un bois clair, et un beau ruisseau, au dessus duquel était le village sur des coteaux, le long des bords de la rivière des Alkansas, qu'ils nomment Imaham à la latitude de 37° 45′ éloigné des Nassonites de quatre-vignt-neuf lieues, en ligne droite, dans le nord-nord ouest."

214 "The 3, they made six leagues and found the chief of the Tonacaros, accompanied by six other chiefs of nations who came to meet them; advertised of their approach, these chiefs caused it to be stated to Mr. de La Harpe, by a Naouidiche who spoke the Nassonite language, that the novelty of seeing an unknown nation in their country did not fail to surprise them, but that the freedom with which they came

made it apparent that it was with the purpose of being friends; that u
this footing they would receive them as brothers. Mr. de La Ha
caused answer to be made to them that the Great Chief of his Nation
sent him to assure them of protection against their enemies; that t
would find in this alliance the advantage of securing consideration
themselves among all the nations, of which the greater part recogn
this chief for their own; that his intention was that they should all l
peace, he being their common father; that if they would follow his
the goods which they needed would be given to them, and also firea
to enable them to provide more conveniently for their subsistence. T
chiefs had brought corn bread and smoked meat; they regaled the t
ellers and caused them to mount horses, which they had led out, to g
their villages; the country which they traversed was level; at gun
distance from their habitations, they saw a thin wood and a beau
rivulet, above which was the village on declivities along the banks of
river of the Alkansas, which they call Imaham, at latitude 37° 45′,
tant from the Nassonites, in a straight line, north-northwest, eighty-
leagues."

215 EXHIBIT H. E. P., No. 9.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND Affiliated Bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 9.—Extract from La Harpe's Jou

(Filed Jul' 30, 1896. Court of Claims.)

216 The annexed typewritten documents in the French langu
are accurate extracts from La Harpe's Journal of Septembe
1719, published at pages 289 and 292 of the sixth volume of Marg
work. The English translations appended thereto are also accurate.
volume is now in the library of the Bureau of American Ethnology,
is accessible, for inspection and production in court on the trial, to all
attorneys and counsel in this cause.

H. E. PAIN

217 In La Harpe's Journal, 6 Margry, 289, under date of Sept
ber 3, 1719, he says:

"A une portée de fusil de leurs habitations, nous traversasmes un b
ruisseau enfermé d'un bois clair, au-dessus duquel sont les villages, si
sur des costeaux, le long de la branche du S.-O. de la rivière des Alcan
Ces villages n'en font qu'un, les maisons se joignant les unes aux aut
courant de l'Est à l'Ouest, une lieue, dans la plus belle situation que
puisse voir. Les Nations de ces establissements sont les Touaca
Toayas, Caumuches, Aderos, Ousitas, Ascanis, Quataquois, Quicasqui

Honechas; ils peuvent fournir six mille personne de tout sexe."

218 On page 292 he says, under date of September 8, 1719:

"Le 8, je fis assembler tous les principaux chefs de ces nations, pour m'informer d'eux de la situation de la rivière des Alcansas, de la demeure la plus prochaine des Espagnols, du commerce qu'ils fasoient avec les Padoucas. A quoy ils me respondirent que leur rivière fermoit deux branches au-dessous de leur village; que celle, sur laquelle estoient leurs demeures, remontoit au soleil couchant jusq'à des villages Espagnols et Padoucas."

219 "At gunshot distance from their habitations, we crossed a beautiful rivulet enclosed by a thin wood, above which are the villages, situated on declivities along the southwest branch of the river of the Alkansas. These vi lages make only one, the houses joining themselves one to another, running from east to west, one league, in the most beautiful situation possible to be seen. The nations of these establishments are the Touacaras, Toayas, Caumaches, Aderos, Ousitas, Ascanis, Quataquois, Quicasquiris, Honechas. They can furnish six thousand persons of both sexes."

"The 8th, I caused all the principal chiefs of these nations to assemble, in order that I might be informed by them of the position of the river of the Alcansas, the nearest dwelling place of the Spaniards, the commerce which they carried on with the Padoucas. To which they answered me that their river formed two branches below their village; that the branch upon which their dwellings were situated extended towards the setting sun to villages of the Spaniards and Padoucas."

220 EXHIBIT H. E. P., No. 10.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND Affiliated Bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 10.—Extract from Du Pratz' History.

(Filed Jul' 30, 1896. Court of Claims.)

221 The annexed typewritten document in the French language is an accurate extract from page 243 of volume 2 of the History of Louisiana, by Du Pratz, published in Paris in 1758. The annexed English translation of said extract is also accurate. Said volume is now in the library of the Smithsonian Institute, and is accessible, for inspection and production in court on the trial, to all the attorneys and counsel in this cause.

H. E. PAINE.

222 The "History of Louisiana," by Du Pratz, published in Paris in 1758, contains, at page 243 of volume 2, the following statement:

"Depuis la Riviere Rouge, jusqu'à celle des Arkansas, il n'y a aucune Nation. Il y en avoit une sur la Riviere Noire; c'étoit les Ouachitas, qui

avoient donné leur nomme à cette Riviere. Il ne reste rien a présent
cette Nation; les Tchicachas l'ayant détruite en grande partie, et le re
s'étant retiré chez les Cadodaquioux, chez lesquels les Tchicachas n'ose
les inquiéter."

223 "From the River Rouge to the Arkansas there is no natio
There was one on the Black River; this was the Ouichitas, w
had given their name to that river. Nothing remains at present of t
nation, the Chickasaws having destroyed it in great part, and the remna
having retired amongst the Cadodaquioux, amongst whom the Chickasa
did not dare to disturb them."

224 EXHIBIT H. E. P. No. 11.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 11.—Extract from Jeffery's Histo

(Filed Jul' 30, 1896. Court of Claims.)

225 The annexed typewritten document is an accurate extract fr
volume 1, page 165, of Jeffery's History, published in Lond
in 1761. Said volume is now in the Library of Congress, and is acce
sible, for inspection and production in court on the trial, to all the atto
neys and counsel in this cause.

H. E. PAINE.

226 [Jeffery's History of the French Dominions in North and South Ameri
London, 1761, page 165, vol. 1.]

"About a hundred leagues from the place where this river falls i
the Mississippi are the habitations of a vast nation called Cadodaquiou
which extends, in different tribes, a vast way. They, as well as the pe
ple before mentioned, have a language peculiar to themselves; but t
of the Chickasaws is understood among them all, like Lingua Franca
the Levant; they call it the vulgar tongue.

"The Ouachitas are intermixed among them, having abandoned t
Black River, to which they gave name, to avoid the rage of the Chick
saws, who dare not follow them; for the same reason the Taensas, w
formerly inhabited this coast, near a river to which they lent their deno
ination, withdrew to the neighborhood of the Mobileans, where we bef
took notice of them."

227 EXHIBIT H. E. P. No. 12.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 12.—Extract from Robin, 1775.

(Filed Jul' 30, 1896. Court of Claims.)

228 The annexed typewritten document in the French language is an accurate extract from volume 3, page 3, of Robin's work, published in Paris in 1807. The English translation appended thereto is also accurate. Said book is now in the Library of Congress, and is accessible, for inspection and production in court on the trial, to all the attorneys and counsel in this cause.

H. E. PAINE.

229 [Robin, Paris, 1807, vol. 3, page 3. Voyages dans l'Interieur de la Louisiane.]

"Des Natchitoches au Yatasses par eau on compte vingt-cinq lieues; de ce village sauvage à celui des Petits Cadeaux, trente; et de là aux Grands Cadeaux, cinquante; des Grands Cadeaux aux Taouayaches, qui se trouvent sur le bord occidental de la dite rivière, et les Ouitcitas sur l'oriental, ces deux villages vis-à-vis l'un de l'autre, quatre-vingts lieues; de ces deux villages, en montant toujours la même rivière, on trouve, à cinquante lieues, dans son milieu, un rocher de sel calciné, qui sert à l'approvisionnement des nations de cette partie, qui en font même entre elles commerce; ce qui, avec plusieurs autres salines, rend les eaux de la rivière Rouge très-saumâtres, lorsqu'elle est basse. En continuant de remonter, cette rivière est toujours large, mais plate et guéable."

230 [Robin, Paris, 1807, vol. 3, page 3.]

"From the Natchitoches to Yatasses the distance, reckoned by water, is twenty-five leagues; from this savage village to that of the Little Cadeaux, thirty; and from there to the Grand Cadeaux, fifty; from the Grand Cadeaux to the Taouayaches, who are located on the west bank of said river and the Ouitcitas on the east, the two villages being opposite each other, eighty leagues. Ascending the same river we find, at a distance of fifty leagues from these two villages, a rock of calcined salt, which serves to supply the natives of this region, who make commerce of it among themselves. This, with many other salt streams, renders the waters of the Red River very brackish when it is low. Higher up this river continues large, but flat and fordable."

231 EXHIBIT H. E. P. No. 15.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 15.—Extract from Schoolcraft.

(Filed Jul' 30, 1896. Court of Claims.)

232 WASHINGTON, *May 14, 1896.*

The annexed document is an accurate extract from a statement of David G. Burnet, formerly President of the Republic of Texas, made August 20, 1847, and printed in the first volume of Schoolcraft's work, page 239.

H. E. PAINE.

233 In 1 Schoolcraft, 239, will be found the following statement, made August 20, 1847, by David G. Burnet, formerly President of the Republic of Texas:

"The Whacoes, Tawacanies, Toweash, Aynies, San Pedros, Nabaduchoes, Nacadochuts, and Hitchies are small tribes, or fragments of tribes, and, separately considered, are quite insignificant. They have been long resident in Texas, and properly belong to it; but they are originally, the Hitchies excepted, of the Caddo stock, being offsets from that family. The Whacoes are the most considerable of these bands, amounting probably to 150 warriors, it being understood among Indians that every adult male is a warrior. They are a stealthy, thieving, faithless race, and have done much mischief, first and last, on our frontier. They live in a village on the Upper Brazos, and raise corn, beans, pumpkins, &c., and usually spend the winter months in hunting. The other small parties, amounting to about fifty families each, live in villages, on the waters of the Trinity and Neches, and cultivate the ground to a small extent.

"The Hitchies, once a distinct and isolated tribe, have so intermarried with their neighbor bands that they have lost their identity, and may be considered merged into the common stock. The Caddoes formerly resided on Red River of Louisiana, above Natchitoches and below the Great Reft, and were included in the jurisdiction of the Indian agency stationed, in 1819, at Natchitoches. They removed to Texas a few years ago and now claim to be Texas Indians."

234 EXHIBIT H. E. P., No. 16.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal No. 16.—Extracts from Account of Louisiana.

(Filed Jul. 30, 1896. Court of Claims.)

235 The annexed typewritten document is an accurate extract from page 12 of An Account of Louisiana, laid before Congress by direction of the President November 14, 1803, now in the library of the Senate, and accessible, for inspection and production in court on the trial, to all the attorneys and counsel in this cause.

H. E. PAINE.

236 "AN ACCOUNT OF LOUISIANA, LAID BEFORE CONGRESS BY DIRECTION OF THE PRESIDENT OF THE UNITED STATES NOVEMBER 14TH, 1803."

On page 12 occurs the following statement:

"Red River and its settlements: On the west side of the Mississippi, 70 leagues from New Orleans, is the mouth of the Red River, on whose banks and vicinity are the settlements of Rapide, Avoyelles, and Natchitoches, all of them thriving and populous. The latter is situate 75 leagues up the Red River. On the north side of the Red River, a few leagues from its junction with the Mississippi, is the Black River, on one of whose branches, a considerable way up, is the infant settlement of Ouchita, which, from the richness of the soil, may be made a place of importance."

On pages 34, 35, and 36 of the same work will be found the following statements:

"About eighty leagues above Nachitoches, on the Red River, is the nation of the Cadoquies, called, by abbreviation, Cados. They can raise from three to four hundred warriors, are the friends of the whites, and are esteemed the bravest and most generous of all the nations in this vast country. * * *"

"Between the Red River and the Arkansas there are but a few
237 Indians, the remains of tribes almost extinct. On this last river is the nation of the same name, consisting of about two hundred and sixty warriors. They are brave, yet peaceable and well disposed, and have always been attached to the French, who espoused their cause in their wars with the Chickasaws, whom they have always resisted with success. They live in three villages. The first is at eighteen leagues from the Mississippi on the Arkansas River, and the others are at three and six leagues from the first."

238 EXHIBIT H. E. P., No. 19.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal No. 19.—Extract from Kennedy's Texas.

(Filed Jul. 30, 1896. Court of Claims.)

239 WASHINGTON, D. C., *May 14, 1896.*

The annexed document is an accurate extract from page 349, volume 1, of Kennedy's Texas, published in 1841.

H. E. PAINE.

240 [Kennedy's Texas, 1841, vol. 1, p. 349.]

"In alliance with the Wacos were the Pawnee Picts, or Toweashes, residing on the Red River, sometimes on the side of the United States and sometimes in Texas."

241 EXHIBIT H. E. P., No. 21.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal No. 21.—Extract from French's Historical Collections.

(Filed Jul. 30, 1896. Court of Claims.)

242 The annexed typewritten document is an accurate extract from part 1, page 2, of French's Historical Collections of Louisiana. Said work is now in the Library of Congress, and is accessible, for inspection and production in court on the trial, to all the attorneys and counsel in this cause.

H. E. PAINE.

243 [French's Historical Collections of Louisiana, New York, 1846.]

At page 72, of part 1, appears the following statement in the English language, purporting to be a translation of Tonti's narrative:

"We set off on the 12th with 12 Taencas, and after a voyage of twelve leagues to the N.W. we left our boat and made twenty leagues

ortage, and on the 17th of February, 1690 (1688?), came to Nachito-
es. They made us stay at the place, which is in the midst of the three
llages called Nachitoches, Ouasita, and Capiché. The chiefs of the
ree nations assembled, and before they began to speak the 30 Taencas
ho were with me got up, and, leaving their arms, went to the temple to
ow how sincerely they wished to make a solid peace."

44 EXHIBIT H. E. P., No. 22.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, *v.* THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence in rebuttal No. 22.—Extract from deposition of Urban Gebhart.

(Filed July 30, 1896. Court of Claims.)

45 WASHINGTON, *July 15, 1896.*

The annexed document consists of accurate extracts from the eposition of Urban Gebhart, taken from pages 693, 694, 695 of the ecord of the case of The United States *v.* The State of Texas, now in the ibrary of Congress.

H. E. PAINE.

46 [Extracts from the deposition of Urban Gebhart, record, United States *v.* Texas, pages 693, 694, 695.]

"5. Q. Where was Camp Radzyminski located when you first got here?

"A. When we first arrived it was located down about—it may have been twenty miles or eighteen miles from the hills, on the creek called Otter Creek.

"6. Q. When you say eighteen or twenty miles from the 'hills,' what hills do you mean?

"A. I mean the Wichita Mountains. * * *

"8. Q. Where did you move to then?

"A. We moved about three or four miles higher up on the same creek.

"9. Q. What creek was that?

"A. Otter Creek. * * *

"12. Q. Where did you go after that?

"A. Then we went to the foot of the mountains. * * *

47 "1. X Q. How many camps were there that were called Radziminski?

"A. There were three camps, sir.

"2. X Q. You were at all of them?

"A. At all three camps; yes, sir."

248 EXHIBIT H. E. P., No. 24.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal No. 24.—Tracing from H. Popple's map, 1741.

(Filed July 30, 1896. Court of Claims.)

249 WASHINGTON, *May 13, 1896.*

The annexed map is an accurate tracing from H. Popple's map, contained in an atlas entitled "Atlas Nouveau," purporting to have been published at Amsterdam in 1741, now in the Library of Congress.

H. E. PAINE.

(Here follows diagram marked p. 250.)

251 EXHIBIT H. E. P., No. 25.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal No. 25.—Tracing from old American maps, Vol. 2, No. 21.

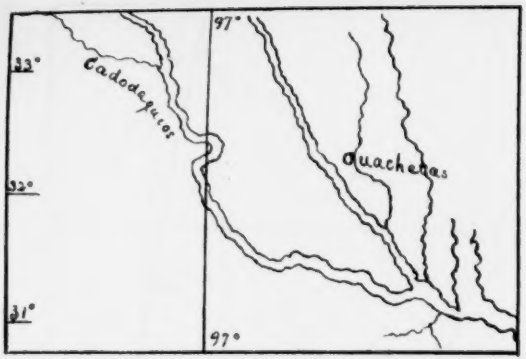
(Filed July 30, 1896. Court of Claims.)

252 WASHINGTON, *May 13, 1896.*

The annexed map is an accurate tracing from a map contained in "Old American Maps," volume 2, 1755, now in the Library of Congress.

H. E. PAINE.

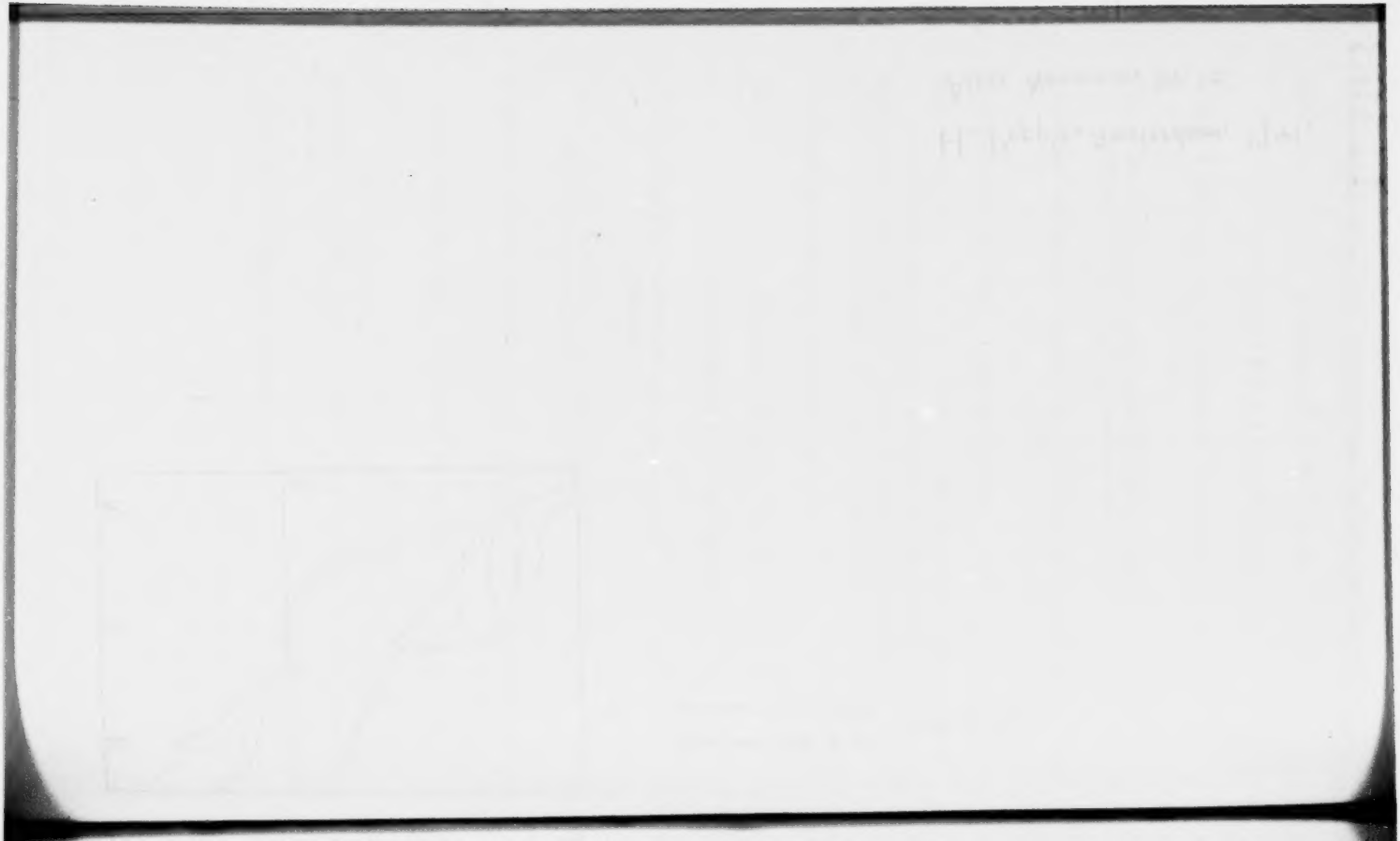
(Here follows diagram marked p. 253.)

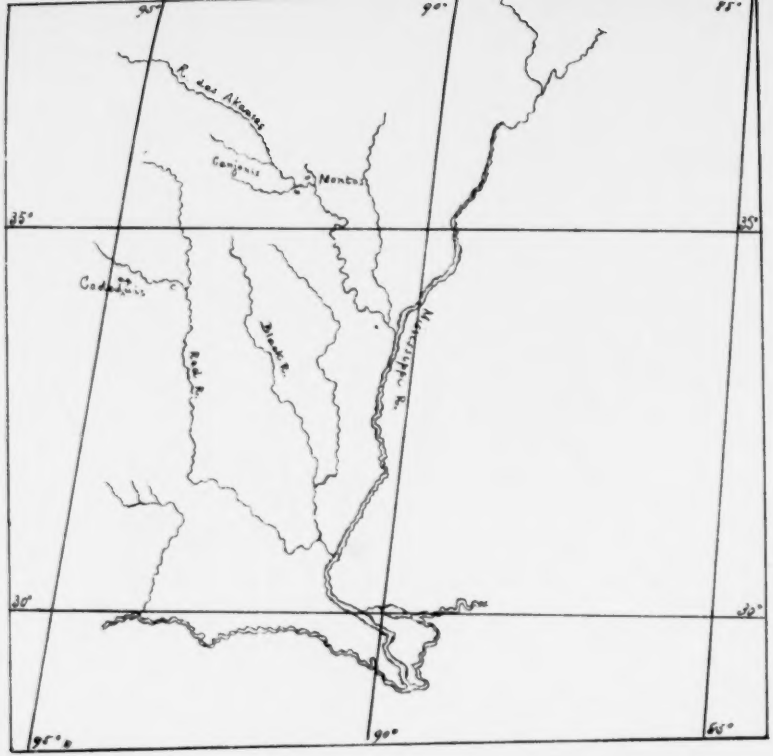


Nos. 337, 338, & 339.
October Term, 1899.
Page 250

H. Popple, Amsterdam, 1741,
Atlas Nouveau, No. 34.

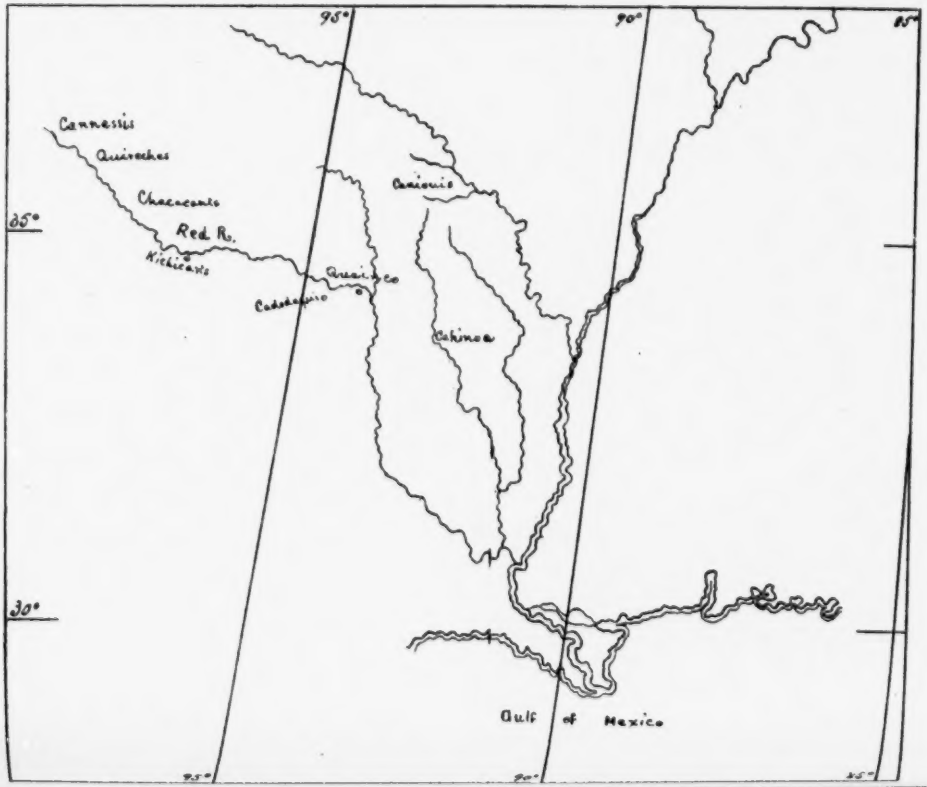
11193





Old American Maps, Vol 2, No. 21, 1795.
Library of Congress

1134



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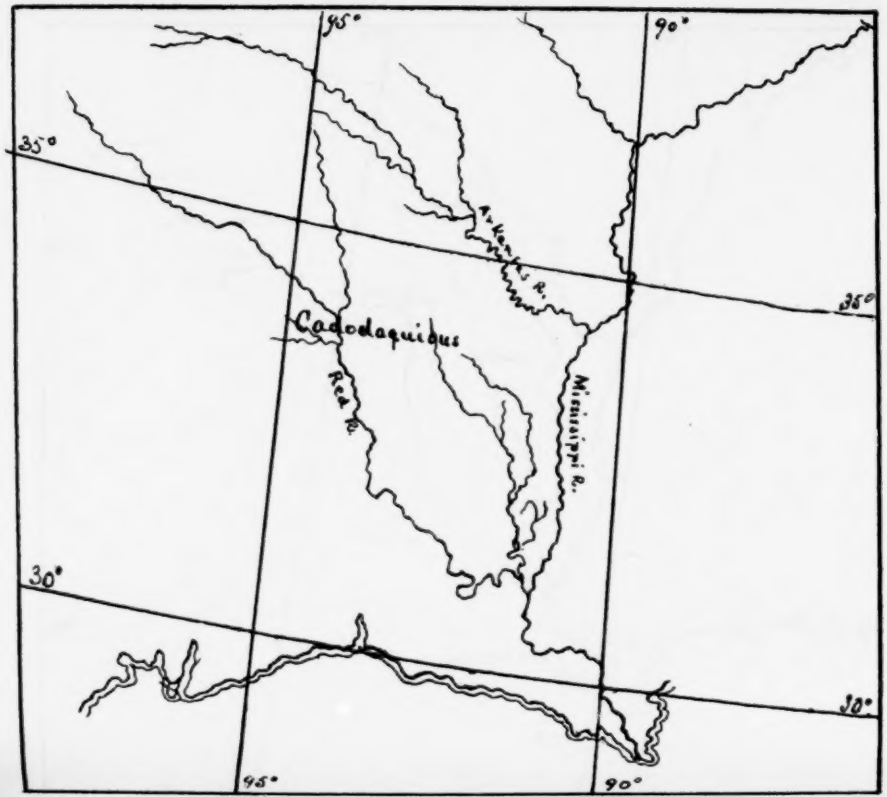
October Term, 1899.
Page 256

J. Palairet, London, 1769
Old American Maps, Vol 2,
No. 28. Library of Congress.



John Roque, London, 1761.
American Atlas, No. 2.

254 EXHIBIT H. E. P., No. 26.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal No. 26.—Tracing from J. Palairet's map, 1759.

(Filed July 30, 1896. Court of Claims.)

255 WASHINGTON, *May 14, 1896.*

The annexed map is an accurate tracing from J. Palairet's map, published in London in 1759, contained in volume 2 of Old American Maps, now in the Library of Congress.

H. E. PAINE.

(Here follows diagram marked p. 256.)

257 EXHIBIT H. E. P., No. 27.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal No. 27.—Tracing from John Roque's map, 1761.

(Filed July 30, 1896. Court of Claims.)

258 WASHINGTON, *May 14, 1896.*

The annexed map is an accurate tracing of John Roque's map, published in London in 1761, contained in "American Atlas," now in the Library of Congress.

H. E. PAINE.

(Here follows diagram marked p. 259.)

260 EXHIBIT H. E. P., No. 28.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 28.—Tracing from E. Bowe map, 1772.

(Filed July 30, 1896. Court of Claims.)

261 WASHINGTON, *May 13, 1896.*

The annexed map is an accurate tracing from E. Bowen's ma London, 1772, contained in Old American Maps, volume 2, now in t Library of Congress.

H. E. PAINE.

(Here follows diagram marked p. 262.)

263 EXHIBIT H. E. P., No. 29.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 29.—Tracing from D'Anville map, 1772.

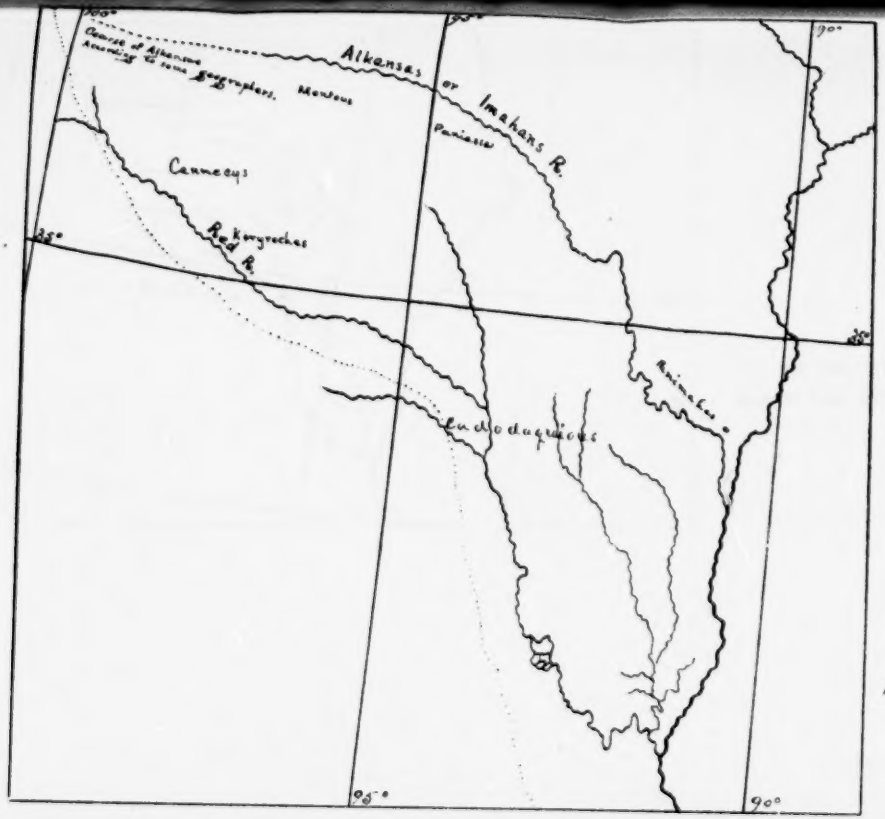
(Filed July 30, 1896. Court of Claims.)

264 WASHINGTON, *May 14, 1896.*

The annexed map is an accurate tracing of D'Anville's map published in 1772, contained in volume 2 of Old American Maps, no in the Library of Congress.

H. E. PAINE.

(Here follows diagram marked p. 265.)



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October Term, 1899.
Page 262

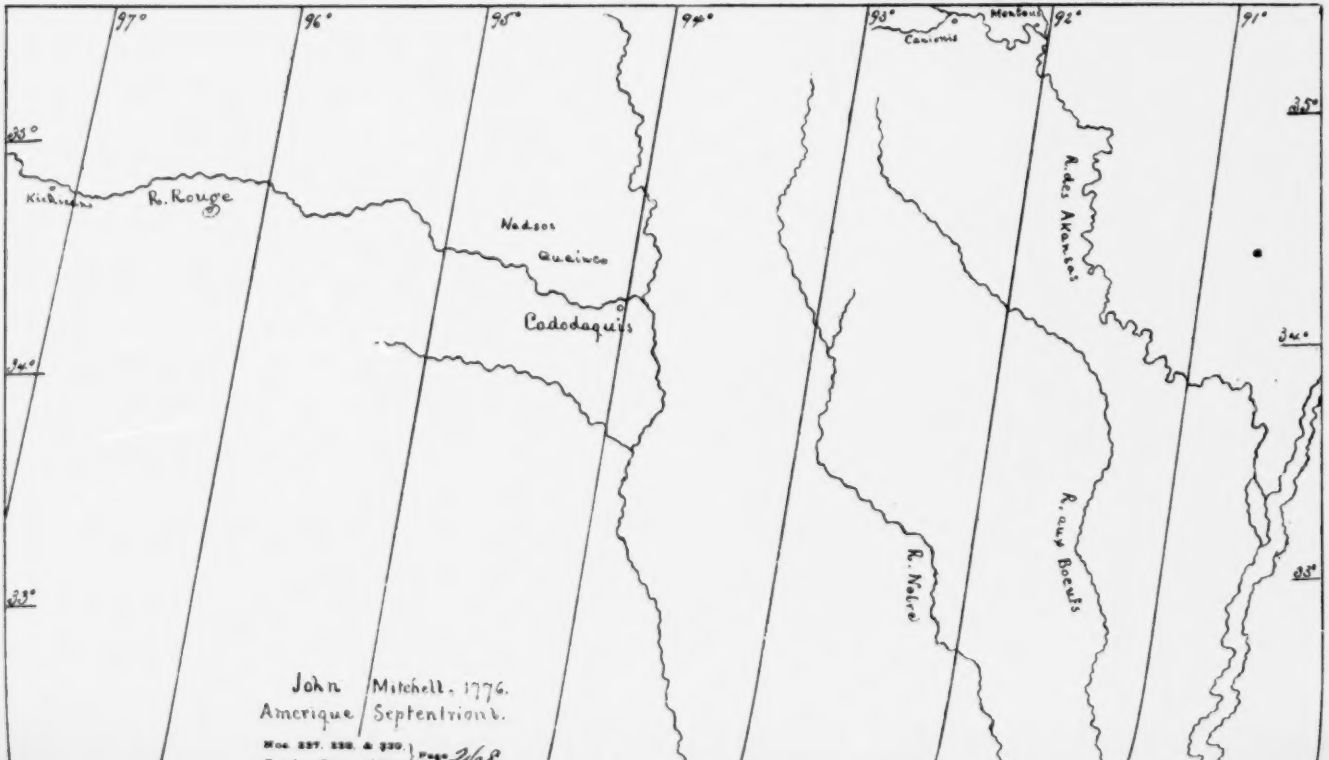
E. Bowen, London, 1772, Old American Maps, Vol. 2, No. 26, Library of Congress.

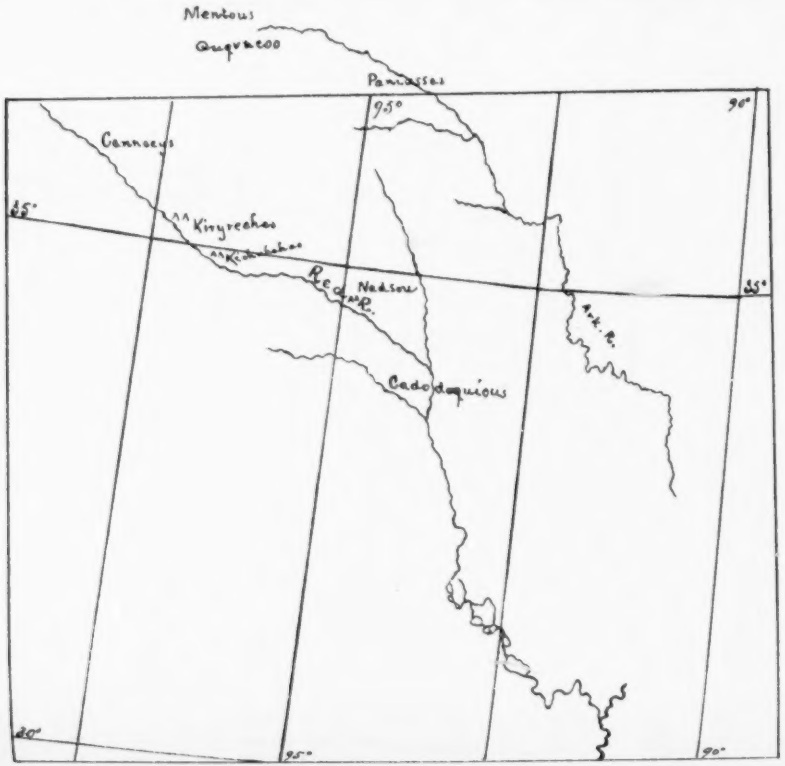
1198

Nos. 337, 338, & 339, October Term, 1899. } Page 265

D°Anville, 1772, Old American Maps, Vol. 2, No. 81. Library of Congress.

11199


97°
96°
95°
94°
93°
92°
91°
35°
34°
33°
Kichicans
R. Rouge
Nadsos
Queinco
Cadodaquis
Canionis
Montoue
R. des Akantas
R. aux Boeufs
R. Noire
John Mitchell. 1776.
Amerique Septentrionl.
Nos. 337, 338, & 339.
Page 268



Nos. 337, 338, & 339.
October Term, 1899.
Page 271

"A New & Correct Map of North America,
London, 1777.
Jeffery's American Maps, No. 5.

Exhibit H. E. P., No. 30.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants..

Claimants' evidence in rebuttal, No. 30.—Tracing from John Mitchell's map, 1776.

(Filed July 30, 1896. Court of Claims.)

WASHINGTON, D. C., *May 13, 1896.*

The annexed map is an accurate tracing from a map in John Mitchell's atlas, entitled Amerique Septrional, published in London in 1776, and now in the Library of Congress.

H. E. PAINE.

(Here follows diagram marked p. 268.)

Exhibit H. E. P., No. 31.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 31.—Tracing from Jeffery's map, 1777.

(Filed July 30, 1896. Court of Claims.)

WASHINGTON, D. C., *May 13, 1896.*

The annexed map is an accurate tracing from a map entitled "A new and correct map of North America," in Jeffery's American Maps, published in London in 1777, and now in the Library of Congress.

H. E. PAINE.

(Here follows diagram marked p. 271.)

272 EXHIBIT H. E. P., No. 32.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 32.—Tracing from G. L. Le Rouge's map, 1778.

(Filed July 30, 1896. Court of Claims.)

273 WASHINGTON, *May 14, 1896.*

The annexed map is an accurate tracing from a map in G. L. Le Rouge's "Atlas, Ameriquain Septentrional," published in Paris in 1778, and now in the Library of Congress.

H. E. PAINE.

(Here follows diagram marked p. 274.)

275 EXHIBIT H. E. P., No. 33.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 33.—Tracing from T. Pownall's map, 1794.

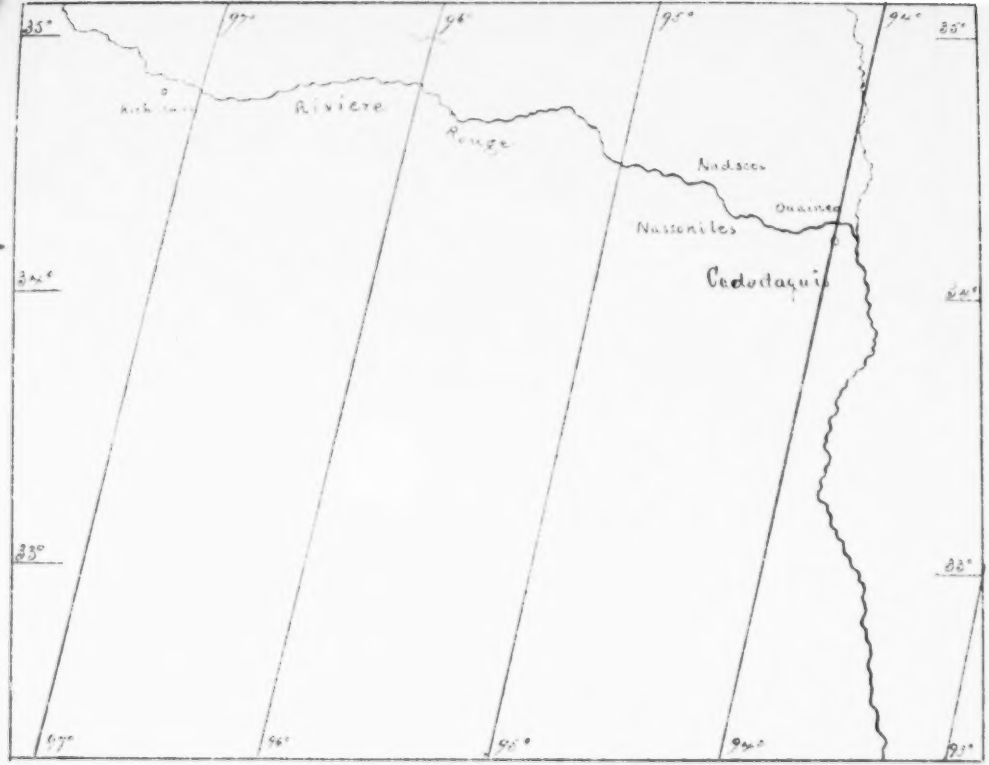
(Filed July 30, 1896. Court of Claims.)

276 WASHINGTON, *May 14, 1896.*

The annexed map is an accurate tracing from T. Pownall's map published in London in 1794, contained in volume 2 of Old American Maps, in the Library of Congress.

H. E. PAINE.

(Here follows diagram marked p. 277.)



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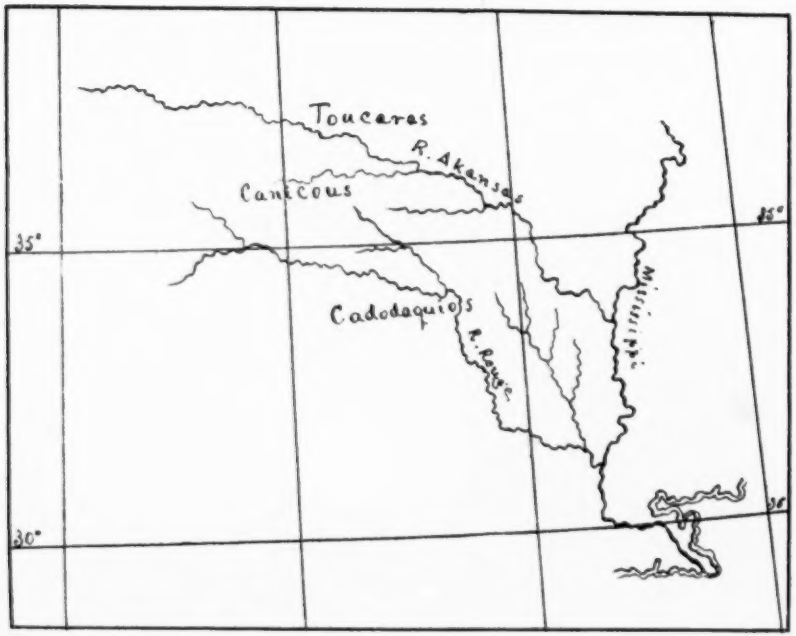
Atlas Ameriquain Septentrional,
G. L. LeRouge. No. 3, Paris, 1778

11203

T. Pownall, London, 1794, Old American Maps, Vol. 2, No 36, Library of Congress.

1204



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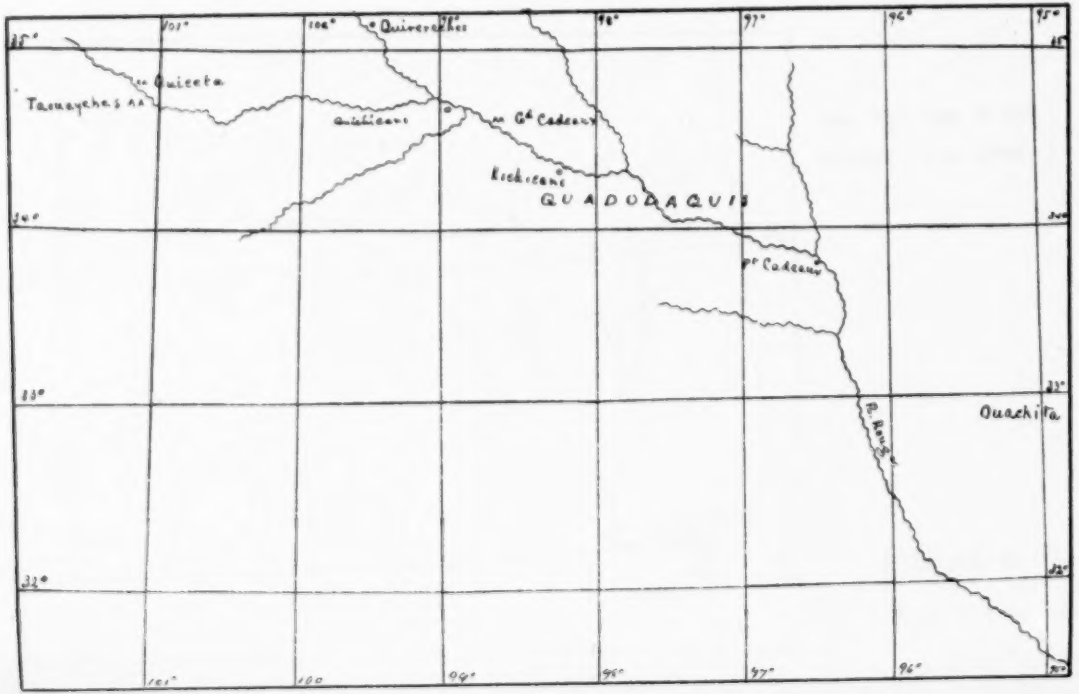
October Term, 1899.
Page 280

Prefixed to Baudry des Lozieres
"Voyage to Louisiana", 1794, 1798.
Published 1802.

11206



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October Term, 1899. } Page 283

Attached to Vol. 2, Robin's Travels in Louisiana.

EXHIBIT H. E. P., No. 34.

United States Court of Claims.

CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
UNITED STATES AND THE WICHITA d affiliated bands of Indians, defendants.

nants' evidence in rebuttal, No. 34.—Tracing from Des Lozieres' map, 1802.

iled Jul. 30, 1896. Court of Claims.)

WASHINGTON, *May 13, 1896.*

The annexed map is an accurate tracing from a map prefixed to ry des Lozieres' "Voyage to Louisiana," 1794, 1798, published in , now in the Library of Congress.

H. E. PAINE.

lere follows diagram marked p. 280.)

EXHIBIT H. E. P., No. 35.

United States Court of Claims.

CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
UNITED STATES AND THE WICHITA d affiliated bands of Indians, defendants.

nants' evidence in rebuttal, No. 35.—Tracing from Robin's map, 1806.

iled Jul. 30, 1896. Court of Claims.)

WASHINGTON, *May 13, 1896.*

The annexed map is an accurate tracing from a map attached to econd volume of Robin's Travels in Louisiana, now in the Library ongress.

H. E. PAINE.

lere follows diagram marked p. 283.)

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284 EXHIBIT H. E. P., No. 36.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA and affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 36.—Tracing from Arrowsmith and Lewis' map, 1812.

(Filed Jul. 30, 1896. Court of Claims.)

285 WASHINGTON, *May 13, 1896.*

The annexed map is an accurate tracing from a map of Arrowsmith and Lewis, published in Boston in 1812, now in the Library of Congress.

H. E. PAINE.

(Here follows diagram marked p. 286.)

287 EXHIBIT H. E. P., No. 37.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA and affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 37.—Tracing from Pinkerton's map, 1818.

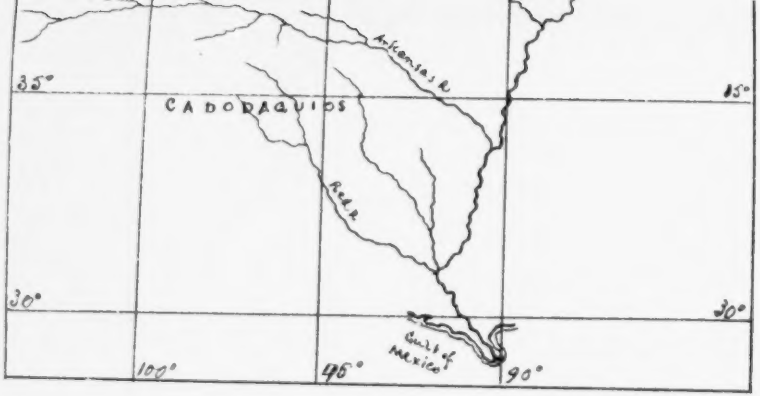
(Filed Jul. 30, 1896. Court of Claims.)

288 WASHINGTON, *May 13, 1896.*

The annexed map is an accurate tracing from the map of John Pinkerton, published in London in 1815, in Philadelphia in 1818, and now in the Library of Congress.

H. E. PAINE.

(Here follows diagram marked p. 289.)

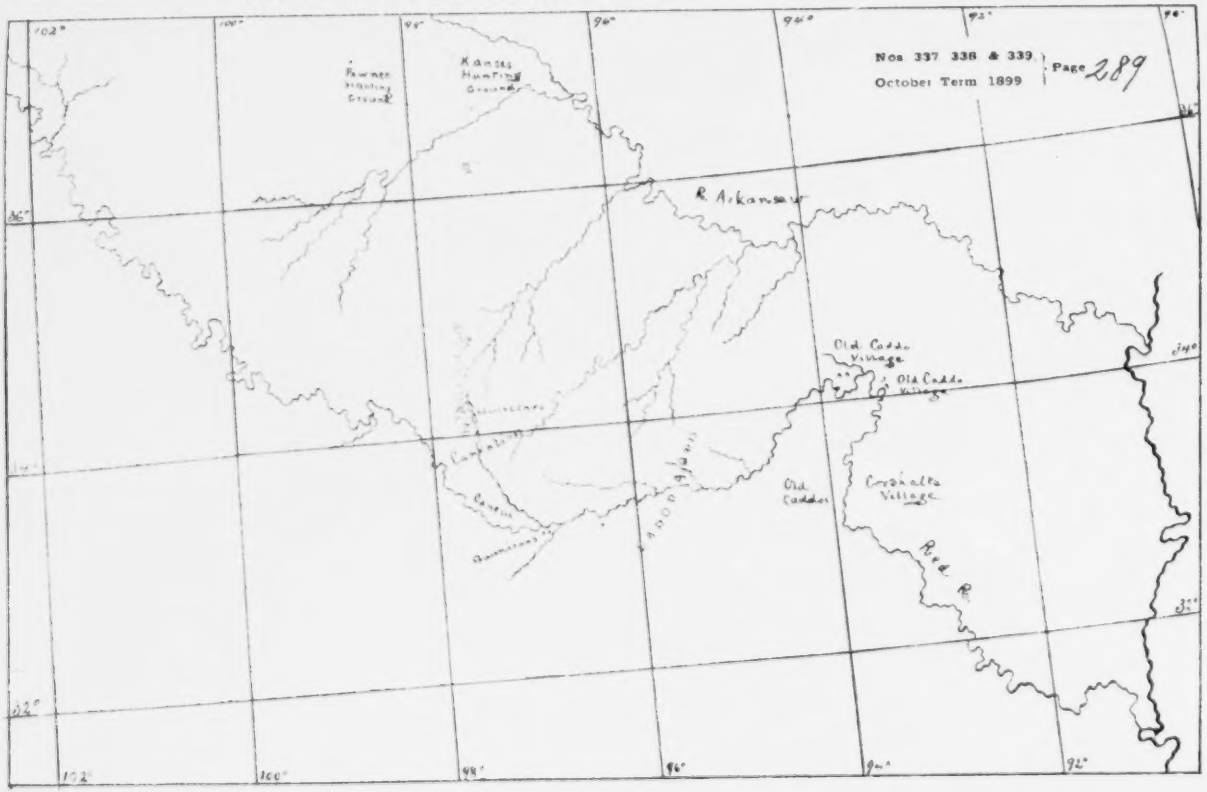


Nos. 337, 338, & 339,
October Term, 1899. } Page 286

Arrowsmith and Lewis, Boston, 1812. No. 52.

11208

John Pinkerton, Modern London, 1810, Philadelphia, 1818



11209

Nos. 337, 338, & 339
October Term, 1899

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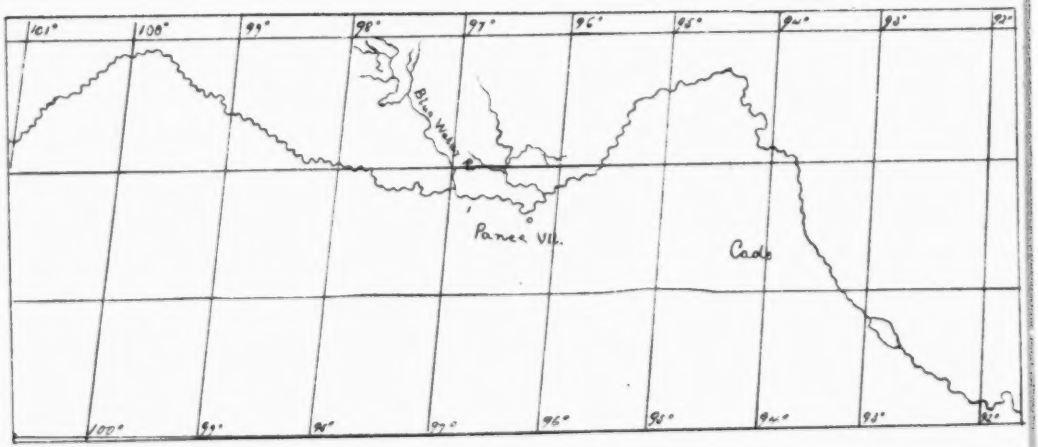
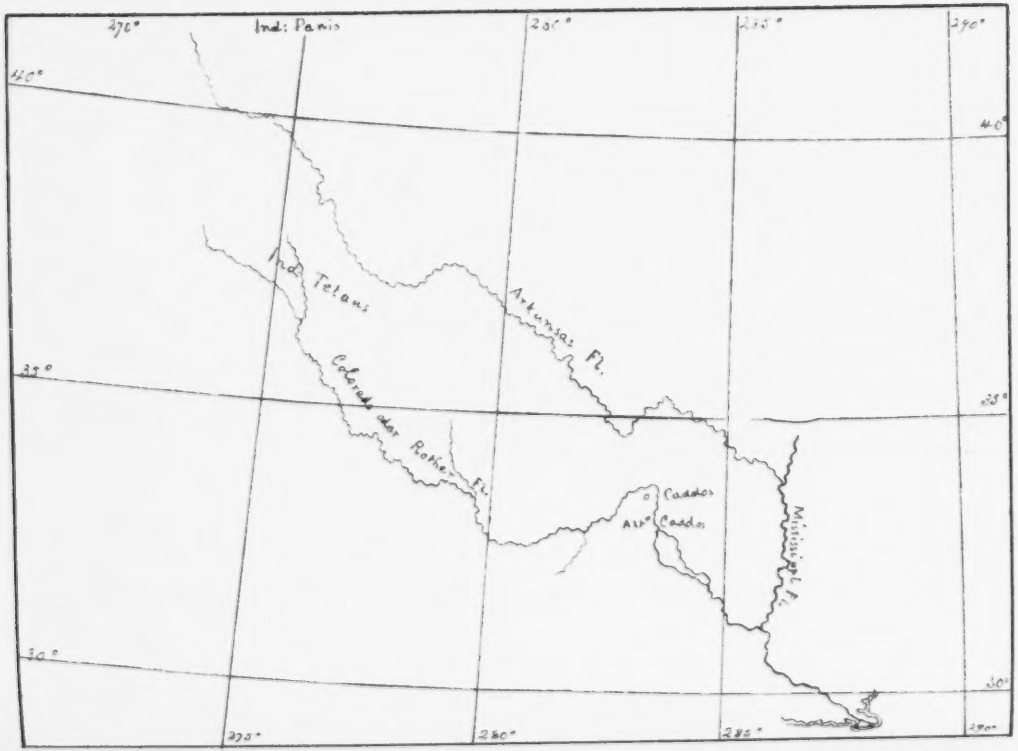


John Melish, 1818,
U.S. v. Texas, Vol. 2, page 1392.

1121



Nos. 337, 338 & 339
October Term, 1899 } Page 295

J. Dirwald,
Vienna, 1822.

290 EXHIBIT H. E. P., No. 38.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA and affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 38.—Tracing from Melish's map, 1818.

(Filed Jul. 30, 1896. Court of Claims.)

291 The map hereto attached is an accurate tracing from Melish's map, 1818, contained in the record of the case of The United States v. Texas, No. 4 original, at page , volume . Said volume and map are now in the Library of Congress, and are accessible, for inspection and production in court on the trial, to all the attorneys and counsel in this cause. The annexed tracings include everything shown on said map pertinent to this case.

H. E. PAINE.

(Here follows diagram marked p. 292.)

293 EXHIBIT H. E. P., No. 39.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA and affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 39.—Tracing from Dirwald's map, 1823.

(Filed Jul. 30, 1896. Court of Claims.)

294 WASHINGTON, *May 13, 1896.*

The annexed map is an accurate tracing from S. Dirwald's map, purporting to have been published in Vienna in 1823, now in the Library of Congress.

H. E. PAINE.

(Here follows diagram marked p. 295.)

296 EXHIBIT H. E. P., No. 41.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 41.—Tracing from Austin's map, 1830.

(Filed Jul. 30, 1896. Court of Claims.)

297 WASHINGTON, *May 13, 1896.*

The annexed map is an accurate tracing of Stephen F. Austin's map, published at Philadelphia, in 1830, by H. S. Tanner, and now in the Library of Congress.

H. E. PAINE.

(Here follows diagram marked p. 298.)

299 EXHIBIT H. E. P., No. 42.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 42.—Tracing from Outline Indian Localities, 1833.

(Filed Jul. 30, 1896. Court of Claims.)

300 WASHINGTON, *May 13, 1896.*

The annexed map is an accurate tracing of an Outline of Indian Localities in 1833, contained in the record of the case of The United States v. The State of Texas, volume 1, page 170, now in the Library of Congress.

H. E. PAINE.

(Here follows diagram marked p. 301.)

S. F. Austin, Published by H. S. Tanner, Philadelphia, 1830.

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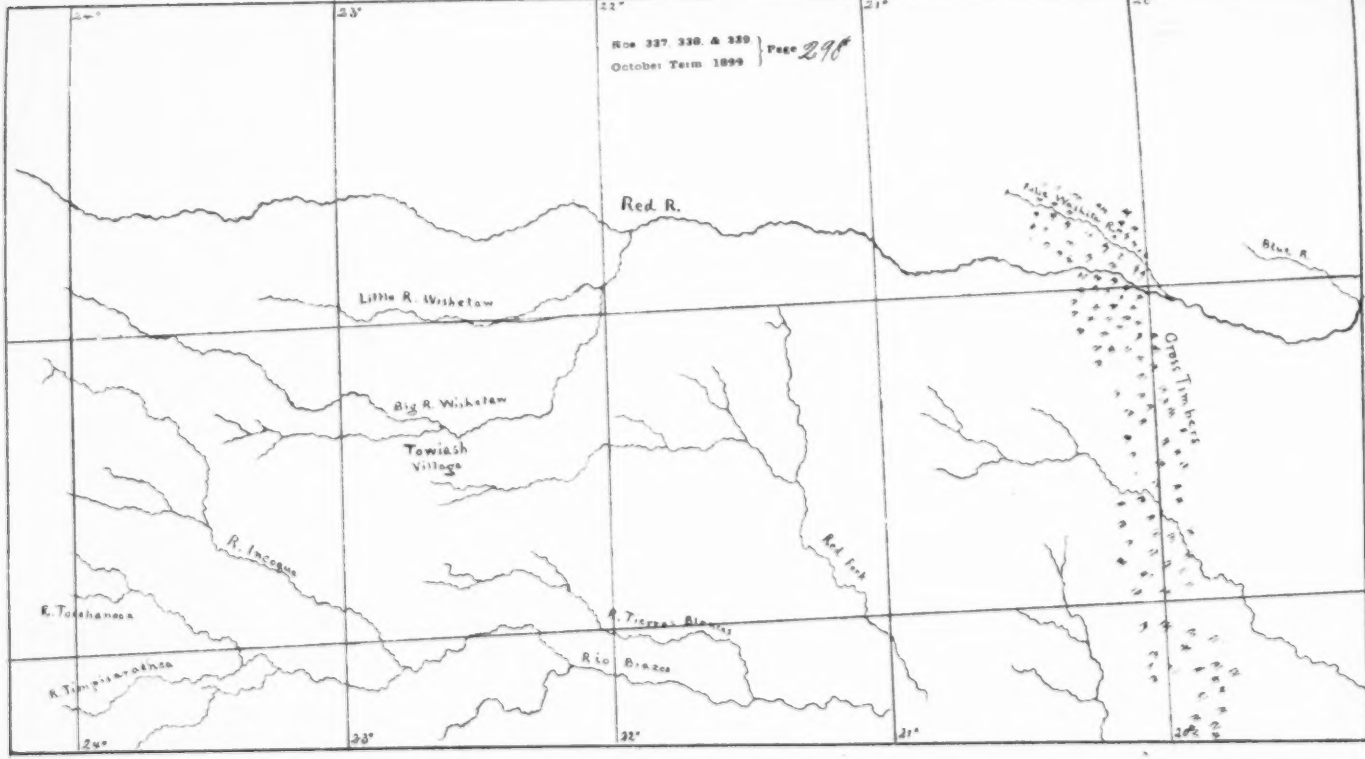
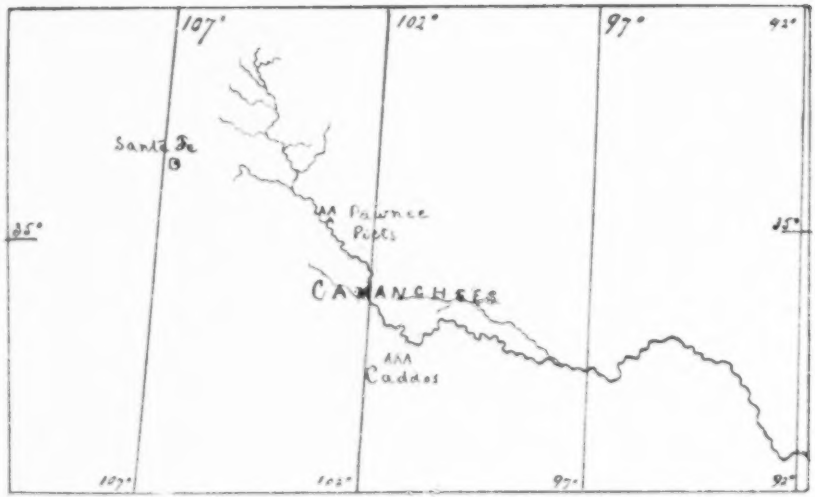


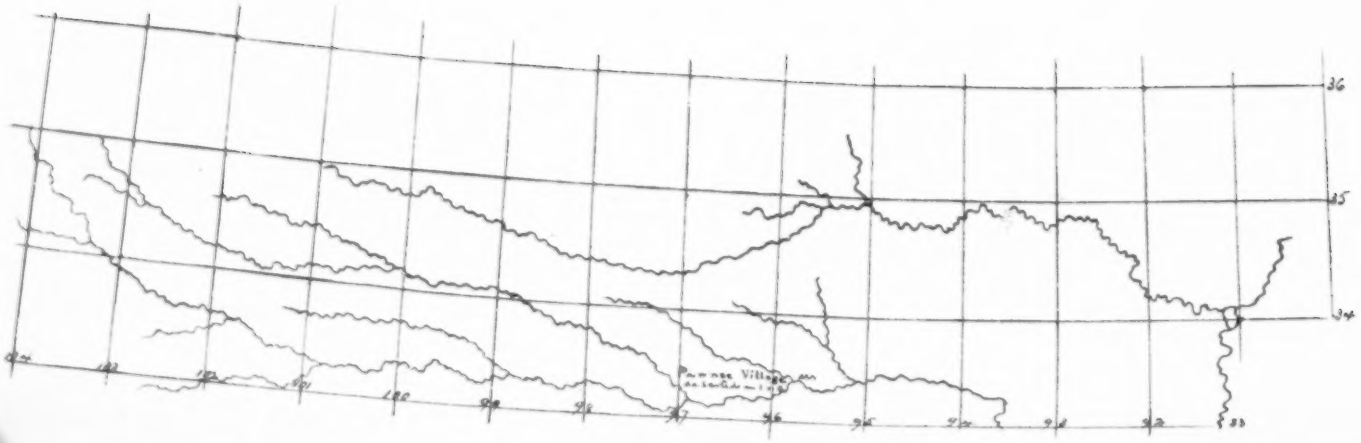


Nos 337, 338, & 339,
October Term, 1899. } Page 301

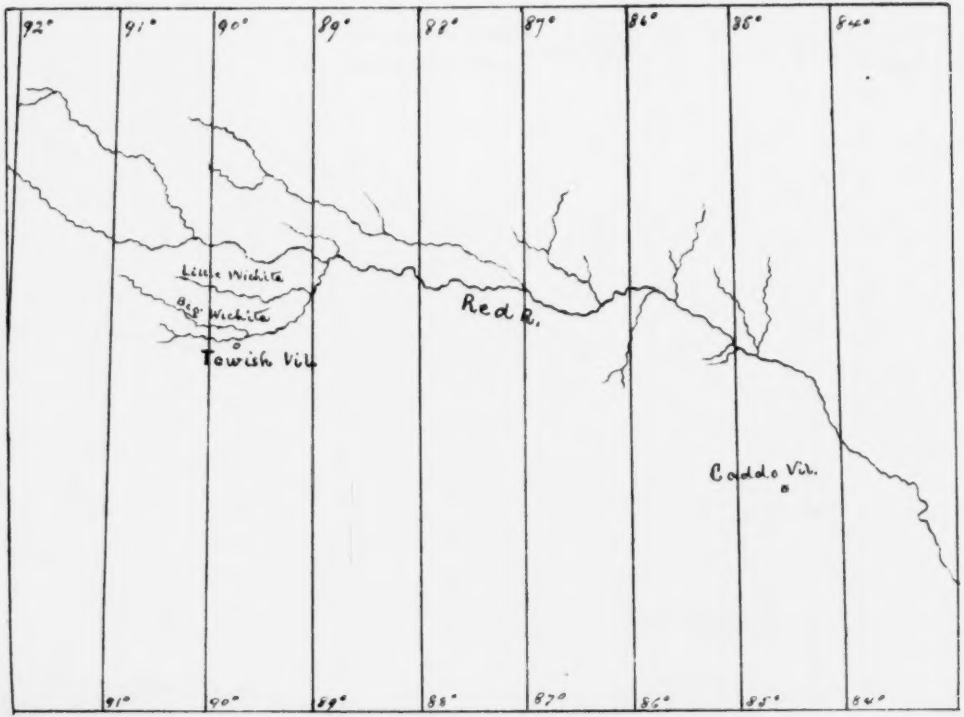
Outline, Indian Localities, 1833,
U.S. v. Texas Vol. 1, page 170.

1214

Maj. S. H. Long, 1834
U.S. v. Texas, Vol. 3, page 30



11216



E. F. Lee, 1886,
U.S. v. Texas, Vol. I, p. 184.

302 EXHIBIT H. E. P., No. 43.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 43.—Tracing from Maj. S. H. Long's map, 1834.

(Filed Jul. 30, 1896. Court of Claims.)

303 WASHINGTON, D. C., *May 13, 1896.*

The annexed map is an accurate tracing from Maj. S. H. Long's map of 1834, contained in the record of the case of The United States *v.* The State of Texas, now in the Library of Congress.

H. E. PAINE.

(Here follows diagram marked p. 304.)

305 EXHIBIT H. E. P., No. 44.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 44.—Tracing from E. F. Lee's map, 1836.

(Filed Jul. 30, 1896. Court of Claims.)

306 WASHINGTON, *May 13, 1896.*

The annexed map is an accurate tracing from E. F. Lee's map, published in 1836, and contained in the record of the case of The United States *v.* Texas, volume 1, page 184.

H. E. PAINE.

(Here follows diagram marked p. 307.)

308 EXHIBIT H. E. P., No. 45.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 45.—Tracing from Young's map of Texas, 1836.

(Filed Jul. 30, 1896. Court of Claims.)

309 The annexed map is an accurate tracing from Young's map of Texas, 1836, contained in the record of the case of The United States v. Texas, No. 4 Original, at page 294, volume 1. Said volume and map are now in the Library of Congress, and are accessible, for inspection and production in court, to all the attorneys and counsel in this cause. The annexed tracing includes everything shown on said map pertinent to this case.

H. E. PAINE.

(Here follows diagram marked p. 310.)

311 EXHIBIT H. E. P., No. 46.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

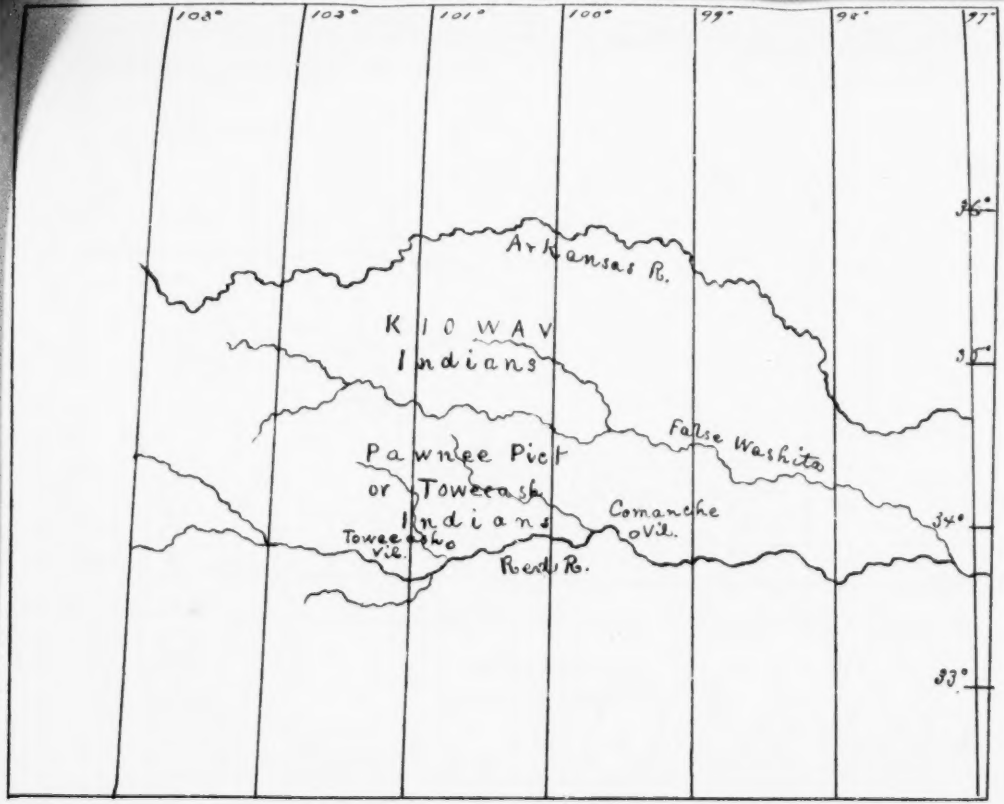
Claimants' evidence in rebuttal, No. 46.—Tracing from Austin's Texas land office map, 1837.

(Filed Jul. 30, 1896. Court of Claims.)

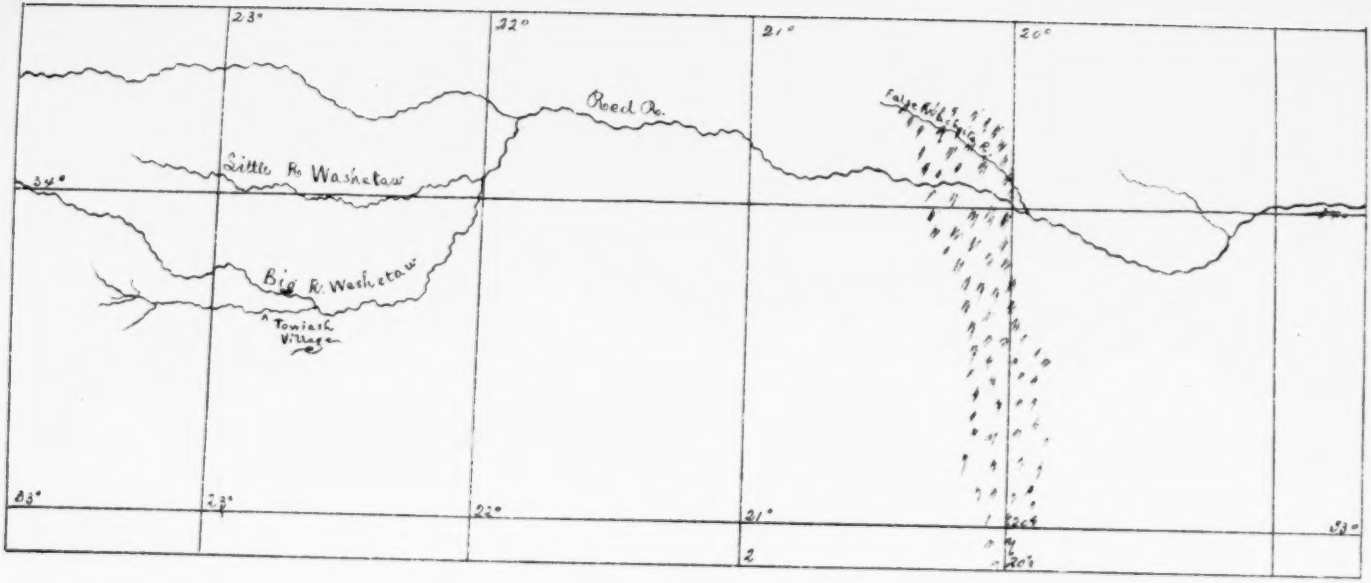
312 The annexed map is an accurate tracing from Austin's Texas land office map, 1837, contained in the record of The United States v. Texas, No. 4 Original, at page 292 of volume 1. Said volume and map are now in the Library of Congress, and are accessible, for inspection and production in court, to all the attorneys and counsel in this cause. The annexed tracing includes everything shown by said map pertinent to this case.

H. E. PAINE.

(Here follows diagram marked p. 313.)



Young, 1836, U.S. v. Texas
page 294.



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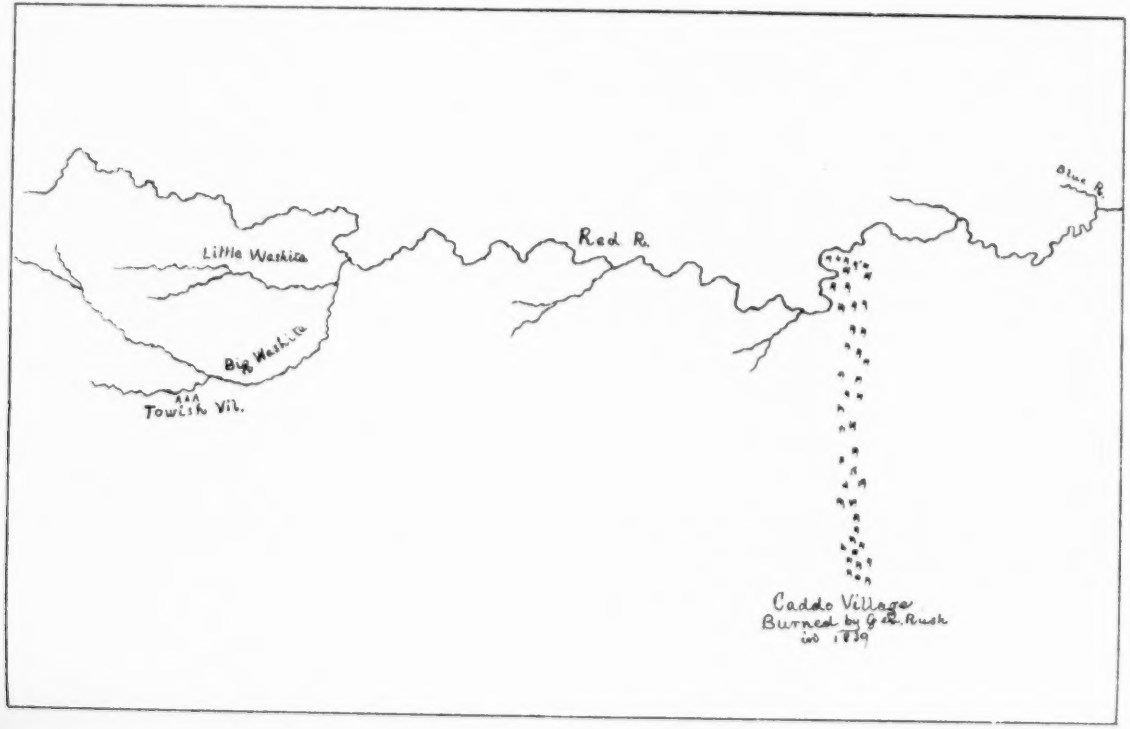
S. F. Austin. Published by H. S. Tanner, 1837, U. S. v. Texas, Vol. I, p. 292.



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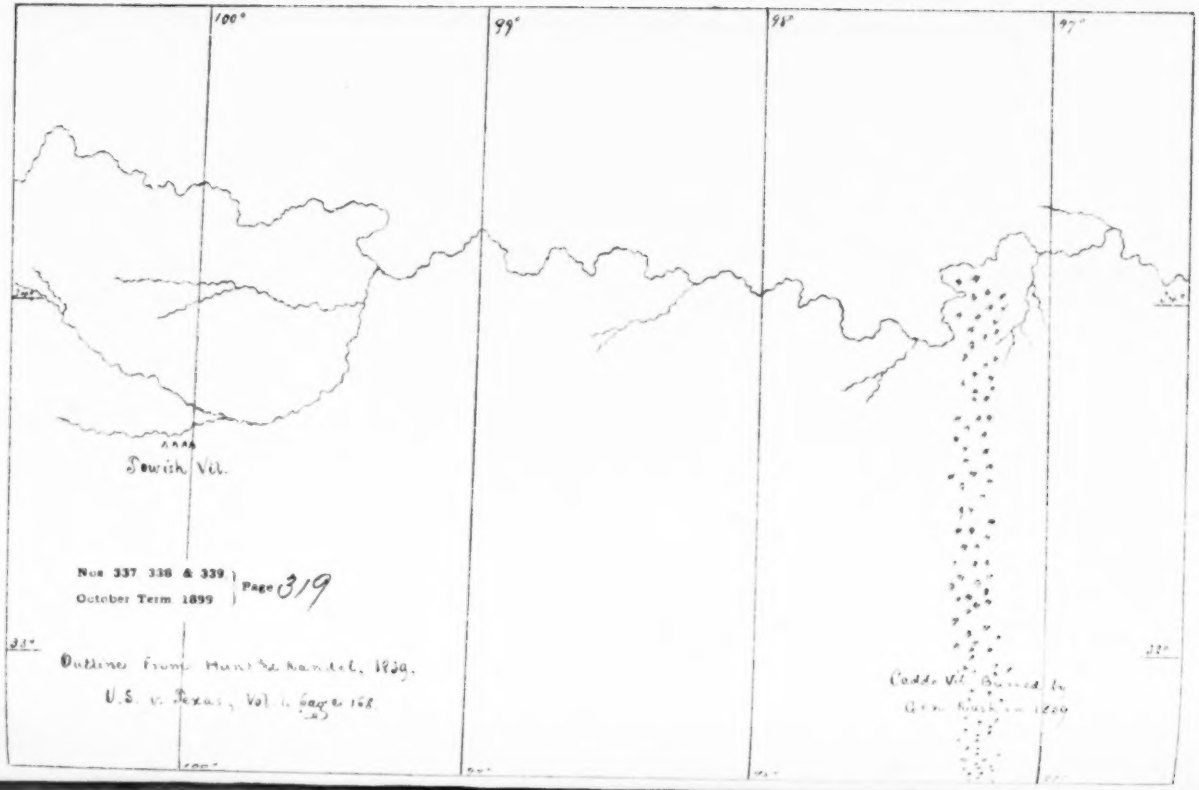
October Term, 1899. } Page 316

Hunt & al v. Randel, 1839,
U. S. v. Texas, page 1016.

11221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Nos 337 338 & 339
October Term 1899
Page 319
Outline from Hunt & Randel, 1839.
U.S. v. Texas, Vol. 1, page 168
Cadde Vil. Burned by
Gen. Rusk in 1839

314 EXHIBIT H. E. P., No. 47.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 47.—Tracing from Hunt and Randel's map, 1839.

(Filed Jul. 30, 1896. Court of Claims.)

315 The annexed map is an accurate tracing from Hunt and Randel's map, 1839, contained in the record of the case of the United States v. Texas, No. 4 original, at page 1016, volume 2. Said volume and map are now in the Library of Congress, and are accessible, for inspection and production in court, to all the attorneys and counsel in this cause. The annexed tracing includes everything shown on said map pertinent to this case.

H. E. PAINE.

(Here follows diagram marked p. 316.)

317 EXHIBIT H. E. P., No. 48.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 48.—Tracing from outline, Hunt and Randel, 1839.

(Filed Jul. 30, 1896. Court of Claims.)

318 WASHINGTON, *May 13, 1896.*

The annexed map is a tracing from an outline from Hunt and Randel's map, purporting to have been published in 1839, contained in the record of the case of the United States v. Texas, volume 1, page 168.

H. E. PAINE.

(Here follows diagram marked p. 319.)

320 EXHIBIT H. E. P., No. 49.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 49.—Tracing from Kennedy's ma No. 1, 1841.

(Filed Jul. 30, 1896. Court of Claims.)

321 WASHINGTON, *May 13, 1896.*

The annexed map is an accurate tracing from a map prefix to "Kennedy's Texas," purporting to have been published in 1841, n in the Library of Congress.

H. E. PAINE.

(Here follows diagram marked p. 322.)

323 EXHIBIT H. E. P., No. 50.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 50.—Tracing from Kennedy's ma No. 2, 1841.

(Filed Jul. 30, 1896. Court of Claims.)

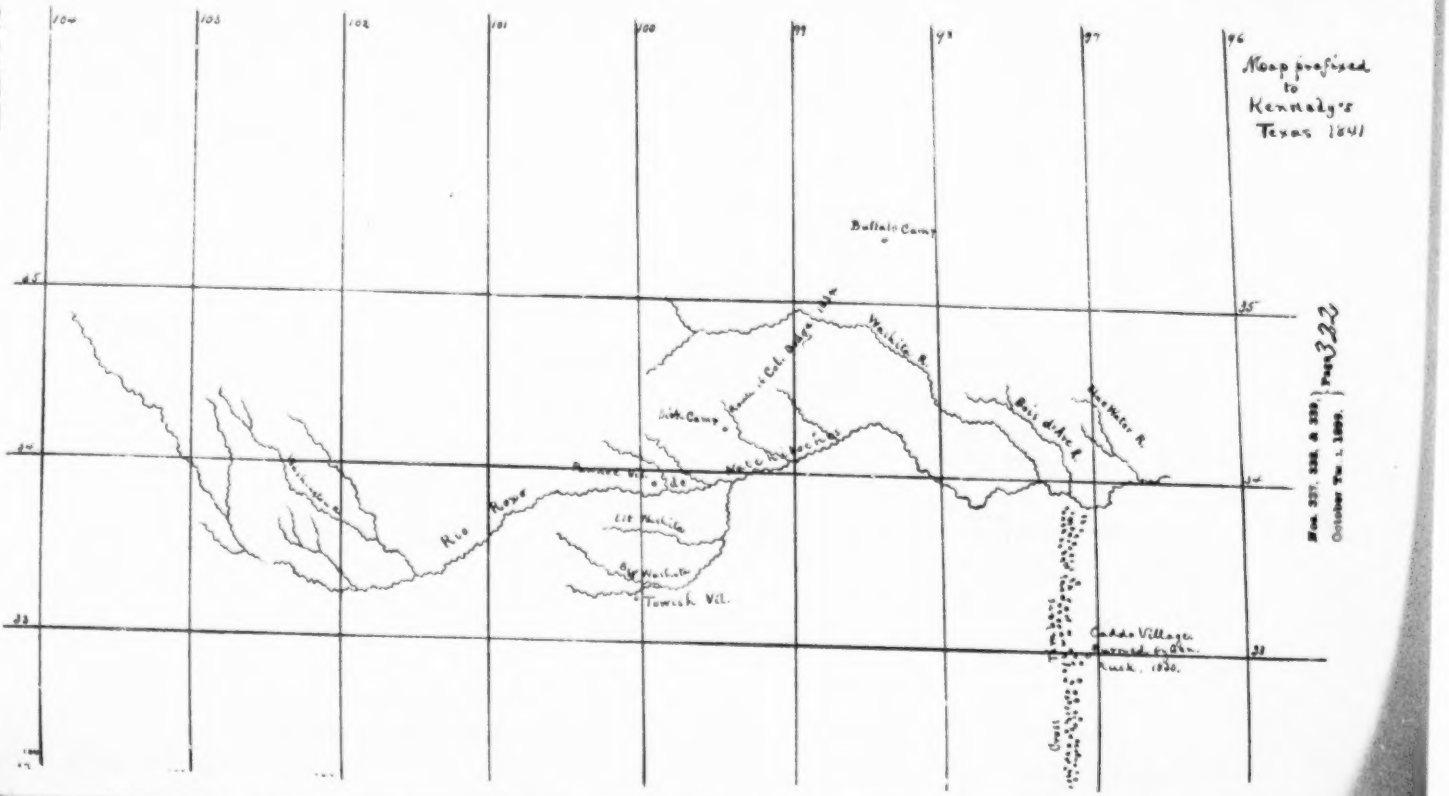
323½ WASHINGTON, *May 13, 1896.*

The annexed map is an accurate tracing from a map appearin at page 337 of volume 1 of Kennedy's Texas, purporting to have bee published in 1841, now in the Library of Congress.

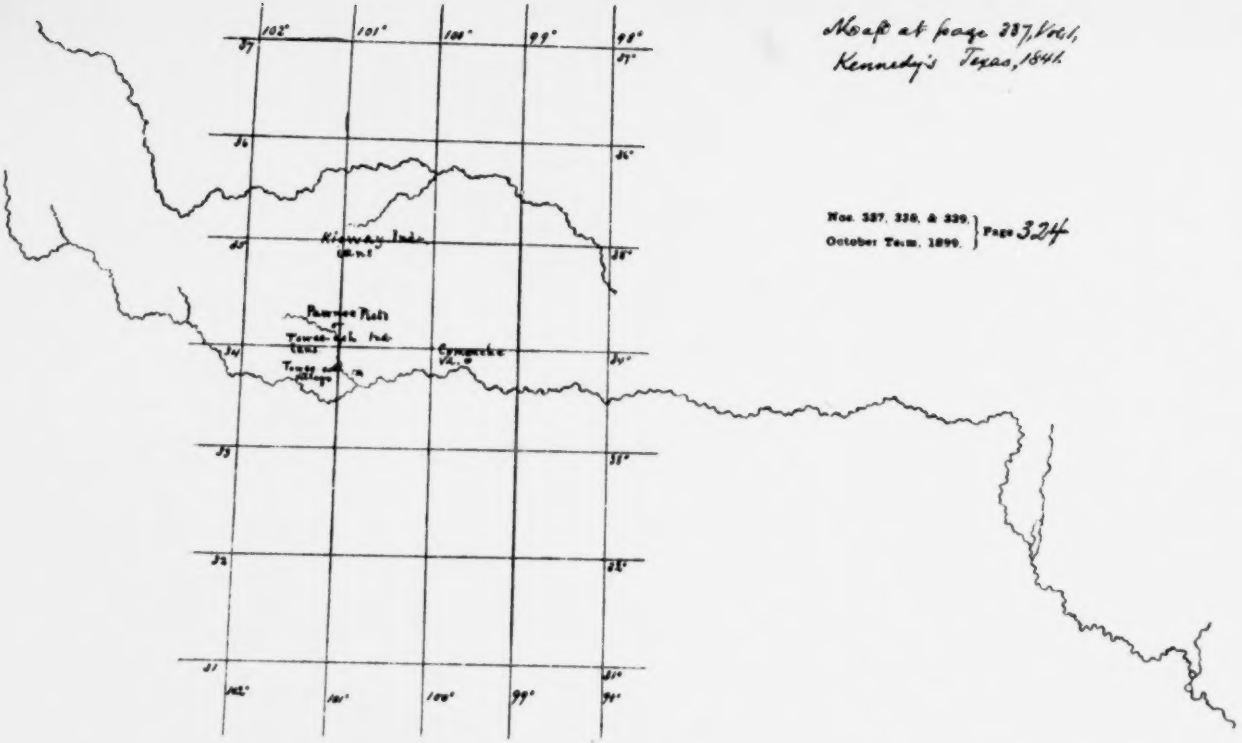
H. E. PAINE.

(Here follows diagram marked p. 324.)

11223



Nos. 337, 338, & 339, October Tm. 1, 1899. Page 322



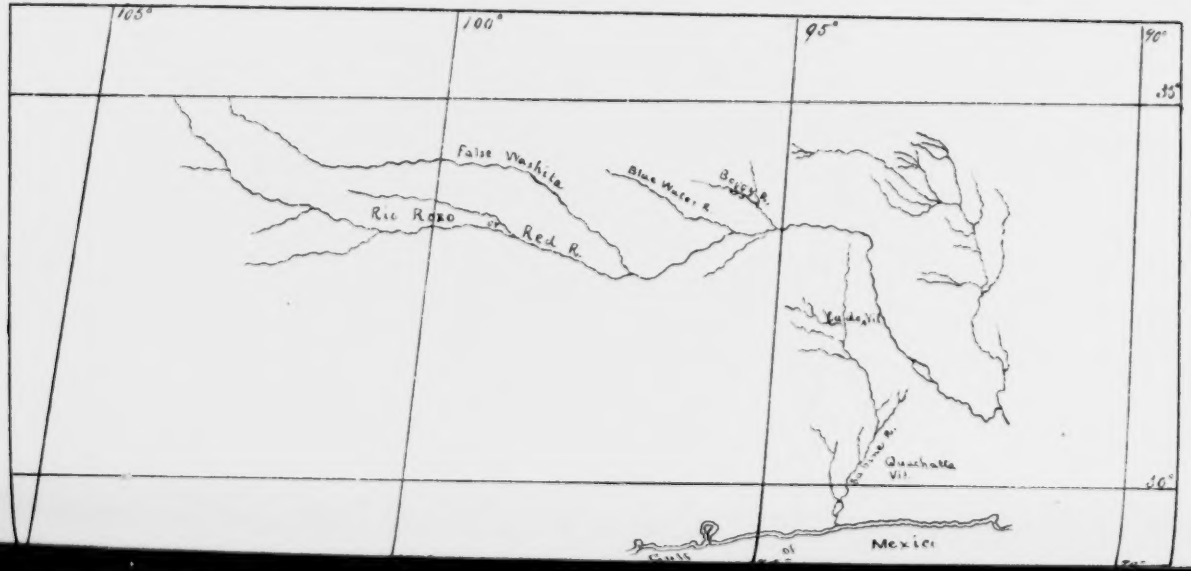
Map at page 337, Vol. 1, Kennedy's Texas, 1841.

Nos. 337, 338, & 339. October Term, 1899. } Page 324

11224

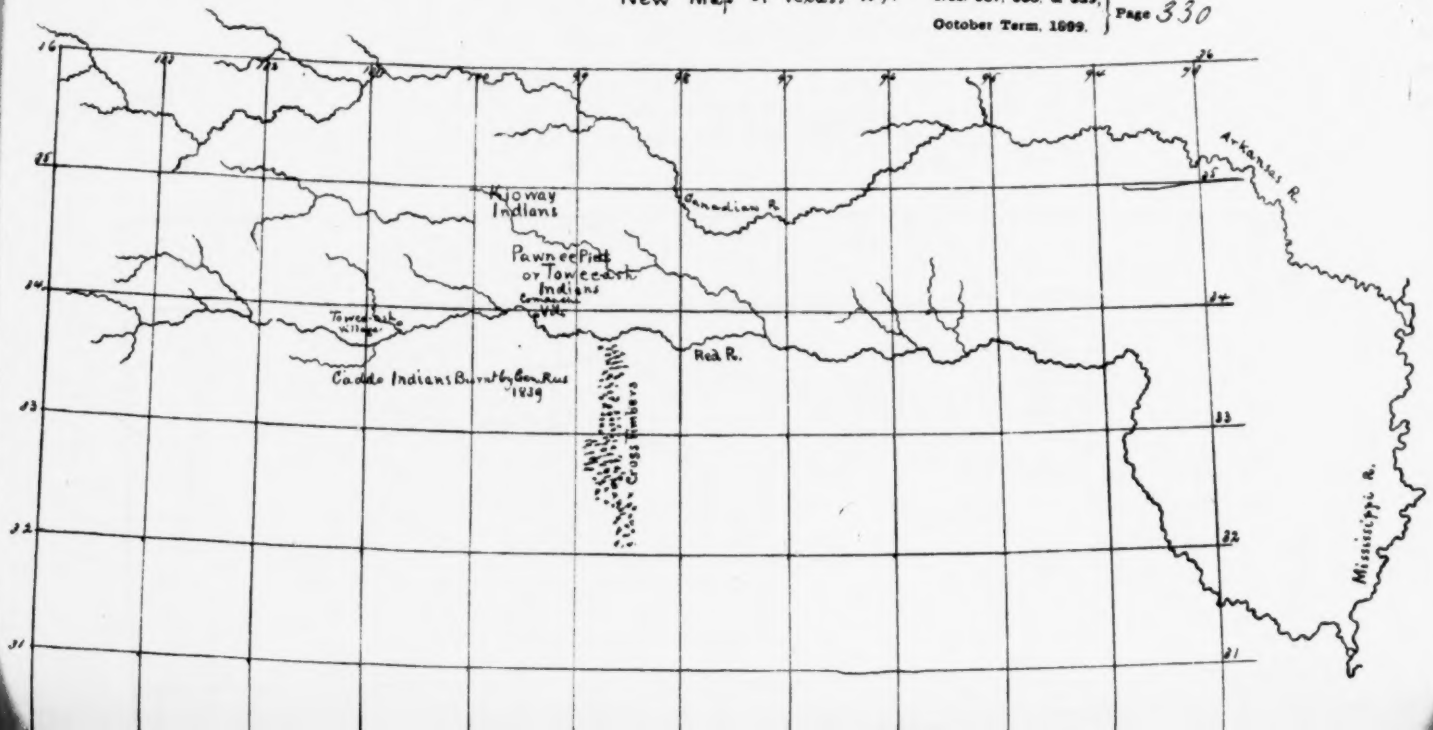
Melish Map of 1823. Opinion in
United States v. Mexico

Nos 337 338 & 339
October Term. 1899. } Page 327



New Map of Texas. 1841

Nos. 337, 338, & 339, October Term, 1899. } Page 330



325 EXHIBIT H. E. P., No. 51.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 51.—Tracing from Melish's map, 1823.

(Filed Jul. 30, 1896. Court of Claims.)

326 The annexed map is an accurate tracing from a map of John Melish, published in 1823, taken from the opinion of the Supreme Court in the case of The United States vs. The State of Texas, decided March 16, 1896. It includes everything shown on said map pertinent to this case. The volume containing this case, when published, will be accessible, for inspection and production in court, to all the attorneys and counsel.

H. E. PAINE.

(Here follows diagram marked p. 327.)

328 EXHIBIT H. E. P., No. 52.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 52.—Tracing from new map of Texas, 1841.

(Filed Jul. 30, 1896. Court of Claims.)

329 The annexed map is an accurate tracing from a map entitled "A New Map of Texas, 1841," attached to volume 3 of the record of the case of The United States v. Texas, No. 4 original, which record and volume are now in the Library of Congress, accessible, for inspection and production in court, to all the attorneys and counsel in this cause. Said tracing includes everything shown in said map pertinent to this cause.

H. E. PAINE.

(Here follows diagram marked p. 330.)

331 EXHIBIT H. E. P., No. 53.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 53.—Tracing from Le Rouge's map, 1778.

(Filed Jul' 30, 1896. Court of Claims.)

332 The annexed map is an accurate tracing from map No. 3, in C. L. Le Rouge's "Atlas Ameriquain Septentrional," published at Paris, France, in 1778, and now in the Library of Congress, accessible for inspection and production in court to all the attorneys and counsel in this cause. Said tracing contains everything shown on said map pertinent to this case.

H. E. PAINE.

(Here follows diagram marked p. 333.)

334 EXHIBIT H. E. P., No. 54.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.
No. 18932.

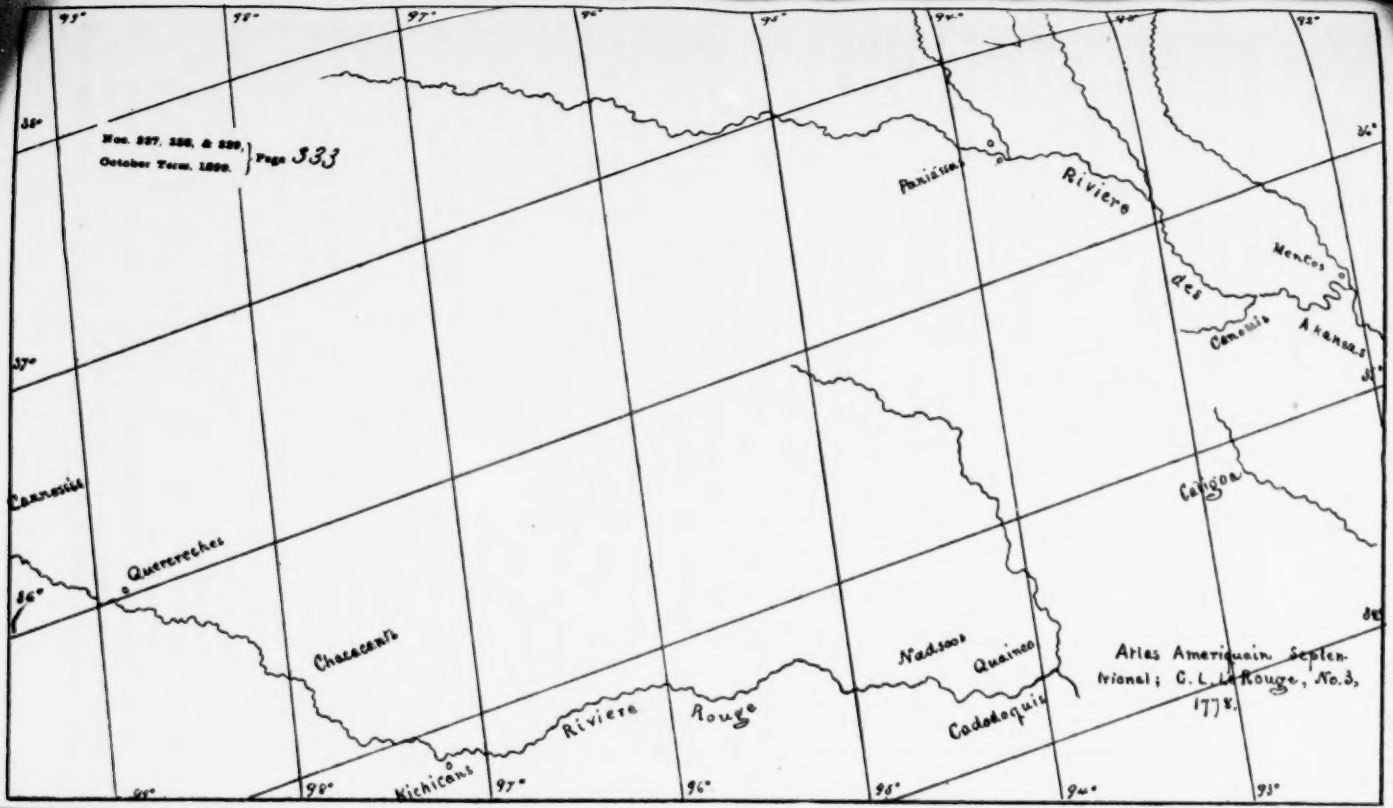
Claimants' evidence in rebuttal, No. 54.—Extract from dictionary of Indian tribes.

(Filed Jul' 30, 1896. Court of Claims.)

335 WASHINGTON, *May 14, 1896.*

The annexed document is an accurate extract from the dictionary of Indian tribes in the Bureau of Ethnology.

H. E. PAINE.


Page 333
Riviere
des
Canonis
Mentos
Akansas
Cangoa
Cannossis
Quereroches
Chacacants
Kichicans
Riviere
Rouge
Nadsoos
Quaineo
Cadodoquis
Atlas Americain Septentrional; C. L. LaRouge, No. 3, 1778.

336 [*Dictionary of Indian tribes, Bureau of American Ethnology.*]

CADDOAN.

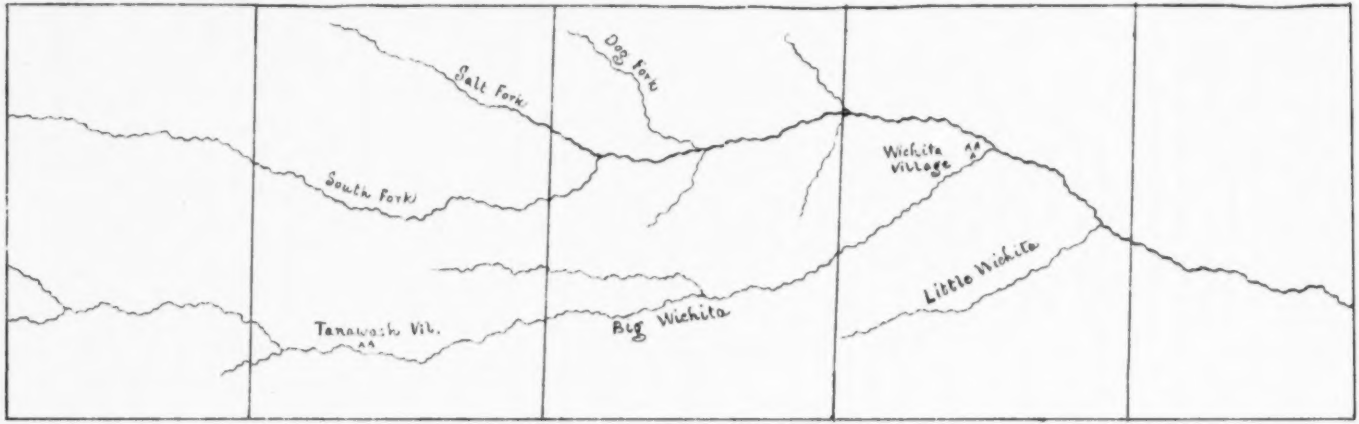
Wichita: One of the tribes of the Caddoan stock. The Wichita, Waco, and Towakarehu speak a language closely related to that spoken by the Pawnee tribes. Gregg said that the Wichita, Waco, and their kindred tribes, on Red R., were chiefly remarkable for their profuse tattooing, whereby they sometimes acquired the title of Pawnee Picts. Catlin and Hildreth identified the Pawnee Picts with the Towiache, and
337 Brackenridge made the Tawakenoe the same as the Towiache. Turner, in Pacific R. R. Rept. III, 68, 1856, regards the Pawnee Picts as the remains of the Towiache. Judging from the name used by Brackenridge, he confounded the Towakarehu, now a Wichita clan, with the whole of the Towiache. Dr. Huffman has discovered that Ta-wai-hash is the real name of the Wichita tribe; hence we may be sure of the identity of the Wichita with the Towiache. In 1809 the Towiache were said to dwell in two villages, Nitcheta, in which the chief lived, and Towaahach.

The latter may have been the original or "real" Towiache (compare real Ponca, real Osage, Sihasapa-hca, etc., of the Siouan stock. In 1891, Dorsey identified the Pancasa, Panoasa, Panconassa, or Panionassa with the Wichita, as Panionassa is the French notation of Pani-wasa,
338 which proves to be the Quapaw for Blackbear (wasa) Pawnee, which, in *in* turn, suggests the Omaha name Pa-cin-wa-sabe, known to be the name by which the Omaha called the Wichita.

Marquette's map (1673) is the first to name the Pancassa. La Salle (1680) 2d Margry, 168, said that the Pana, Pancassa, etc., could be reached by the Missouri R., or by land, and had many horses. Tonti (1690) placed the Onasita village near the Natchitoches and Capiche, 20 leagues inland from the Mississippi R. De l'Isle, in his Carte du Mexique (1703), places the Pani and Panionassa (i. e., Pawnee and Wichita) on two streams entering Arkansas R., on the south. La Hontau (1703) placed the Pancassa on the upper Otentas R., i. e., on the river of the Oto tribe. La Harpe (1719) speaks of the To-a-jas as the most populous nation among those on the S. W. branch of the Arkansas R.
339 At Imaham village, La Harpe met chiefs of the Towakarehu, Adoize, Ouachita, Osita (both were Wichita), Asine, and Tayas (Texas, Ioni?), representing about 4,000 people, the allies of the Pawnee, 40 leagues to the north. Beaurain thought that these nations were the Mento (q. v.). He placed the Panionassa near the river of the Otonys (Oto?). La Harpe also said that the Ouachita village was on Ouachita R. in 1700. According to Le Page, Du Pratz, the Ouachita, fled from the Chickasa prior to 1730. Coxe's map, 1741, places the Ouasita on Natchitock R., SW. of Analac. Bowles' map of America (after 1750) names the Panjasa on the Imaharus R., south of the Osage and NW. of the Mento, and the Paniaisa (as if they were distinct tribes) on the Padoncas R. Jefferys (1761) describes the Ouachita as inter-
340 mixed with the Caddo and as living about 400 leagues up Red R., or 50 leagues above the Natchitochas, having abandoned the Black R. (to which they had given their name) to avoid the Chickasaw, who

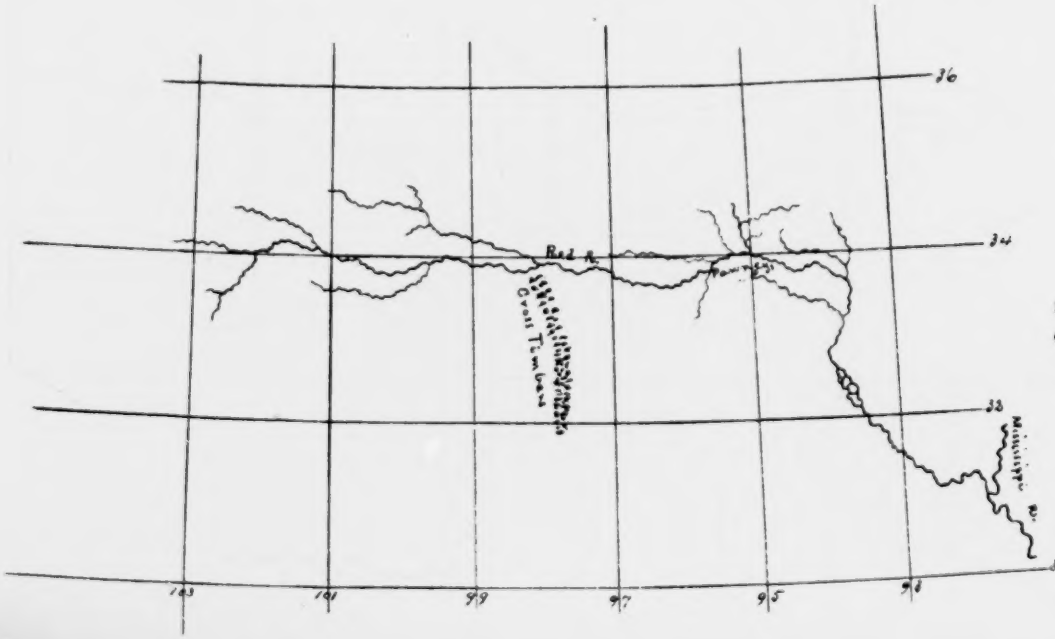
dare not follow them up Red R. Charlevoix (1761) placed the Black Pani on the headwaters of the Arkansas R., but confounded them with the Arikara, who were further north. Jefferys (1763) has two tribes or villages, Paniassa on Arkansas R. and Paniassa on Padoucas R., S. of the Kansez and W. of the Osage. Hutchins (1764), in Schoolcraft (1853), gave the Panis Pigues as distinct from the Panis Blancs by mistake. Perrin du Lac (1805) said that they burnt every white person whom they captured. Bouquet (1764), in Jefferson (1825), located the White Pani south of the Missouri R. Carver (1778) placed the Pani-
341 assa on the Red R. in Arkansas. Alcedo (1788) speaks of the Paniovasa as a village on a small river which flows into the Padoucas R. The Texas State archives (1791–2) distinguished between the Tabayase (Towiache) and Guichitta (Wichita), and in the census of 1790 they speak of the Tahuay as in the jurisdiction of Nacogdaches. According to the same authority (1804), the village of the Tahuayase was on the bank of the Rio Colorado (Red R.). Sibley (1805) gave Pani as their French name, and Towiache as the Spanish and native name. Jefferson (1806) in Bowen (1876) and Fisher (1812) said that the Pawnee Piet were formerly known as White Pawnee. Robin (1807) said that the Ouicita village was on Red R., Texas, opposite that of the Taouayache, the latter being 80 leagues W. of the Grands Cadeaux. According to Lewis, (1809) the Pawnee Piet had no intercourse with the inhabitants
342 of Illinois; they dwelt in a very fertile country and enjoyed a delightful climate. Brackenridge (1815) placed the Ta-wa-ke-nee south of Red R., above the Kä-do-hadalco. He located the Towiache 800 miles above Natchitoches, 340 by land, saying that they had been much reduced by smallpox in 1807 or 1809. Buchanan (1824) distinguished between the white and freckled Pawnee! According to the Soc. Geogr. Mex. (1870) the Tamayacas and Huichites lived in 1828, on the eastern bank of the Brazos R., numbering 58 families. Gallatin (1836) spoke of them as Pani, placing them on the Red R. McCoy (1838) placed the Wichita near the Towiache and Waco. Bonnell (1840) placed the Pawnee Piet on the Red R. Kennedy placed them S. of the False Washita R. now the Washita R., Indian Territory. Sagr (1846) located them on the Kansas Platte and Arkansas rivers (?) He must
343 have included the Pawnee, by mistake. Maillard's map, in his Hist. of Texas gives a village of the Tuckaukanie, betw. two western branches of the Colorado R., betw. 103° and 104° W. of Greenwich and in 32° 30′ N. Lat. The Ind. Rept. for 1849 calls the Towash intruders on the Brazos and Trinity rivers, Texas, with Wichita and Kichai, all of whom it makes of the Wichita tribe. Schoolcraft (1851) called the Towcash a small tribe or part of a tribe in Texas, on the Trinity or Neches R. The Ochivita, according to Soc. Geogr. Mex. (1869), was a hunting tribe in Texas, in the 18th century, being mentioned with the Waco and Towakaseha. Gatschet says that this name was a corruption Huichita. In 1822 (fide Morse) there were 400
344 Towcash on Red R., 1200 miles from its mouth. In 1867, there were 392 Wichita; in 1884 there were 209; in 1885 there were 199; in 1886, 187. All of the Wichita are on the Wichita Reservation, Indian Territory.

11230



State Map of Texas in use until 1858, U.S. v. Texas, p. 292.

11231



H. S. Tanner, 1846,

U.S. v. Texas. Vol. 2, page 30.

345 EXHIBIT H. E. P., No. 55.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 55—Tracing from "State Map" of Texas. Prior to 1858.

(Filed July 30, 1896. Court of Claims.)

346 The annexed map is an accurate tracing from the "State Map" of Texas, contained in the record of the case of The United States v. Texas, No. 4 original, at page 292 of volume 1. Said volume and map are now in the Library of Congress, and are accessible for inspection and production in court, to all the attorneys and counsel in this cause. The annexed tracings include everything shown on said map pertinent to this case.

H. E. PAINE.

(Here follows diagram marked p. 347.)

348 EXHIBIT H. E. P., No. 56.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 56—Tracing from H. S. Tanner's map, 1846.

(Filed July 30, 1896. Court of Claims.)

349 WASHINGTON, *May 13, 1896.*

The annexed map is an accurate tracing from H. S. Tanner's map of 1846, contained in the record of the case of The United States v. Texas, volume 3, page 40, now in the Library of Congress.

H. E. PAINE.

(Here follows diagram marked p. 350.)

351 EXHIBIT H. E. P., No. 57.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 57.—Tracing from R. Creutzbar's map, 1848.

(Filed July 30, 1896. Court of Claims.)

351½ WASHINGTON, *May 13, 1896.*

The annexed map is an accurate tracing from R. Creutzbar's map of 1848, contained in the record of the case of The United States v. The State of Texas, volume , page 292, now in the Library of Congress.

H. E. PAINE.

(Here follows diagram marked p. 352.)

353 EXHIBIT H. E. P., No. 58.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 58.—Tracing from Cordova map, 1848.

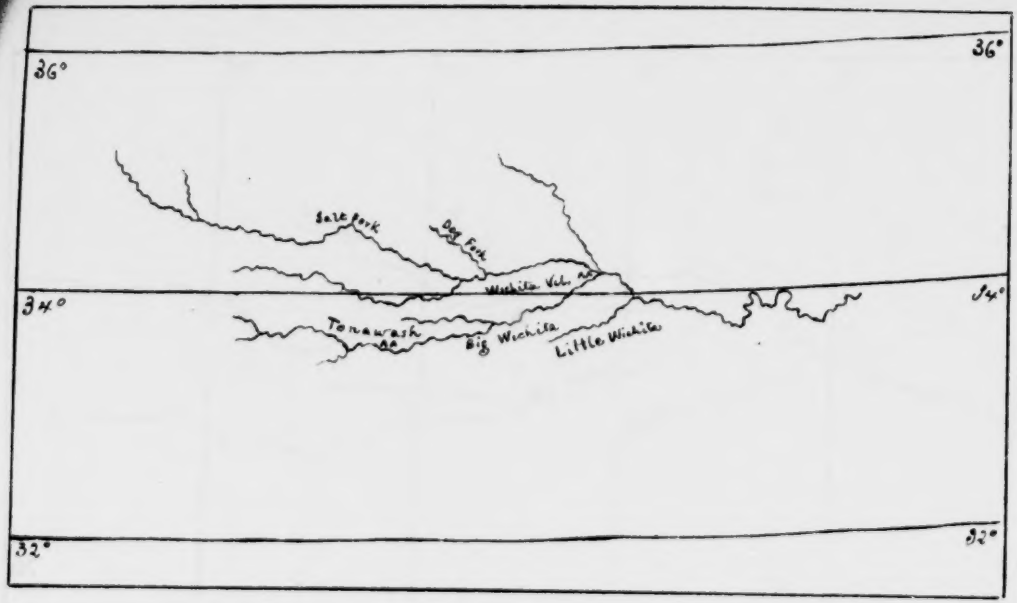
(Filed July 30, 1896. Court of Claims.)

354 WASHINGTON, *May 13, 1896.*

The annexed map is an accurate tracing from De Cordova's map, contained in volume 1 of the record of the case of the United States v. The State of Texas, at page 292.

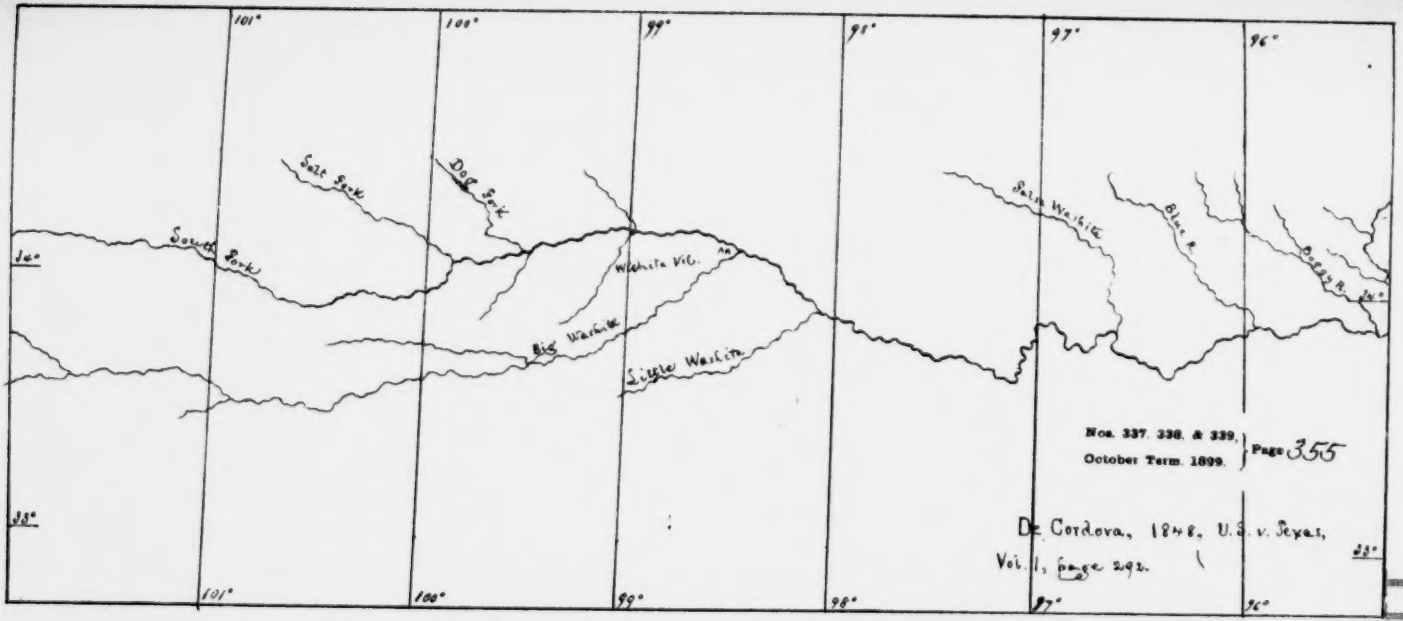
H. E. PAINE.

(Here follows diagram marked p. 355.)

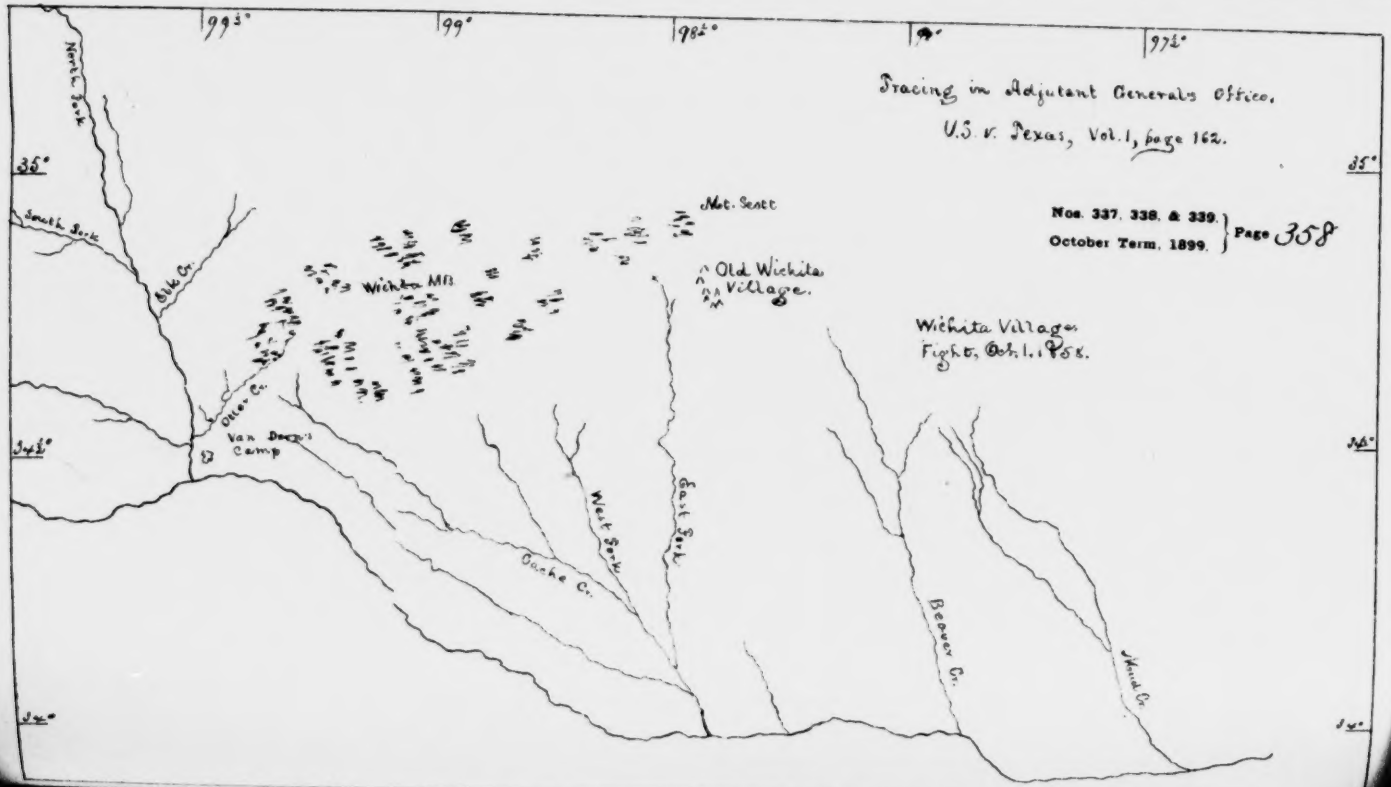


Nos. 337, 338, & 339.
October Term, 1899.
} Page 352

R. Creuzbaur, 1948, U.S. v. Texas, p. 282


101°
100°
99°
98°
97°
96°
34°
33°
South Fork
Salt Fork
Dog Fork
Wichita Vil.
Big Washita
Little Washita
Salsa Washita
Blue R.
Boggy R.
Nos. 337. 338. & 339,
October Term. 1899.
Page 355
De Cordova, 1848, U.S. v. Texas,
Vol. 1, page 292.

11234


Tracing in Adjutant Generals Office.
U.S. v. Texas, Vol. 1, page 162.
Nos. 337, 338, & 339.
October Term, 1899.
Page 358
99½°
99°
98½°
97½°
35°
34½°
34°
North Fork
South Fork
Elk Cr.
Otter Cr.
Van Dorn's Camp
Wichita MB.
Mt. Scott
Old Wichita Village.
Wichita Village Fight, Oct. 1, 1858.
West Fork
East Fork
Cache Cr.
Beaver Cr.
Mud Cr.

356 EXHIBIT H. E. P., No. 59.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants.
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 59.—Tracing from map in Adjutant-General's Office, 1859.

(Filed Jul. 30, 1896. Court of Claims.)

357 The annexed map is a tracing from a tracing in the Adjutant-General's Office, contained in the record of the case of The United States v. Texas, No. 4, original, at page 162 of volume 1. Said volume and tracing are now in the Library of Congress and are accessible for inspection and production in court to all the attorneys and counsel in this cause. The annexed map includes everything shown on said tracing pertinent to this case.

H. E. PAINE.

(Here follows diagram marked p. 358.)

359 EXHIBIT H. E. P., No. 60.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 60.—Tracing from W. Darby's map.

(Filed Jul. 30, 1896. Court of Claims.)

360 WASHINGTON, *May 13, 1896.*

The annexed map is an accurate tracing from W. Darby's map, contained in the record of the case of The United States v. The State of Texas, volume 3, page 30.

H. E. PAINE.

(Here follows diagram marked p. 361.)

362 EXHIBIT H. E. P. No., 61.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 61.—Tracing from Maj. Merrill's map, after 1855.

(Filed Jul. 30, 1896. Court of Claims.)

363 WASHINGTON, *May 14, 1896.*

The annexed map is an accurate tracing from Maj. H. W. Merrill's map, contained in the record of the case of the United States v. The State of Texas, at page 172, now in the Library of Congress.

H. E. PAINE.

(Here follows diagram marked p. 364.)

365 EXHIBIT H. E. P., No. 62.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 62.—Tracing from P. Vandermaelen's map.

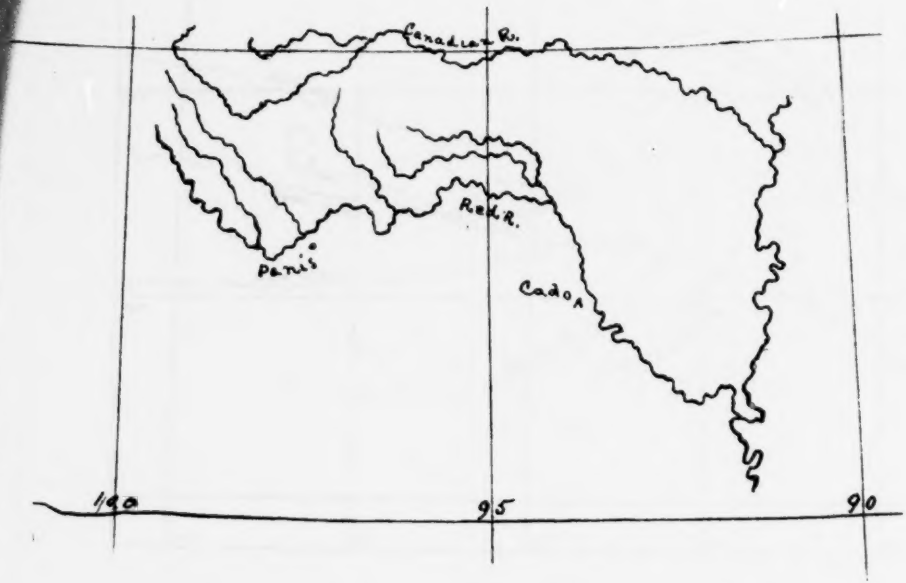
(Filed Jul. 30, 1896. Court of Claims.)

366 WASHINGTON, *May 13, 1896.*

The annexed map is an accurate tracing from a map contained in the fourth part of an atlas, purporting to have been published in Bruxelles, in 1827, entitled "Atlas Universal de Geographie," now in the Library of Congress.

H. E. PAINE.

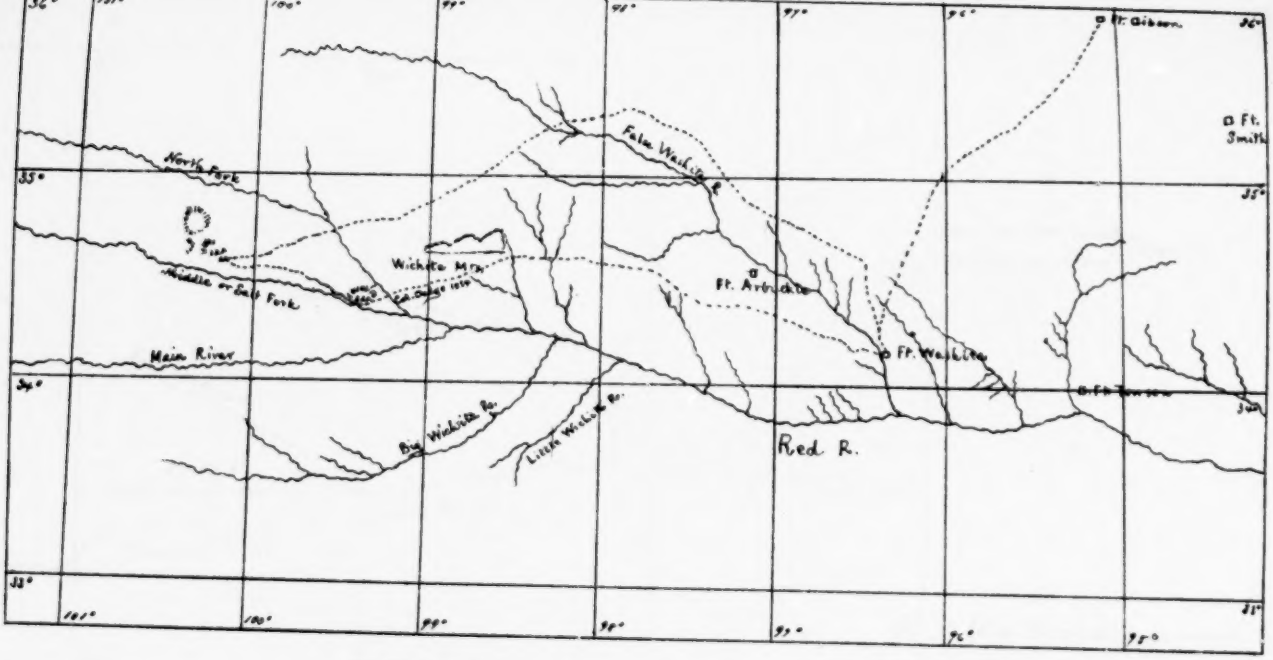
(Here follows diagram marked p. 367.)



Nos. 337, 338, & 339,
October Term, 1899. } Page 361

W. Darby, U.S.v. Texas, Vol. 3, p. 30.

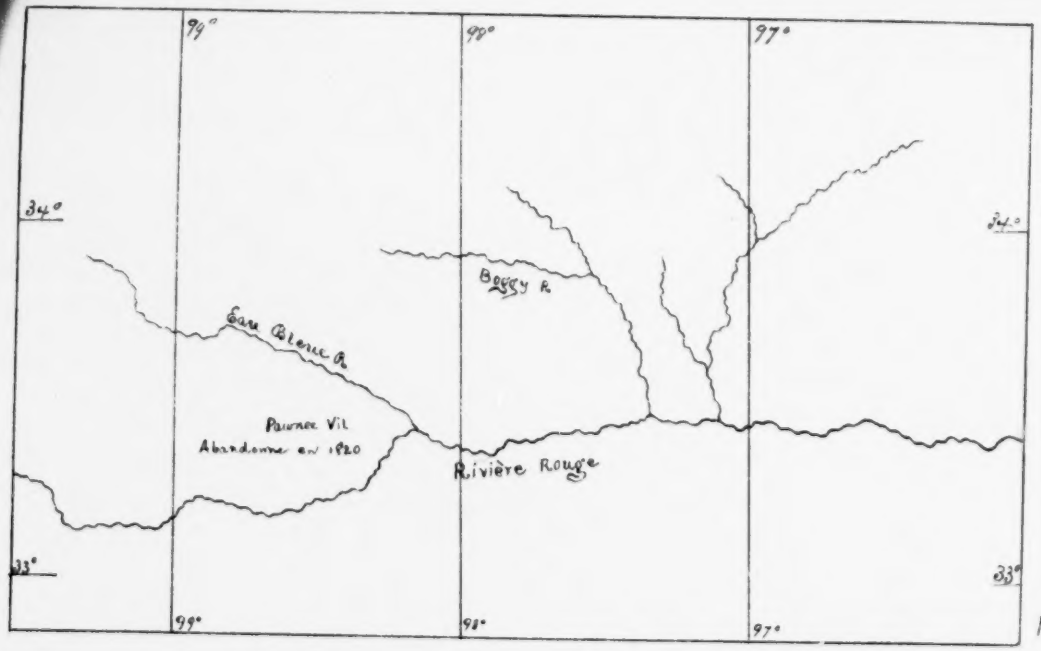
1235



Nos. 327, 328, & 329,
October Term, 1899. } Page 364

Maj. H.W. Merrill.
U.S. v. Texas, Vol. I, page 172.

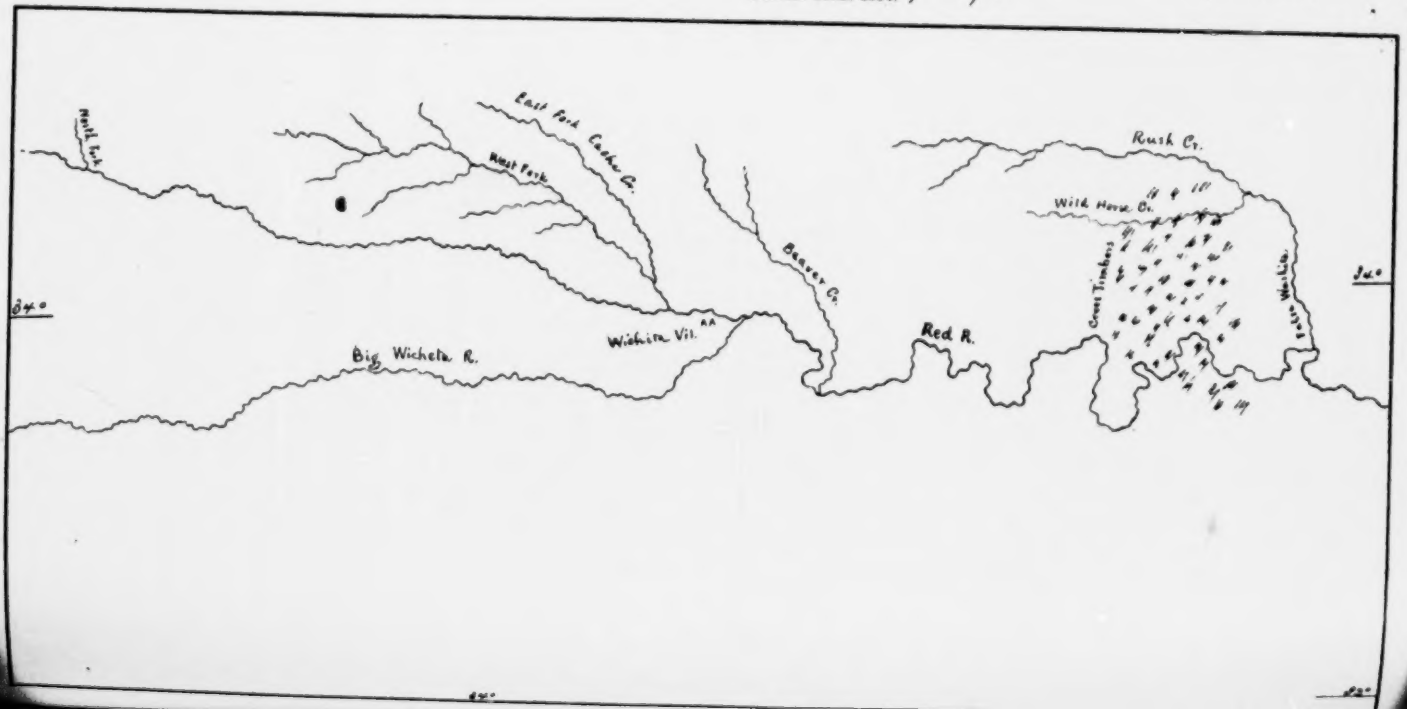
11238



Atlas Universal de Geographie Dressé par Ph. Vandermaelen, Quatrième Partie, No 53, Bruxelles, 1827.

11239

R. Creutzbar;
New York, 1886.
(Detatched.)



368 EXHIBIT H. E. P., No. 63.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 63.—Tracing from Creutzbar's map, 1856.

(Filed Jul. 30, 1896. Court of Claims.)

369 WASHINGTON, *May 13, 1896.*

The annexed map is an accurate tracing from R. Creutzbar's map, published in New York in 1856, now in the Library of Congress.

H. E. PAINE.

(Here follows diagram marked p. 370.)

371 EXHIBIT H. E. P., No. 64.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 64.—Extracts from Brackenridge's work.

(Filed Jul. 30, 1896. Court of Claims.)

372 The annexed typewritten document is an accurate extract from Brackenridge's work, published in 1817. Said book is now in the Library of Congress and is accessible, for inspection and production in court on the trial, to all the attorneys and counsel in this cause.

H. E. PAINE.

373 Brackenridge's work, 1817, contains the following statements:

"Keyeshees: 60 warriors, 200 souls, east branch of the Trinity River." (Page 150.)

"Tachees: 80 warriors, 250 souls, on a branch of the Sabine." (Page 150.)

"Caddoqués: Thirty-five miles west of the main branch of Red River, 120 miles by land above Natchitoches; formerly lived 375 miles higher up." (Page 158.)

"Tachees: On a branch of the Sabine; language, Caddo; gave their name to the province of Texas." (Page 159.)

"Pani, or Towiache: Eight hundred miles above Natchitoches, 340 by land." (Page 160.)

374 EXHIBIT H. E. P., No. 65.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 65.—Tracing from Mitchell's Atlas, 1776.

(Filed Jul. 30, 1896. Court of Claims.)

375 The annexed map is an accurate tracing from Mitchell's "Amerique Septentionale," published in London, England, in 1776, and now in the Library of Congress, accessible, for inspection and production in court, to all the attorneys and counsel in this cause. Said tracing includes everything shown on said map pertinent to this case.

H. E. PAINE.

(Here follows diagram marked p. 376.)

377 EXHIBIT H. E. P., No. 66.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

Claimants' evidence in rebuttal, No. 66.—Extracts from Moore's Description of Texas, 1844.

(Filed Jul. 30, 1896. Court of Claims.)

378 The annexed typewritten documents are accurate extracts from pages 30 and 32 of the second edition of a "Description of Texas," &c., by Francis Moore, jr., published in New York, in 1844, now in the Library of Congress, accessible, for inspection and production in court, to all the attorneys and counsel in this cause.

H. E. PAINE.

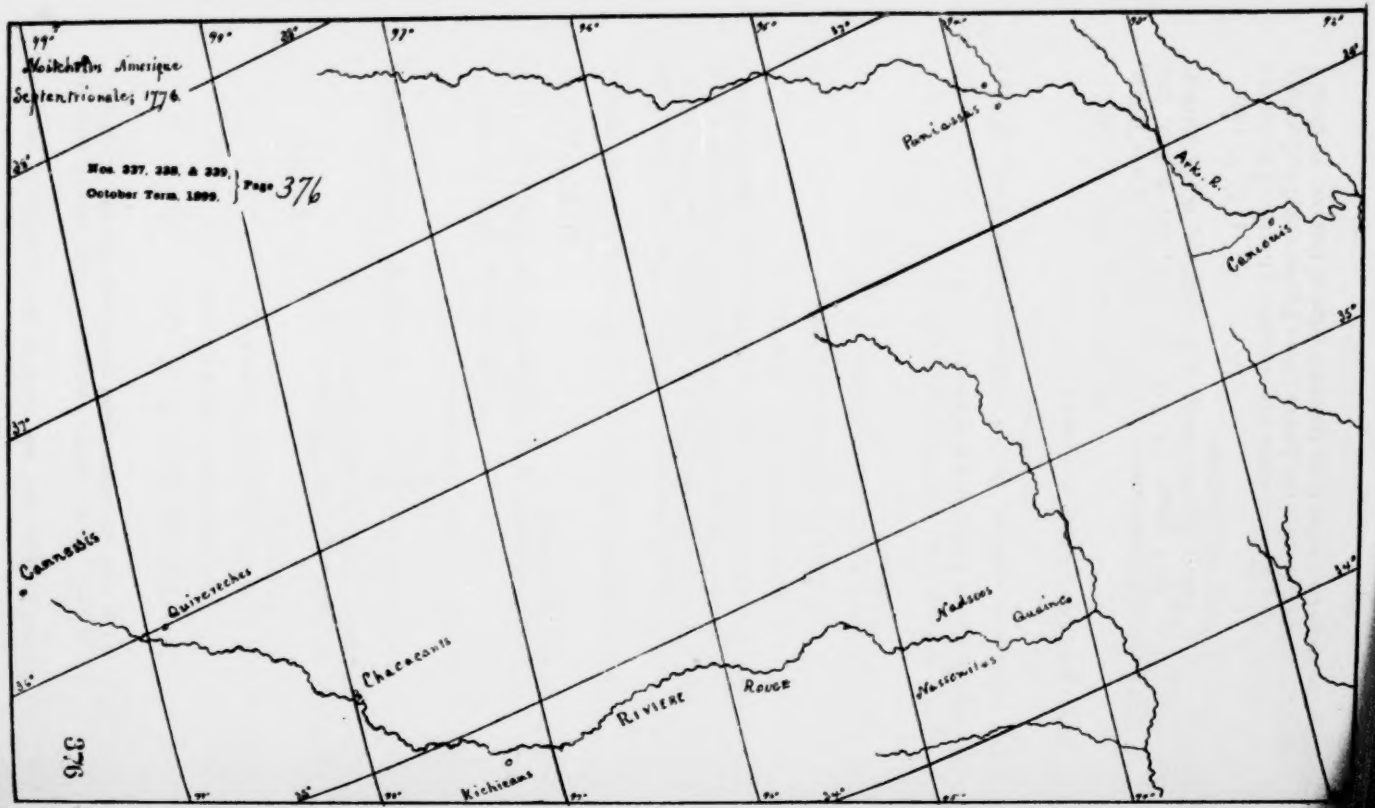
379 [Description of Texas, by Francis Moore, jr., New York, 1844. Second edition.]

"The principal tribes now residing within the limits of Texas are the Commanches, the Lipans, the Tonkewas, the Carancuawas, the Towaccanies, the Towcash, the Keachies, the Ienies, the Coshattus, the Alabamas, and Bedais, and a few roving Cherokees, Kickapoos, Caddos, and Shawnees from the United States." (Page 30.)

"The Towaccanies and Towcash resemble each other and are often found associated in the same villages. They number about two hundred and fifty warriors. They live high up on the Colorado, above the San Saba.

"The Keachies number about fifty warriors. They formerly inhabited the forests near the sources of the Trinity, but have been driven into the

11242


Moitchelin Amerique
Septentrionale; 1776.
Nos. 337, 338, & 339,
October Term, 1899.
Page 376
Paniassus
Ark. R.
Cancouis
Cannessis
Quivereches
Chacacanis
Kichieans
Riviere
Rouge
Nadsoos
Quaincs
Nassonitus
376

prairies west of that stream, and are now in an exceedingly destitute condition.

"The Ienies number about forty warriors. They reside near the sources of the Trinity, and are often found associated with the Keachies." (Page 32.)

380 EXHIBIT H. E. P., No. 67.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, v. THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence in rebuttal No. 67.—Extract from Martin's History of Louisiana.

(Filed Jul. 30, 1896. Court of Claims.)

381 WASHINGTON, *May 14, 1896.*

The annexed document is an accurate extract from page 102 of Martin's History of Louisiana.

H. E. PAINE.

382 In Martin's History of Louisiana, page 102, it is stated that, in 1669—

"Bienville and St. Denys returned to Biloxi. They had found the country through which they intended to pass entirely covered with water, and had proceeded to the village of the Wachitas, in which they found but five huts, the Indians having mostly removed to the Natchitoches."

383 EXHIBIT H. E. P., No. 68.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, v. THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence in rebuttal, No. 68.—Extracts from Notes, Marcy's Expedition.

(Filed Jul. 30, 1896. Court of Claims.)

384 WASHINGTON, *May 14, 1896.*

The annexed documents are accurate extracts from Notes Taken, Marcy's Expedition, 1854, pages 79, 212, 213, 221, 227–8, 228, 214, contained in Notes Taken During Marcy's Expedition, W. B. Parker, Phila., 1856, in Library of Congress.

H. E. PAINE.

385 "These Cross Timbers are a very singular growth. The one we had now entered is called the Lower Cross Timbers, and is about six miles wide; then eighteen miles from the outer edge of this one we should

enter the Upper, and larger. They extend almost due north and south from the Canadian to the Brazos. The timber is a short, stunted oak not growing in a continuous forest, but interspersed with open glades plateaus, and vistas of prairie scenery, which give a very picturesque and pleasing variety." (Notes Taken, Marcy's Expedition, 1854, page 79.)

"September 4th to 10th (1854). The surveying parties having concluded their labors, we struck tents this morning and marched to Fort Belknap, where we camped for a short time to procure stores and prepare for future work in locating and surveying lands for the Caddos, Ionies, Ah-nan-da-kas, To-wac-ko-nies, Wichitas, and Ton-kah-was, who exist in this neighborhood." (Id., page 212.)

"We arrived at Fort Belknap on the seventh (Sept., 1854). At a council held here the Ionies and Ah-nan-dah-kas were represented by Jose Maria, the Caddos by Ti-nah, the Wichitas and Wacos by O-che-ash and Ack-a-quash, and the To-wac-ko-nies by Utsiocks." (Id., page 213.)

"The Indians who subsist in the vast regions of the far Southwest are the Comanches, Wacos, Caddos, Ionies, Ah-nan-dah-kas, To-wac-co-nies, Ton-kah-ways, Paluxsies, Moscalara, Apaches, Lipans, Kechies, Wichitas, Kickapoos, Quapaws, Kioways, and Navajoes, all nomadic, and the Creeks, Seminoles, Choctaws, Chickasaws, Shawnees, and Delawares, who live in permanent houses." (Id., page 221.)

386 "The Caddos, Ionies, and Ah-nan-dah-kas numbered about seven hundred and fifty—warriors, women, and children—speak the same language, and intermarry. They have a tradition that they issued from the Hot Springs of Arkansas, and from that went to Red River, near Natchitoches, and finally to the Brazos." (Id., page 227-8.)

"As far as could be ascertained there are eighty Witchita men, one hundred and twelve women, and one hundred and twenty-two children. They are most arrant horse thieves and scoundrels, and have given more trouble to the settlers in Texas than any other tribe.

"They have a village up on Rush Creek, a tributuary to the Washita, a kind of rendezvous for them, from which they make constant marauding expeditions." (Id., page 228.)

"Fort Belknap, one of the most distant posts on this frontier, is situated about a mile from the Brazos." (Id., page 214.)

387 EXHIBIT H. E. P., No. 138.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

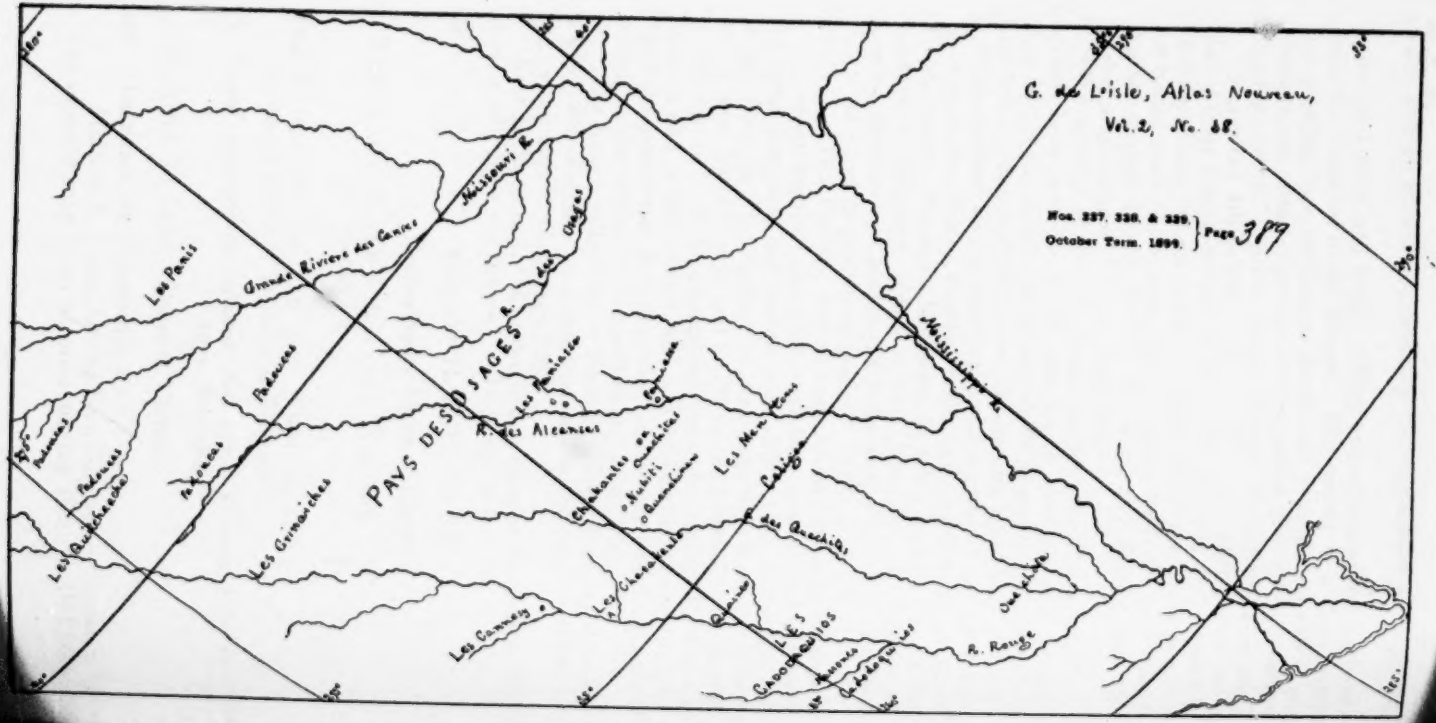
Claimants' evidence in rebuttal, No. 138.—Tracing from De l'Isle's Atlas Nouveau.

(Filed Jul. 30, 1896. Court of Claims.)

388 DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, deposes as follows: The annexed map is an accurate tracing from G. De l'Isle's "Atlas

11244


G. de Lisle, Atlas Nouveau,
Vol. 2, No. 58.
Nos. 337, 338, & 339.
October Term. 1899.
Page 389
Missouri R.
Grande Riviere des Cantes
Les Panis
Padoucas
Les Quichoacha
Les Grimaiches
PAYS DES OSAGES
R. des Osages
Les Paniasse
R. des Alcanses
Chakantes ou Quachites
Nubiti
Quanelinen
Les Menicous
Caligea
R. des Quachites
Les Chacahantes
Les Cannesy
Quaines
LES CADODAQUIOS
Kanones
Cadodaquios
R. Rouge
Ouachita
Mississippi R.

Nouveau," volume 2, No. 38. Said atlas is now in the Library of Congress, accessible, for inspection and production in court, to all the attorneys and counsel in this cause. Said tracing includes everything shown on said map pertinent to this case.

H. E. PAINE.

Subscribed and sworn to before me this day of , 1896.

(Here follows diagram marked p. 389.)

390 EXHIBIT H. E. P., No. 149.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, v. THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence in rebuttal, No. 149.—Extract from Johnson's Universal Cyclopedia.

(Filed Jul. 30, 1896. Court of Claims.)

391 WASHINGTON, *May 14, 1896.*

The annexed document is an accurate extract from Johnson's Universal Cyclopedia, in the Bureau of Ethnology.

H. E. PAINE.

392 [Extracts from Johnson's Universal Cyclopedia.]

On pages 868, 869, appears an article entitled "Caddoan Indians," written by Mr. S. O. Dorsey, of the Bureau of Ethnology, after the preparation of the Seventh Annual Report of that Bureau. It contains the following paragraphs:

"Southern group: This includes the Caddo, Wichita, Kichai, and other tribes and villages which were formerly in Texas, Louisiana, Arkansas, and Indian Territory. The Caddo and Kichai have undoubtedly been removed from their priscan habitats, but the Wichita, judging from the survival of local names and the statement of La Harpe in 1719,
393 are now in or near one of their early abodes. Sibley locates the Caddo habitat 35 miles W. of the main branch of Red River, being 120 miles by land from Natchitoches; and they formerly lived 375 miles higher up. The Wichita probably migrated from northwestern Louisiana and southwestern Arkansas to the Indian Territory. * * * After comparing the recorded statements about the several tribes, it would appear that the original habitat of the southern group of the Caddoan Indians was a section of country now embracing northeastern and part of eastern Texas and adjacent territory in Arkansas and Louisiana, its boundaries being the Red, the Sabine, and the Brazos rivers."

394 EXHIBIT H. E. P., No. 152.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, v. THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence in rebuttal No. 152.—Extract from Gregg's Narrative, 1839.

(Filed July 30, 1896. Court of Claims.)

395 WASHINGTON, D. C., *July 15, 1896.*

The annexed document is an accurate extract from pages 17, 18, 179, 180, 199, 200 of Gregg's "Commerce of the Prairies."

H. E. PAINE.

396 *Josiah Gregg's expedition of 1839.*

[Pages 17, 18, 179, 180, 199, 200.]

We had just reached the extreme edge of the far-famed "Cross Timbers," when we were gratified by the arrival of forty dragoons under the command Lieut. Bowman, who had orders to accompany us to the supposed boundary of the United States. On the same evening we had the pleasure of encamping together at a place known as Camp Holmes, a wild, romantic spot in latitude 35° 5′, and but a mile north of the Canadian River. Just at hand there was a beautiful spring, where, in 1835, Colonel Mason, with a force of United States troops, had a "big talk" and still bigger "smoke" with a party of Comanche and Wichita Indians. * *

This vast territory is not interrupted by any important moun-
397 tainous elevations, except along the borders of the great western Sierras, and by some low craggy ridges about the Arkansas frontier—skirts of the Ozark Mountains. There is, it is true, high on the dividing ridge between the Red River and the False Washita, a range of hills, the southwestern portion of which extends about to the 100th degree of longitude west from Greenwich—that is, to the United States boundary line. These are generally called the Witchita Mountains, but sometimes Towyash, by hunters, perhaps from toyavist, the Comanche word for mountain. I inquired once of a Comanche Indian how his nation designated this range of mountains, which was then in sight of us. He answered "Toyavist." "But this simply means a mountain," I replied. "How do you distinguish this from any other mountain?"

"There are no other mountains in the Comanche territory,"
398 he rejoined, "none till we go east to your country, or south to Texas, or west to the land of the Mexican." * * *

The celebrated Cross Timbers, of which frequent mention has been made, extend from the Brazos, or perhaps from the Colorado, of Texas,

across the sources of Trinity, traversing Red River above the False Washita, and thence west of north to the Red Fork of Arkansas, if not further. * * * They may be considered as the "fringe" of the great prairie, being a continuous brushy strip composed of various kinds of undergrowth, such as blackjacks, post oaks, and in some places hickory, elm, etc., intermixed with a very diminutive dwarf oak, called by the hunters, "shin oak." * * * The underwood is so matted in many places with grapevines, green briars, etc., as to form almost impenetrable "roughs," which serve as hiding places for wild beasts as well as
399 wild Indians and would, in savage warfare, prove almost as formidable as the hammocks of Florida.

400 EXHIBIT H. E. P., No. 153.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.
No. 18932.

Claimants' evidence in rebuttal No. 153.—Extract from "The Pawnee Indian," by Dunbar.

(Filed July 30, 1896. Court of Claims.)

401 WASHINGTON, D. C., *July 15, 1896.*

The annexed document is an accurate extract from paragraph 8 of "The Pawnee Indians, Their History and Ethnology," now in the Bureau of Ethnology.

H. E. PAINE.

402 *The Pawnee Indian. By John H. Dunbar. Library of Bureau of Ethnology.*

The Pawnee Indians; Their History and Ethnology. Paragraph 8, B. of Eth.:

"The traditions of three of the bands, the Xaú-i, Kit-kĕ-hak-ĭ, and Pĕt-a-haú-ĕ-rat coincide in stating that the Pawnees migrated to the Platte River region from the south and secured possession of it by conquest. * * * The Wichitas, I am told, have a tradition that the primitive home of themselves and the Pawnees was upon the Red River below the mouth of the Wichita. This would place them in close proximity with the Caddos (c. f., p. 1). The Wichitas also attempt to explain their own southern position by alleging that, having had reason to be dissatisfied with the migration or its results, they attempted to return to their
403 old home. The Pawnees also state that the Wichitas accompanied them on the migration, but wandered away to the south, though silent as to the reason. This much may be safely claimed, that the separation must have occurred long since, as is indicated by the marked divergence of the Wichita dialect."

404 EXHIBIT H. E. P., No. 154.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, v. THE UNITED STATES AND THE WICHITA and affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence in rebuttal, No. 154.—Extract from Journal of M. de Bienville's Voyage, 1700.

(Filed Jul' 30, 1896. Court of Claims.)

405 WASHINGTON, *July 15, 1896.*

The annexed document embraces accurate extracts from a copy of the journal of the voyage of M. de Bienville, from the Taensas to the village of the Yatachés (March 22–May 18, 1700), printed in the fourth volume of Margry, at pages 432, 434. The annexed English translation of said document is also accurate.

H. E. PAINE.

406 [Copie du Journal du Voyage de M. de Bienville, des Taensas au village des Yatachés par les terres (22 mars–18 mai 1700).] 4 Margry, 432, 434.

Le 22 de mars (1700) je suis party du village sur les neuf heures du matin, avec vingt-deux Canadiens, six Taensas et un Ouachita. Je marchay tout le jour, dans un pays noyé, dans l'eau jusqu'à moitié jambes et aux genoux. Sur le soir, je me suis rendu sur le bord d'une petite rivière de soixante-dix pas de large et fort profonde, distant des Taensas de quatre lieues et demie à l'ouest. Ie trouvay là les Ouachitas avec plusieurs canots en partie chargés de sel. Ils sont venu de chez eux par de petites rivières, practicable dans les eaux hautes.

Le 28, dimanche, j'arrivay au village des Ouachitas. Après
407 avoir fait deux lieues et demie au ouest, nous avons passé à la nage un marais de cinq cents pas de large, et traversé plusieurs prairies séparées les unes des autres par des lisières de bois meslées de pins, fresnes, ormes, cèdres. Ie me suis rendu au village des Ouachitas. Ce village est sur le bord de la rivière Marne ou Sablonière, ou plustost une branche de cette rivière.

408 [Copy of the journal of M. de Bienville's voyage by land from the Taensas to the village of the Yatachés (March 22–May 18, 1700).]

March 22.

March 22, at nine o'clock a. m., I left the village with twenty-two Canadians, six Taensas, and one Ouachita. I travelled all day through an overflowed country, in water half-leg deep and up to the knees. In the evening I arrived upon the bank of a small river, seventy paces in width and very deep, distant westwardly from the Taensas four and one-half leagues. I found there the Ouachitas with several canoes partly laden with salt. They came from home by small streams, practicable in high water.

On the 28th, Sunday, I arrived at the village of the Ouachitas. After having made two leagues and a half in a westerly direction we
409 swam across a marsh five hundred paces wide and traversed sev-

eral prairies separated from each other by borders of woods of mixed pines, ashes, elms, cedars. I arrived at the village of the Ouachitas. This village is on the bank of the river Marne or Sablonière, or rather a branch of that river.

410 EXHIBIT H. E. P., No. 156.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, *v.* THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence in rebuttal, No. 156.—Extract from deposition of Ta-wa-ko-nee Jim.

(Filed Jul' 30, 1896. Court of Claims.)

411 WASHINGTON, D. C., *July 15, 1896.*

The annexed document is an accurate extract from the deposition of Ta-wako-nee Jim, printed at page 634 of the record of the case of The United States *v.* Texas, now in the Library of Congress.

H. E. PAINE.

412 [Extract from deposition of Tawakonee Jim. Record, United States *v.* Texas, page 634.]

"2d. Q. How old were you when you first came into this territory?

"Ans. (Direct, without interpreter.) I was born at Towakonee Hills, in Texas, and I came here to Fort Sill when I was about ten years old. The Wichita used to live right there at the foot of the hills. I belonged to the Ta-wako-nees. Ta-wako-nees are all the same tribe as the Wichitas."

Taken in 1894; 51 years old; born in 1843.

413 EXHIBIT H. E. P., No. 157.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, *v.* THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence in rebuttal, No. 157.—Extract from deposition of H. P. Jones.

(Filed Jul' 30, 1896. Court of Claims.)

414 WASHINGTON, D. C., *July 15, 1896.*

The annexed document is an accurate extract from the deposition of H. P. Jones, taken from pages 495 and 497 of the record of the case of the United States *v.* The State of Texas, now in the Library of Congress.

H. E. PAINE.

415 [Extract from deposition of H. P. Jones. Record, United States v. Texas, pages 495, 497.]

"6. Q. Do you know the location of Camp Radzyminski? If so please describe it, with reference to its distance from the mouth of Otter Creek and its proximity to the mountains.

"A. Yes. It is on the west side of Otter Creek, right in a basin of the mountain. Otter Creek flows right along part it on the east and I should judge that Radzyminski was about fifteen or sixteen miles from the mouth of Otter Creek where it empties into the North Fork of Red River.

"7. Q. What is the nearest point on the North Fork to Camp Radzyminski?

"A. I think that there is one place that is not over six or
416 seven miles from Radzyminski, where it makes a bend to the east. * * *

"28. Q. How far from this place (Ft. Sill) is the eastern end of the Wichita range of mountains?

"A. About a mile and a half, I reckon."

417 [Extract from deposition of Charles Goodnight. Record, United States v. Texas, page 401.]

"59. Question. When you first became acquainted with the North Fork of Red River and the country adjacent thereto, were there any evidences of old villages in that region, Indian or otherwise?

"Answer. There is evidence of the Comanche Indians in that country, but they are not in the habit of settling or living long at a place, except Palo Duro Canyon, over here. That is the oldest I have ever seen where they wintered there many, many years.

418 [Deposition of J. J. Sturm, taken March 23, 1894. Record, United States v. Texas, pages 602, 603.]

"The Caddo Indians, ever since I have known them, have been an agricultural people, and the Wichitas the same. They have a small, early corn, that is called Indian corn. When the corn is in roasting-ears state they roast it by the fire—I mean the Caddos—and after it gets dry they sack it up for winter use. * * * When I first came among the Wichitas they would expose the corn, after it was gathered, to the sun until it was thoroughly dry—put it on a scaffold. After that they would sack it up in little rawhide sacks, &c. * * * When I first came among them—that was on the Brazos River, twenty miles below Belknap—they had all been furnished plows by the Government,
419 and the larger fields the men plowed."

420 EXHIBIT, H. E. P., No. 158.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.
No. 18932.

Claimants' evidence in rebuttal, No. 158.—Extract from deposition of Che wah stalk.

(Filed Jul. 30, 1896. Court of Claims.)

420½ WASHINGTON, D. C., *July 15, 1896.*

The annexed document embraces accurate extracts from the deposition of Che wah stalk, taken from pages 645, 646 of the record of the case of The United States v. The State of Texas, now in the Library of Congress.

H. E. PAINE.

421 [Extract from the deposition of Che wah stalk, a Wichita Indian. Record, United States v. Texas, pages 645, 646.]

"Ans. I don't know how old I am. I don't live very far from here. I live on a creek called Osh ke kaw, which means, or what the English call, Sugar Creek.

"2d Q. Do you remember when the stars fell?

"Ans. Yes.

"3d Q. How big was you then?

"Ans. About eight or nine years old. I was about four foot high. * * *

"Cross-examined:

"1st Q. Where was you born—what country?

"Ans. I was born southeast of here.

"2d Question. Were you born in Texas?

422 "Answer. I was born on the other side of Kitchikaw River, down on the Brazos River, way below Waco. * * *

"31st Q. Did your people go by the name of Pawnee picks when you were a young man?

"Ans. I don't know anything about that.

"32d Q. Did they call them Toy way ihosh?

"Ans. Yes; I was young when I knew that name—Toy way ihosh.

"33d Q. Did anybody ever call your people Pannis?

"Ans. I don't know anything about that."

423 EXHIBIT, H. E. P., No. 159.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, v. THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence in rebuttal, No. 159.—Extract from deposition of A. J. Mears.

(Filed Jul. 30, 1896. Court of Claims.)

424 WASHINGTON, D. C., *July 15, 1896.*

The annexed document is an accurate extract from the deposition of A. J. Mears, taken from page 191 of the record of the case of The United States v. The State of Texas, now in the Library of Congress.

H. E. PAINE.

425 [Extract from deposition of A. J. Meers. Record, United States v. Texas, page 191.]

"Question. What proportion of the Wichita range of mountains is south of North Fork and what proportion north thereof?

"Answer. South and west there is about one-seventh, and almost due east, in the Territory, is about six-sevenths."

426 EXHIBIT, H. E. P., No. 160.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, v. THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence in rebuttal, No. 160.—Extract from deposition of James Mooney.

(Filed Jul. 30, 1896. Court of Claims.)

427 WASHINGTON, D. C., *July 15, 1896.*

The annexed document embraces extracts from the deposition of James Mooney, taken from pages 318 and 675 of the record of the case of The United States v. The State of Texas, now in the Library of Congress.

H. E. PAINE.

427¼ [Extract from the deposition of James Mooney. Record, United States *v.* Texas, pages 318, 675.]

"20 Q. Can you give me any of the names by which the tribes now known as the Wichitas and Wacos were formerly known?

"A. For the Wichitas, yes; they are as follows:

"Their proper names, Kiti Kitish, Tow cash; old French name, Pani Piqué; old English name, Pawnees of the South; common name (perhaps of Osage origin) Wichita.

"I obtained the Wichita proper names from personal investigation. I may add that, in regard to the Wacos, the only names I know of for the Wacos are variants of the common names:

427½ "Proper name, Wigá; Spanish form, Hueco; common form, Waco."

427¾ [Deposition of James Mooney. Record, United States *v.* Texas, vol. 1, page 675. (Continued.)]

"The white people, or at least the maps, commonly applied the name Wichita Mountains to them—the whole range of mountains in that general location, running from Fort Sill west; but the Indians call by that name only the immediate western spur. They say they called them by that name because that is where the Wichita Indians used to live; then they have told me approximately when the Wichitas left that neighborhood and moved down to where they now are. When I visited the Wichitas first I sent for, or talked with, two of their oldest people (a man and a woman). One of them had lived at this place when
428 it was a Wichita settlement; they told how they had lived in said earth lodges there, as I have described, and told how, when they had left that country and moved up further into the prairie, and more especially in recent years, when they had come into friendly terms with other former enemies of surrounding tribes, they had largely discarded their old style of earth lodges and taken instead the tepee of their immediate neighbors. They still have, as I said, a few old earth lodges. They told me also that when they had lived there at this place they had used stone metates of the kind that I have found there—of the same kind that I had seen very recently used among the Navajoes. They told me
429 the name of the village there in their own language. They said that when they had left there they had moved first to the vicinity of Fort Sill, which is, I guess, about fifty miles, and afterwards they had come down to about their present location on the north side of the Wichita. They told me when they had left there, and fixed the date by what is called by all the prairie tribes, north and south, from Dakota down, the year that the stars fell. As Indians do not have our system of chronology, they fix events by important phenomena, or things of that kind. The stars fell, in the Indian way of putting it, in November, 1833; that was the date of the great meteoric display over that Western country, and it is recorded in pictures upon the Sioux calendar, that we have in the
430 possession of the Bureau, that contains the chief events in the history of the Sioux tribe clear back to about 1820. The same event is recorded on two Kiowa calendars, which I have obtained from the Kiowas and have in my possession in the Bureau. They told me that they had left this village the summer after the stars fell, which would mean the summer of 1834."

431 EXHIBIT H. E. P., No. 161.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.
No. 18932.

Claimants' evidence in rebuttal, No. 161—Extract from letter of Stokes a Arbuckle, Sept. 15, 1835.

(Filed, Jul. 30, 1896. Court of Claims.)

432 WASHINGTON, D. C., *July 15, 1896.*

The annexed document is an accurate extract from a letter Montfort Stokes and M. Arbuckle, commissioners, to Hon. Lewis Ca Secretary of War, dated Sept. 15, 1835, now on file in the office of t Commissioner of Indian Affairs.

H. E. PAINE.

433 "FORT GIBSON, *Sept. 15th, 1835.*

"The Hon. LEWIS CASS,
"*Secretary of War.*

"SIR: * * * As some confusion has existed, both here and el where, with respect to the names of the nations of the great weste prairie, who reside and hunt to the west and southwest of this post, deem it proper to inform you that there are but three distinct nations these Indians, with the exception of one or two small tribes, who resi far south of the Red River, in the province of Texas. These thr nations are the Comanches, who are the most numerous, but who ha no fixed or permanent villages, and follow the herds of buffalo, wi their movable lodges, and are some times north and at other times sou of Red River.

434 "The Witchetas consist of several bands, some residing nor and some south of Red River; those residing north of Red Riv are the Towee ash and Wachos. They have fixed villages and rai some corn and vegetables.

"The Kioaways have no fixed villages, but wander from the cre timber, on the Arkansas, Canadian, and Red River, to the Rock Mountains, and are some times, but not often, south of Red River.

"We are, with great respect, your obdt. servants,

"MONTFORT STOKES.
"M. ARBUCKLE."

435 EXHIBIT H. E. P., No. 163.

United States Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, claimants, v. THE UNITED STATES AND THE WICHITA and affiliated bands of Indians, defendants. } No. 18932.

Claimants' evidence in rebuttal, No. 163.—Extract from Darby's Description of Louisiana.

(Filed Jul. 30, 1896. Court of Claims.)

436 WASHINGTON, *July 15, 1896.*

The annexed document is an accurate extract from William Darby's Geographical Description of the State of Louisiana, second edition, 1817, taken from page 827 of the record of the case of The United States v. The State of Texas, now in the Library of Congress.

H. E. PAINE.

437 [Extract from Wm. Darby's Geographical Description of the State of Louisiana, second edition, 1817. Record, United States v. Texas, page 827.]

"The Panis, or Towinche, Indians have their village on Red River at 97° W. lon. and 35° 20′ N. lat. The 32° N. lat. intersects the Sabine at 94° 05′ W. longitude, distant from the Panis village upward of 160 miles in a direct line. A ridge of hills winds along the south bank of Red River, near the Panis village, discharging the waters southward toward the gulph. The streams near the village are supposed by some to be the sources of Sabine, but from the diminutive column of that river when it passes 32° N. lat., it is extremely improbable it can draw its sources from so great a distance. The general range of the rivers
438 would indicate the neighborhood of the Panis as the sources of the Trinity, which is not even so well explored as its neighbor, the Sabine."

439 U. S. Court of Claims.

THE CHOCTAW AND CHICKASAW NATIONS, vs. THE UNITED STATES ET AL. } No. 18932.

Request for call on Interior Department.

The claimants ask the court to request the Secretary of the Interior to deliver to the bearer hereof, who is a messenger of this court, for the inspection of the court, on the trial of the above entitled cause, the following original papers, viz:

1. The printed address of the U. S. commissioners who attended the Fort Smith council of 1865, with an indorsement in pencil thereon.

2. The reply of the committee on the part of the Choctaws and Chickasaws to the said address, dated Fort Smith, Arkansas, 19th September, 1865.

H. E. PAINE,
Of Counsel for Claimants.

439½ (Indorsed:) (Copy.) U. S. Ct. Claims, No. 18932. The Choctaw Nation et al. vs. The United States et al. Request for call on Int. Dept. H. E. Paine, of counsel for cl'ts.

440 DEPARTMENT OF THE INTERIOR,
Washington, January 24, 1898.

JOHN RANDOLPH, Esq.,
Assistant Clerk, Court of Claims,
Washington, D. C.

SIR: I am in receipt of a call of the Court of Claims requesting to be furnished with certain papers relating to cause No. 18932, the Choctaw and Chickasaw Nations vs. The United States, as set out in the petition of Hon. H. E. Paine, of counsel for claimants.

In response thereto I transmit herewith a copy of a communication of the 22nd instant from the Commissioner of Indian Affairs, and accompanying papers.

Very respectfully, C. N. BLISS, *Secretary.*

542, Ind. Div., '98. 2 inclosures. M. E. W.

441 [3 enclosures.]

Refer in reply to the following: Land, 3490–1898.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, Jany. 22, 1898.

The honorable the SECRETARY OF THE INTERIOR:

SIR: I have the honor to acknowledge the receipt, by your reference for immediate report, of a call from the Court of Claims issued January 21, 1898, at the request of counsel of claimants for the inspection of the court, on the trial of cause No. 18932, The Choctaw and Chickasaw Nations vs. The United States et al., the following original papers:

1. The printed address of the U. S. commissioners who attended the Fort Smith council of 1865, with an indorsement in pencil thereon.

2. The reply of the committee on the part of the Choctaws and Chickasaws to the said address, dated Fort Smith, Arkansas, 19th September, 1865.

In compliance with said reference I transmit herewith said original papers, taken from the package entitled, "Papers rel. to councils held at Fort Smith, 1865," a part of the files of this office.

The call of the Court of Claims is herewith returned.

Very respectfully, your obedient servant,

W. A. JONES, *Commissioner.*

2 We propose to renew the treaty stipulations that existed previous to or at the breaking out of the rebellion, so far as regards the nuities.

The Gov'm't will insist on purchasing a portion of their lands for the tlement of friendly Indians.

No part of any moneys expended by the President in providing for the ief of destitute Indians which were reduced to want on account of ir friendship to the Gov'm't will be refunded.

A stipulation of general amnesty among themselves must be incorpo-ed, and no individual shall be proscribed or any act of forfeiture or nfiscation passed against those who remained friendly to the U. S., but y shall enjoy equal privileges with other members of the nation.

3 ADDRESS OF THE COMMISSIONERS.

BROTHERS: After considering your speeches made yesterday, the com-ssioners have decided to make the following reply and statement of the ficy of the Government:

BROTHERS: We are instructed by the President to negotiate a treaty treaties with any or all of the nations, tribes, or bands of Indians in Indian Territory, Kansas, or of the plains west of the Indian Terri-y and Kansas.

The following-named nations and tribes have by their own acts, by king treaties with the enemies of the United States at the dates here-er named, forfeited all right to annuities, lands, and protection by the ited States:

The different nations and tribes having made treaties with the rebel vernment are as follows, viz:

The Creek Nation, July 10th, 1861.

Choctaws and Chickasaws, July 12th, 1861.

Seminoles, August 1st, 1861.

Shawnees, Delawares, Witchitaws, and affiliated tribes residing in sed territory, August 12th, 1861.

The Comanches of the prairie, Aug. 12, 1861.

The Great Osages, Oct. 2d, 1861.

The Senecas, Senecas and Shawnees (Neosho Agency), Oct. 4th, 1861.

The Quapaws, Oct. 4th, 1861

The Cherokees, Oct. 7th, 1861.

By these nations having entered into treaties with the so-called Con-derate States, and the rebellion being now ended, they are left without y treaty whatever, or treaty obligation for protection by the United tes.

Under the terms of the treaties with the United States and the law of ngress of July 5th, 1862, all these nations and tribes forfeited and lost their rights to annuities and lands. The President, however, does t desire to take advantage of or enforce the penalties for the unwise ions of these nations.

The President is anxious to renew the relations which existed at the aking out of the rebellion.

We, as representatives of the President, are empowered to enter into w treaties with the proper delegates of the tribes located within the

so-called Indian Territory and others above named living west and north of the Indian Territory.

Such treaties must contain substantially the following stipulations:

1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.

2. Those settled in the Indian Territory must bind themselves, when called upon by the Government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory, and with the United States.

3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished and measures taken for the unconditional emancipation of all persons held in bondage and for their incorporation into the tribes on an equal footing with the original members or suitably provided for.

4th. A stipulation in the treaties that slavery or involuntary servitude shall never exist in the tribe or nation except in punishment of crime.

5th. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by Government, or such as may be fixed by the Government.

6th. It is the policy of the Government, unless other arrangements be made, that all the nations and tribes in the Indian Territory be formed into one consolidated government, after the plan proposed by the Senate of the United States in a bill for organizing the Indian Territory.

7th. No white person except officers, agents, and employees of the Government or of any internal improvement authorized by the Government will be permitted to reside in the Territory unless formally incorporated with some tribe according to the usages of the band.

BROTHERS: You have now heard and understand what are the views and wishes of the President, and the commissioners, as they told you yesterday, will expect definite answers from each of you upon the questions submitted.

As we said yesterday, we say again, that in any event those who have always been loyal, although their nations may gone over to the enemy, will be liberally provided for and dealt with.—Fort Smith New Era print.

444 FORT SMITH, *19th Sept., 1865.*

The committee on the part of the Choctaws and Chickasaws reply to the propositions made on the part of the United States as the basis of new treaties:

That we are pleased to learn that you propose to renew your previous relations with us, and we are willing to go into negotiations for the making of a new treaty with the United States, and as a basis of this new treaty accept art. 1st & 7th.

In reference to the requirements of the 2d article, we desire to say that we wish as far as possible to avoid coming in conflict with our red brethren, should any of them be so unfortunate as to get into conflict with the United States authorities. We are willing to guarantee all our influence in favor of peace in all its bearings with our red brethren, and will not object to any of our citizens volunteering for service in any war

in which the United States may become involved, for the aiding of the United States.

We are willing to enter into negotiations for the settlement of all the points contained in the 3d & 4th articles.

On certain terms, on which we can doubtless agree with you, we are willing to admit the settlement of other tribes within our territory, as proposed in the 5th article.

We are willing to submit the Territorial bill referred to in the 6th
445 article for the consideration of our respective general councils, and for this purpose request a copy of that bill for the principal chief of the Choctaw Nation and for the governor of the Chickasaw Nation.

We accept art. 7th and are willing to have the provisions thereof incorporated into the treaty.

We are also willing to incorporate a provision that no individual shall be proscribed, or any act of forfeiture or confiscation passed against those who remained friendly to the U. S., and that they shall enjoy equal privileges with other members of the nation.

R. M. JONES,
Chairman of the Committee of Choctaw & Chickasaw Com'rs.

445½ (Indorsed:) 18932. The Choctaw and Chickasaw Nations v. United States et al. Reply of Interior Dept. Filed Jan. 24, 1898. Court of Claims.

Address of the Choc. & Chick. com'rs in regard to the propositions for a treaty. Dept. of the Interior. Received Jan. 24, 1898. Indian div. 542.

446 In the Court of Claims. Term 1897–8.

THE CHOCTAW NATION AND THE CHICKASAW Nation *vs.* THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians.	No. 18932.

Objection of counsel for defendants to paper offered in evidence.

The counsel representing the United States and the defendant Indians object to the paper produced in court by General Paine on January 20, 1898, and offered in evidence for the following reasons:

First. While the paper produced may be a part of the official records of the Department of the Interior, it does not come before this court in the proper manner. If it is an official record, it should be delivered to the court by an accredited representative of the Department in whose charge it is.

Second. The written paper dated Fort Smith, Arkansas, 19th
447 September, 1865, is not printed in the official record of the Fort Smith council as it appears in the report of the Secretary of the Interior for 1865 (pp. 496–537). Certain statements signed by R. M. Jones, president of the Choctaw commissioners, and David Birney, president pro tem. of the Chickasaw commissioners, are printed in that official report; but this paper purports to be signed by R. M. Jones,

chairman of the committee of Choctaw and Chickasaw commissioners. Of the constitution of that committee we have no knowledge, nor do we know whether this report was accepted by the whole body of Choctaw and Chickasaw commissioners and submitted by them officially to the United States commissioners; and from the fact that it does not appear in the official report we believe that it was not officially adopted and presented by the Choctaw and Chickasaw commissioners, or, if so presented, was subsequently withdrawn, and we therefore object to it on this ground.

Third. The printed paper attached to the written paper by a pin is a copy of the address of the commissioners of the United States printed in the report of the proceedings of the Fort Smith council at pp. 502 and 503 of the report of the Secretary of the Interior for 1865; but we have no knowledge of the authenticity or official character of the pencil memoranda on the back, nor of whether those pencil memoranda were ever submitted to the Choctaw and Chickasaw commissioners. We therefore object to said paper, as far as concerns the pencil memo-
448 randa, on the ground that they are not signed, and that it has not been proved who wrote them, when they were written, in what capacity the writer acted, or that they were ever shown to the Choctaw and Chickasaw commissioners.

CHARLES C. BINNEY,
Special Attorney.

J. M. VALE,
A. A. LIPSCOMB,
PHILIP WALKER,
W. C. SHELLEY,
Counsel for the Wichita and Affiliated Bands of Indians.

449 (Indorsed:) Court of Claims. No. 18932. Choctaw Nation and Chickasaw Nation vs. The United States and the Wichita and affiliated bands of Indians. Objections of counsel to paper offered in evidence. Filed Jan. 22, 1898. Court of Claims.

450 In the Court of Claims of the United States.

THE CHOCTAW NATION AND THE CHICKASAW Nation
vs.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians.
No. 18932.

And now comes the defendant Indians, by their attorneys, J. M. Vale and A. A. Lipscomb, and for more specific objection to certain items of evidence offered by the claimants, show the following reasons why the same should not be received:

Evidence in chief:

No. 34. Of the two forks of a river shown in the approximate location of the Arkansas, that to the south bears, in the original, the legend "R. des Acansa;" the upper fork has no name. In the tracing tendered to the court there is no name on either.

No. 28. The tracing omits lettering which shows that the dotted line on the left-hand side of the tracing is the western boundary of Louisiana, thus differing materially from other items of evidence tendered by the claimants.

Evidence in rebuttal:

No. 42. Waco village omitted on North Fork of Red River, across from the Pawnee Pict village. Important because of evidence of long existence of Waco village.

No. 59. Words "Leased country for Caddoes, Wichitas, and Kechies," across face of map, omitted in tracing. A certified copy of the original is in evidence.

J. M. VALE,
A. A. LIPSCOMB,
Attorneys for Defendant Indians.
W.

451 (Indorsed:) U. S. Court of Claims. No. 18932. The Choctaw Nation and the Chickasaw Nation v. The United States and the Wichita and affiliated bands of Indians. On behalf of defendant Indians. Exhibit No. . Objection to certain items of claimants' evidence. Josiah M. Vale and Andrew A. Lipscomb, attorneys for said defendants. Philip Walker and William C. Shelley, counsel. Filed Feb. 15, 1898. Court of Claims.

452 *Evidence for defendant Indians.*

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453 *Extracts translated from the original French in a work entitled Discoveries and Establishments of the French in the West and South of North America (1614–1754). Memoirs and documents gathered and published by Pierre Margry; 6 volumes, Paris, 1876–1886.*

(Library of the Bureau of Ethnology.)

ACCOUNT OF NICOLAS DE LA SALLE, 1682.

(I Margry, 547, et seq.)

(P. 554.) The Arkansa said that there were four villages and showed by signs where they were. * * * We made about eight leagues, and on the left found a village of the Akansa. They were all on a hunt. We made another six leagues and came to a river which is called Akansa. There is still another Akansa village there, where we slept.

RELATION DE JOUTEL.

(III Margry, 438, et seq.)

XVI.

Among the Arkansas.

* * * * * * *

(P. 443.) We learned that these people were tractable and how much they desired that M. de La Salle should return from the lower river, as he had promised them at the time of their discovery; we learned also that this nation of Arkansas was composed of four villages bearing different names. Two of the villages are situated on the banks of the Colbert [Mississippi] River and the two others on the river called Arkansas.

* * * * * * *

(P. 443.) They are established in a very good country, and, according to the report of the two Frenchmen, behind the house they have fields, which are not far off, and in which there are a quantity of buffalo, roes, stage, and does.

* * * * * * *

(P. 444.) The villages of the nation are called: The first, Otsote, [elsewhere called Otsotchaue]; the second, Thoriman; the third, Tonguinga; and the fourth, Cappa, of which we have already spoken; although this nation is in general called Akansa, none of the said villages bear this name. The first two are situated on the banks of the river Arkansas and the two others on the river Colbert, the one on one bank and the other on the other.

* * * * * * *

(P. 452.) We arrived at six o'clock in the evening at the first village, or rather the second, named Thoriman, which was about five or six leagues distant from the first.

* * * * * * *

(P. 454.) I saw at one or two gunshots distant the river Colbert, which was very large and rapid. Couture said that the village was on a kind of island, upon which we had descended by a fork which the river
454 made about a league above, although the river was still fine before the said village. Couture also told me that there was also another branch which passed behind the first village, but that it was smaller.

* * * * * * *

As to the savages of this village, they have even the advantage for the hunt over the others, having the use of the river or better, the rivers, by means of canoos, of which they have a large number very well made.

* * * * * * *

(P. 457.) We entered into the river Colbert or Mississippi, which we had so much desired. We passed to the other bank.

* * * * * * *

We arrived at eleven in the morning at the other village, which is about two leagues from that which we had quitted.

* * * * * * *

This was constructed in the same manner as the others, although it was not so large, which led to its being called Tonigua, which signifies "little village," according to what Couture told us. It is situated on the bank of the river Colbert, on the right, ascending.

* * * * * * *

(P. 458.) The 30th [July, 1687], we left the said village to go to that of the Kappa, which was the last of that nation and which they told us was eight leagues off.

* * * * * * *

(P. 462.) This village is situated on the left of the river, going up, on a height of thirty feet. The village is larger than the others.

* * * * * * *

From what I was able to learn, there were four hundred warriors in this village, and at least three hundred in the others.

COPY OF THE JOURNAL OF THE VOYAGE OF M. DE BIENVILLE, FROM THE TAENSAS TO THE VILLAGE OF THE YATACHES, BY LAND. (MARCH 22 TO MAY 18, 1700.)

(IV Margry, 432 et seq.)

The 22d of March I left the village at nine o'clock in the morning with twenty-two Canadians, six Taensas, and one Ouachita. I marched all day in a flooded country in water halfway up the legs and to the knees. In the evening I was on the banks of a little stream seventy paces wide and very deep, distant about four and a half leagues west from the Taensas. I found the Ouachitas there with several canoes partly loaded with salt. They abandoned their village to go and live with the Taensas. They came thence by little rivers, practicable in high water.

* * * * * * *

The 28th I arrived at the village of the Ouachitas. * * * This village is on the banks of the river Marne or Sabloniere [Red River], or rather on a branch of that river. There were only about five cabins there and about seventy men. * * * From what I could learn this village is twenty leagues from that of Taensas, while that of the Coroas is six leagues to the north and six or seven degrees north of west.

455 MEMOIRE ON THE NATCHITOCHES.

ARCHIVES OF THE MINISTRY OF THE MARINE—GENERAL CORRESPONDENCE OF LOUISIANA. BEFORE 1730.

(VI Margry, 228.)

(P. 229.) The Red River is divided into two branches at forty leagues from where it flows into the Mississippi at a place called the Rapid, and these two branches into different channels which flow from a quantity of lakes, which prevent communication between the post and New Orleans when the waters are low, which lasts for half the year; then as they reunite 41 leagues above Natchitoches, where, after having formed an obstruction of trees for 10 leagues [the Big Raft], it is beautiful and navigable in its season for 200 leagues higher up. Its source is still unknown, because of the savage nations who are enemies; but its general course is west-northwest, which leads to the belief that it is not far distant from the Missouri. The nations who live near or who are established on its course, from its mouth to points within our knowledge, are the Aouayeilles, the Innatchas, the Quiouahans, and the Touacanna or Paniouassas; these last are near the river of the Otouys.

All these nations have their superstitions; though different, they center around the same point, the belief in a good and a bad spirit. They never invoke the good, because it can not do them harm, as they say. It is only the bad that they fear, because it may come to injure them.

The largest commerce that could be had with these Indians would be in horses, pelts, bear's oil, or slaves, because they appear to have nothing else but these which form all their wealth.

I do not think there are any mines in the region, or if they are discovered, it will be only after some time. They ought, however, to be discovered on the side of the Illinois, who are more to the north, and above all in the mountains of the Cannesis and the Padoucas, which are towards New Mexico. The French have a post of six men at the Cadodaquious or Nassonites, more annoying than profitable to the nation by the bad idea which the savages form from their small number.

RELATION OF THE VOYAGE OF BENARD DE LA HARPE—DISCOVERY BY HIM OF SEVERAL NATIONS SITUATED IN THE WEST.

(VI Margry, 249 et seq.)

(P. 249.) [Jan., 1719.] We advanced to the mouth of the Ouachita River, 14 leagues from the Mississippi.

* * * * * * *

(P. 260.) The 5 [April, 1719], we continued to march over many hills and prairies. At ten o'clock the war chief of the Nassonites and six headmen who accompanied him, arrived before us with some horses on which we mounted. After having crossed grand prairies and very beautiful country we came to a wood, after passing which we arrived at three in the afternoon at the cabin of the chief of the Nassonites, who was then more than seventy years of age. This chief, with those of the Cadodaquious, Nadsoos, and Natchitoches, awaited me at his cabin, outside of which, under a shed, they had prepared a feast consisting of bread and boiled corn, differently prepared with bear and buffalo meat and fish.

They maintained a profound silence during the repast; it is even
456 the custom of the savages to ask no question of new guests until they have rested or until they speak themselves. Instructed in this savage politeness, I waited until each had eaten; after which, I said to each of these nations, by my interpreters, that the great French chief, of whose word I was the bearer, having learned of the cruel wars made against them by the Chicachas, the Anahons, the Imahans, the Inocas, and the Tonicaux [Osage, Akansas, Tonicas, and Illinois, Beaurain], had sent me to them with several warriors to defend them against their enemies and to assist in their protection; that he had sent orders to their enemies to cease their hostilities, or he would declare war against them.

The chief of the Cadodaquions, who was a respected old man and the most eloquent speaker of these nations, though almost eighty years old, then spoke. He showed these people that the time was come when they must change their tears into gladness, as it was true that the greater part of their countrymen had been killed or enslaved by their adversaries, so that there remained but a small number, but that the arrival of the French would prevent their entire destruction, as their enemies, being allies of the Canouches (meaning the French), would no longer make war upon them, for which they should give thanks to the Great Spirit, whose anger was appeased, and at the same time assist the French with all their power, so as to keep their friendship; that they knew by experience that since the arrival of one of these warriors in their village [Beaurain says, de la Salle], the Naoudiches and other nomadic nations have made peace with them; that they were sad that their compatriots, who had been killed, could not take part in their common joy and add this pleasure to the glory of their lives, which had been sacrificed for the liberty of their country; he said to them on this subject such touching things that all these nations began to weep.

After this chief had ceased speaking, I informed myself, by the old men of these nations, of the nearest establishments of the Spaniards and savage nations on the west of which they had knowledge. They assured me that sixty leagues to the south was the village of the Nadocas, their allies, with whom the Spanish had a mission, and another with the Assinaïs, in the Amediche nation, south one-quarter southwest, seventy leagues from the Nassonites; that eighty leagues to the west, on the right bank of the Red River, were several nomadic nations who were at war against the Cannecy, a savage nation of New Mexico; that 100 leagues to the northwest there were powerful nations situated on the banks of a grand river, but that these countries are unknown to them

It is remarkable that these savages never mistake when they show the part of the world where a nation lives whom they know, and that, finding the direction by the compass, one is certain of their situation as to the distance; they count an ordinary day's journey, according to my observation, 5 leagues.

The 8th, I sent some canoes to my boats with food.

The 7th, I went in a canoe with M. Du Rivage to seek up the river a suitable place to build a habitation. We advanced 10 leagues to the former location of the Natsoo village. This place seemed very suitable to me, there being a fine hill projecting into the water, a suitable situation for a fort, below which the soil is excellent and suitable for raising wheat and all other grains. Then we saw vast prairies, admirable springs,

and many fruit trees. I should have fixed upon this place, with-
457 out the inconvenience of seeking further wild foods, upon which I must necessarily depend the first year. I therefore resolved to establish myself above the chief of the Nassonites to the left of the river, at a gunshot distance. As to the Cadodaquious, they are two leagues below the Nassonites and Natsoos, and the Natchitoches three leagues above, all in a line on the river. These nations are dispersed in different localities; they form no village amongst themselves; their reasons are that being far apart, their enemies can not destroy them all at once, the bad consequence of which is the cause of their destruction. Ten years ago there were 2,500 persons in these nations, which are to-day reduced to 400, who can furnish 200 warriors. In 1717 some families of Yatasses came to live in their village. These are persons who are fond of the French and the first to render them service. They were formerly established 56 leagues away, on the banks of the Red River; but the Chickachas having almost destroyed them, the remainder were compelled to seek refuge, part with the Natchitoches and the others among the four nations. It will, however, be very necessary to oblige them to return to their village, so that they may aid the boats coming up the river, and we might, for the security of that nation, leave with them a detachment of ten soldiers and a sergeant.

* * * * * * *

(P. 272.) The desire that I had to discover the nomadic nations of the Red River led me to form the resolution to send there M. Du Rivage, the famous geometer, whom I had brought with me from France. I sent with him four soldiers, six of my men, and eight Nassoos warriors to whom I made considerable presents for engaging in this service. I gave M. Du Rivage 1,500 pounds of merchandise to give to the nomadic nations from me, so as to form an alliance with them, well knowing that it was for the interests of the company to have them for allies, on account of their proximity to New Mexico. I instructed him to inform himself of the nearest Spanish dwelling, and to find if they know of these nations established to the northwest of the *the* Nassonites on the banks of a river, in which case he should do everything possible to conduct me a guide who could lead me thither. He left on his expedition on the 4th of June.

* * * * * * *

(P. 276.) The 12th there arrived six savages of the Canicon nation, with two women; their village is situated on the banks of the river of the Arkansas [a day's journey from Touacaro and other peoples who we think are the Mentos. Beaurain.] Our savages rejoiced greatly on their arrival, as it was the first time that nation had ever visited them. They sang them the Calumet and made them some presents.

The 13th, the chief of the Canicons, with his suite, came to see me; I was very friendly with him and made him eat with me. I gave him many presents; I would have had many useful conversations with him, but I had no interpreter. Those who might have served me on that occasion had gone with M. Du Rivage to discover the nomadic nations.

The 16th, several Nadaco savages arrived.

* * * * * * *

The 24th, a savage of the Oulchioni nation arrived.

* * * * * * *

The 29th, M. Du Rivage arrived from his trip with two savages of the Quidehais nation; he reported to me that 70 leagues to the west and
458 to the west one-quarter northwest, he had encountered a party of nomadic nations, who are the Quidehais, Naoudiches, Joyvan, Huanchané, Huané Tancaoye, by whom they had been very well received. He learned that they had just had a battle with a party of the Caney[1] nation, of whom they had the advantage; that the Caney composed a well-peopled village on the banks of the Red River, 60 leagues from the place which M. Du Rivage reached; that the Spanish were established among the Caney, where they worked to draw from the earth a very heavy material; that in time of high water we could go by the Red River to within three days' journey of these nations; that sometimes they have followed them by land up to their village, but that the Spanish had fired big guns at them (a term which they use to indicate cannons or swivel guns).

M. Du Rivage gave these nations the presents destined for them; he asked them, from me, to form a good union with the French, and when he asked them if they knew the nations situated towards the north on the banks of a great river, they assured him that they were their allies, and that the principal one of these nations was called the Touacara [Touacaro, Beaurain]. He then told them I desired to go there in order to form an alliance with them but that I needed a guide. Thereupon the chiefs deliberated among themselves and assured M. Du Rivage that they would find, within a moon, some one to serve me. These people are nomadic, with no fixed residence; they follow the buffalo which serves them for food, as does its skin for clothing. It is on their hunts that they are apt to encounter their enemies. In all, they form a body of 2,500 men; but they are scattered in bands the better to secure their subsistence. These nations are allied with the Quichuan [Quihohaun, Beaurain], situated two leagues from the Red River, on the left, up about where M. Du Rivage found the nomadic nations. These people are bellicose; they almost always have the advantage of their enemies, although inferior in number. The Tancaoyes are renowned above all others; the greater part of their chiefs are scarred with the arrow wounds which they have received. These nations and the Caney are so bitter against each other that the conquerors eat the conquered; they do not even spare the women and children. The arms of both are the arrow and the lance. The Caney have some swords, some coats, cloth, and hats, but they have no firearms, it being the inviolable law among the Spaniards to furnish them with none.

The advantage which the Caney have over their enemies is that they have fine horses, while the other nations have few, and still they were coming from the defeat of their adversaries. [Beaurain says: "The Canneey, whose principal village is that of the Quirirèches, have very fine horses."] In their camps, they form tents of buffalo skin finished like parchment; but in their marches it is strange that their dogs carry these houses on their backs.

It is to be observed that the chain of mountains which extends to beyond the Illinois begins among these villages in latitude 35° 30′, and that from these mountains to Santa Fe, the capital city of New Mexico,

[1] These savages came from destroying a party of the Caney nation with 11 villages established near the sources of the Red River, about where the Spanish have their establishments. (Beaurain.)

it is but 100 leagues over the prairies. The Presidio of Paral, so famous for its richness and its situation, distant only 40 to 50 leagues
459 from Rio Conchas, which falls into the Gulf of California, is situated, they say, in 33° 30′ of latitude, some leagues to the west of the river of the north and about 80 leagues to the southwest of the Caney. The latter ought to know of what importance it is to keep up the posts established on the Red River, particularly that of the Nassonites, which is but 120 leagues distant from the Caney nations in whose country the Spaniards find their gold.

* * * * * * *

I thought it would be to the interest of the king for me to set out to discover those nations said to exist to the northwest, so that alliances might be made with them to facilitate the means of penetrating into New Mexico and to the Padoucas nations, whence the Spaniards draw great wealth. The corporal had arranged with the Nadocas and Assinais for a dozen horses which he brought with him. I bought ten others from our savages; I loaded them with effects and food, and, the 14th of August, I set out with our two Quidehais guides, a Nassonite savage, MM. Du Rivage and de la Filoche, a soldier, two servants, and two negro's. * * *

We advanced three leagues west-northwest the same day. The 12th, we passed several prairies and country filled with vines; we made 6 leagues to the west ¼ northwest.

The 13th, in the same direction we advanced 5 leagues. We passed many oak and nut-tree groves; we camped on a pond.

The 14th, towards the northwest, we marched 6 leagues through a wood of beech, in which we commenced to find stony places. Then we fell into a great prairie, partly rocky, which continues towards the west along the river to the Caney village, established in New Mexico. We see from this point, towards the north, several chains of mountains.

The 15th, we made five leagues to the north-northwest. We crossed the prairie and camped near a "cross roads" formed by two trails; one goes to the west among the nomadic nations, the other to the northwest, which is that which we followed the next day.

The 16th, we made 5 leagues towards the northwest through a very pretty hilly country; we passed the night in a wood of beech.

The 17th, we remained in camp; our guides killed two cows and some deer; but the heat was so great that the meat would not keep more than two days without drying. As this takes time, we could not remain for it.

The 18th, we advanced along several hills and by beautiful prairies and saw slate quarries and many pieces of rock crystal; we made 4 leagues towards the north-northwest.

The 19th, we continued to wind along several hills; at ten o'clock we quitted the shortest road leading to the Tonacaras, because of the difficulty of the mountains, to follow that to the west; at six o'clock, we descended a high hill, at the foot of which we camped, having made 9 leagues towards the west.

The 20th, we passed mountains, very difficult because of the large rocks which we encountered, and the ups and downs over which we were obliged to pass. At ten o'clock we found a pond among the rocks; at noon we stopped near a lake at the foot of a mountain; at five o'clock we camped near a marsh after having made 7 leagues towards the north one-quarter northwest.

460 The 21st we followed a small trail, which wound through several hills; at nine o'clock our guides killed several deer; while they were dressing it I killed a very large bear; we stopped near a brook among the rocks. At eleven o'clock a party of thirty Nassonite and Nadsoo warriors joined us; they were returning to their village for fear of a party of the Anahous (Osage) nations, whose fire they had seen. These Nassonites had been for fifteen days on the hunt, during which time they had killed 46 buffalo; this day we advanced 3 leagues towards the north-northwest.

The 22nd our guides, alarmed by a party of Anahous, who ranged in these parts, wished to quit us; we had to use many remonstrances to persuade them to continue our journey. We made a league and a half towards the northeast, after which we turned to the left and passed several hills and prairies. At four o'clock we were on a little river flowing towards the west. It winds much and falls into the Red River below the Cadodaquious. We entered, afterwards, fine prairies, enclosed in mountains[1] which pass by the Illinois; at this place they are about 30 leagues wide from north to south, and from appearances there are metal mines there, judging from the different colored earths and marcassites which are found and the assurances given by the savages. The route this day was northeast 1/4 north 5 leagues.

The 23rd we advanced into the prairie northwest 1/4 north 2 leagues, after which we passed a small river, flowing south, which winds between many mountains and falls into the river above the old Nadsoo village. We camped then to rest our horses, who were diminished by two, whom we were obliged to abandon, as they could advance no further.

The 24th we continued to advance in the plain to a very thick wood near a brook over which we must go; in the afternoon we entered mountains very difficult to pass, because of the thickness of the woods and the overturned rocks which we encountered there, in addition to which the valley was always ascending; two of our horses perished there. At five in the evening we camped in this valley near a brook, at the foot of many mountains.

* * * * * * *

We made that day five leagues towards the northwest.

The 25th we mounted to the summit of the mountain. Having advanced a league, we came to prairies and valleys very agreeable to the view. We there killed three buffalo. That day we made three leagues towards the northwest.

The 26th, in the morning, we perceived a troup of twenty savages; our guides thought they were lost, having recognized them for Anahous. These are the Osages. * * * Although friends of the French, this nation is perfidious, and it is well to be on one's guard against them. This party approached within bow-shot; our savages wished to fly, but I told them if they did this they were lost; that we alone could save them. We kept a brave front, and the Osages appeared, on their part, to intend to attack us. In this perplexity I advanced towards them with three well-armed Frenchmen, one of whom was the soldier of the garrison, who knew several savage languages. The enemy, surprised

[1] Which is the same chain which leads to the mines situated near the saline of the Illinois. (Beaurain.)

461 at our hardihood, presented a calumet of peace. They then explained that they knew our nation and that we were their friends, but that they proposed to scalp our guides. I opposed their wishes and told them that if they persisted in their design I should find myself forced to fight them. This resolution changed their sentiments; they consulted among themselves and concluded to leave us alone. I made them several presents, after which they withdrew without approaching our guides, who remained on guard with the rest of the people. This same day we found two brooks, some hills and prairies, and made three leagues to the northwest.

The 27th we entered into a fine country, where we perceived a great number of deer. At ten o'clock we passed a small arid mountain; then a brook, near which we rested to pass the heat of midday. At three o'clock we perceived several camping grounds, of which the fires were still lighted, and some signs of horses. Our guides told us that these might be a Caney party. As that nation would have given us no better quarter than to our savages, and as we had reason to fear becoming their prey, we marched on guardedly. Having advanced a league and a half, we crossed a lake on some rafts; one of our horses fell into the water with his load; he was drowned, but we saved the effects which he carried. We camped on the other side of the lake. At five in the evening a Naoudiche savage, who was on the lookout, recognizing us as allies, came to warn us that the camps which we had found were of a Caney war party of sixty men, for whom we should be on our guard; that 6 leagues further on, on one of the branches of the river of the Onachitas, was the head chief of the Naouydiches and forty warriors, who were going to the Touacara village to see the French chief. That day we made six leagues towards the northwest.

The 28th we marched through a beautiful prairie, diversified with hills and thickets; we encountered a prodigious quantity of buffalos and a great number of wolves. They are small and not bad. We also saw many partridges, woodcock, and lapwings. In the evening we climbed to the summit of a rock, after descending which we camped near a small lake; the same night my English dog strayed away, which caused me great regret; we made 3 leagues towards the north ¼ northeast.

The 29th we advanced three leagues towards the north-northeast and crossed a rather difficult wood and several small rocky mountains. We afterwards entered on the prairies, then a very thick wood, in which our guides lost us. After a thousand embarrassments we found ourselves on the western branch of the river of the Onachitas, which separates 20 leagues below from the other branch, which flows from the west-northwest; this river flows into the Red River, 14 leagues from the mouth. At two o'clock in the afternoon we joined the Naouydiche party; * * * (p. 287). The head chief of the Naouydiche and his warriors assured me of much friendship and in that place sang me a calumet, which obliged me to make them new presents. I showed them the marcassites which I had gathered in the mountains. They assured me that in the same chain, to the northeast of where I had passed, they knew of many very heavy metallic stones.

62 The 31st, we marched with the Naouydiche party. We found a very thick wood, on leaving which we entered one less dense; hen some prairies, at the end of which we passed a wood, on the other de of which we stopped on the west-northwest branch of the river of the achitas. This day we made 6 leagues towards the north ¼ northwest. The 1st [September, 1719], we crossed the branch of the river, in hich there were, at the time, two or three feet of water. We followed trail to the right, along a rather thick wood, which lead us to some ights. We reached some prairies and valleys, filled with large shells, ade after the fashion of ricados, in which I found a pearl of very beauful water. I showed it to the Naouydiche chief. He assured me that me days above the villages, to which I journeyed, they found very large es in shells which they fished from the river. We passed near this ace a brook, after which we entered a vast prairie lacking water. At ven in the evening we stopped near a little reservoir of water which found in a hollow. We advanced that day seven leagues to the north. The 2nd, we continued to traverse great prairies, in which we found ooks among thickets, after which we found several abundant coal mines. e passed the night near a lake in a hollow. We made that day 8 agues to the north.

The 3rd, we continued to advance into the prairie near a brook, where e grand chief of the Tonacara nation, accompanied by six other chiefs nations, waited upon me, having had news of my arrival from some aouydiches, who had gone ahead. They were mounted on very beautiful rses, saddled and bridled after the Spanish fashion. Our first complients were passed by demonstrations of friendship, after which the nacara chief said to me, through a Naouydiche, who spoke the Nasnite language, understood by a soldier of the garrison, that the novelty seeing in their country a nation to them unknown could not but surse them, but that the freedom with which we came assured them of r sincerity; that they wished to make an alliance with us, and that our emies should be their enemies.

I represented to them that the chief of my nation, of whose message I s the bearer, had sent me among them to assure them of his protecn and of his friendship, and to offer them help against their enemies; t I accepted, in his name, the alliance which they proposed to me, and t I would take care to inform him of their good intentions. These efs had carried with them bread made of corn mixed with wheat and e dried meats, with which they regaled my troup. Then I mounted a handsome horse which they had brought to me, and we marched in mpany to go to their villages. The country through which we passed s unique. At a gunshot from their habitations we crossed a beautiful ook, running through an open wood, above which are the villages, situd on hills along the southwestern branch of the river of the Alcansas.[1] ese villages make but one, the houses being joined to each other, rung from east to west for a league in the most beautiful situation that

[1] Which is called Imaham, at the high latitude of 37° 45'. Distant from the Nassonite 89 leagues in a straight line to the north. (Beaurain.)

one could see. The nations in these establishments are the
463 Touacaras, Toayas, Caumuches, Aderos, Ouistas, Ascanis, Quataquois, Quicasquiris, and Honechas. They might furnish six thousand persons of both sexes.[1]

On arriving at this village, the chiefs who had accompanied me made me dismount at a gunshot distance from the Touacara chief. Then two head men carried me on their shoulders, the face turned towards the earth. They then put me on a buffalo robe, stretched on the floor. Then all the principal Indians made a circle about me, and each of them put his hand in mine as mark of his good friendship. When my packages were brought into a tent I made my present to the Touacara chief. It consisted of several guns, some powder and balls, some axes, some knives, and several ells of goods. Although he was surprised to see so much merchandise, he showed, however, no emotion, keeping an air of gravity, although he was but about twenty-five years old. To mark his gratitude, he gave me a crown of eagle feathers, trimmed with little birds of all colors, with two plumages de calumet, the one of war and the other of peace, which is the most considerable present these warriors can make.

The 4th, the eight nations sang me the calumet. There were 7,000 persons,[2] including some of the nomadic nations, who had come to these villages expressly to sing to me the calumet. The Toajas and Ascanis chiefs, old men of more than sixty years, conducted the ceremony of this festival. They handled the plumage with an infinite address. They made harangues, "in which they exposed the advantage of our alliance; that we were a warrior nation, who feared no enemies on the way, although we were few in number. Besides, the commerce which they would have with us would be advantageous, since we brought them arms to defend them against their enemies, and many sorts of merchandise suitable for their uses; that they should feed us well so that we might leave them with a full stomach." After they had held these discourses, all the chiefs and head men of these nations recounted to me all their prowess, and told the number of all the scalps which they had taken. Tired of this ceremony, which lasted from eight o'clock in the morning until two hours after midnight, I took the liberty of going to repose and of leaving M. Du Rivage in my place, knowing well that this festival would not finish until the following day at two o'clock in the afternoon, during which the savages would not discontinue their chants nor their dances of the calumet, so that they would be so fatigued and their voices so hoarse that they could hardly be heard.

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[1] These nations are the Touacaro, Toayas, Caunouche, Ardeco, Ousita, Ascanis, Quataquon, Quirasquiris, and Honechas. It is thought that they are the Mento. They may number together 4,000 persons. They are allies of the Panionassa, who are 50 leagues away to the north. Though they are at peace with the Osages, they are cautious of them. This nation is situated 40 leagues to the northeast of them. They are also allied with the nomadic nations established on the upper Red River, but they have a cruel war with the Canecy, the Padoucas, and with some of the Panis villages. They know the Aricaras, established near the Canses in Missouri. According to the report of the old savages, there is a white nation, which trades in metals with some of the Padouca villages, situated fifteen days to the west-northwest; but they rarely go into those countries because of their enemies, not going farther than the mountains, where they find rock salt. They assure me, likewise, that in high water the river was navigable to the neighborhood of the Panionassa, much below their village. But what is peculiar, none of these nations make boats, not knowing how. (Le Chev. de Beaurain.)

[2] 5,000 persons. (Beaurain.)

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464 The 5th the chiefs came to take me[1] from the place where I reposed on a buffalo robe; they carried me to the calumet, which they sang under a shed covered with leaves on account of the heat of the sun; they painted my face with ultramarine blue; then they threw at my feet thirty buffalo robes, many pieces of rock salt, of cakes of tobacco, of vert-de-gris, and some little ultramarine. They added to these presents a young slave of the Cancy nation, aged eight years, of whom they had eaten a finger of each hand, indicating that he was one day destined to serve for the food of these cannibals. Then the chief of the Toajas, which is the most numerous nation, told me that he was sorry to have only one slave to present me; that if I had come a moon sooner he would have given me seventeen of the same nation, which they had eaten at a public feast. I thanked him for his good intentions, regretting myself not to have arrived in time to have saved the lives of these poor unfortunates, by means of which we could have made peace with their nation by sending them home. I gave these nations the presents which were destined for them, amounting to nearly 1,500 pounds.

The 8th I assembled the principal chiefs of these nations to inform myself of the situation of the river of the Alcansas, of the nearest settlement of the Spaniards, and of the commerce which they had with the Padoucas. To which they replied to me that their river formed two branches below their village; that that on which they lived rose [lit., ascended] towards the setting sun among the villages of the Spaniards and Padoucas; that the Spaniards obtained yellow iron from those countries, slaves, and some peltries; that the country of these white men was full of cows and domestic deer; that their prairies were covered with horses and other animals which bore wool; that the Padoucas were a numerous nation whose villages extended a long distance to the north and to the north-northwest; that the Spanish were not allied with all this nation, and that when they went to trade at some distant village, over towards the Aricaras, they were often attacked by the Panis nation, an enemy of the Padoucas. They told me likewise that the Anahous and Missoury, to whom they gave another name, made war upon them, but that they were allied with the two villages of the Ascanis and Ousita, situated to the north-northwest of their home, sixty leagues away; that there were seven famous villages of the Aricaras to the north-northwest, 120 leagues away, with whom they were allied. I think that the Aricaras form part of the forty-five Panis villages.

They confirmed the impression that in the upper river, at several days journey, they found rock salt, vert-de-gris, and ultramarine blue, but that there was risk in going there because of the Cancy, who passed

[1] The 5th, in the morning, the chief came to take him from the place where he had slept, while the headman had watched all night, chasing away, with eagle plumes, the flies which might incommode him. They carried him anew on their shoulders to the calumet, which was sung under a shed that they had prepared and covered with leaves on account of the heat of the sun; they washed his head, his feet, and his stomach, and painted his face with blue and red and put on his head a bonnet of eagle plumes, after which they continued their haraugues and their chants. A little later they threw at his feet several buffalo robes, dressed with the brains of these animals, and likewise made him presents of several pieces of rock salt, of cakes of tobacco, and of stones of color, green and blue. * * * To which they added a young Canneey slave, eight years old, from the Quirroche village. (Le Chev. Beaurain.)

465 those places in going to their wars against the Paducas. One of the chiefs assured me that there was a hill six days from these villages where there was yellow iron that the Spaniards esteemed much. He gave me a stone that he by chance had in the camp.

My design was to leave with this nation three of my people until the Council of Louisiana had decided on that establishment, but I changed my mind when I found that these peoples quit their village in the month of October to go on their hunt, whence they only return in the month of March to sow their corn, beans, and pumpkins, upon which they feed in the summer. The ground in this locality is very fertile; it is black and light. The country is open, and it is only in little districts that we find thickets of oak, nut trees, and mulberries; the prairies are high and suitable for the culture of wheat and other grain.[1] The savages here cultivate a prodigious quantity of tobacco, which they press into small cakes after having powdered it.[2]

The chase is abundant not only for buffalo, bears, and deer, but generally for all the other animals. The river furnishes very good fish, and although the waters were altogether low, there remained a stream two or three feet deep.[3]

These nations raise very fine horses and would be unable to do without them either in war or the hunt; they have saddles and bridles which are very well made, and even wear leather cuirasses, which are arrow proof;[4] their cabins are raised, the greater part built of straw and reeds, coated with earth, forming a dome; above the door each chief of the nation has his arms painted on a piece of round leather; they represent the sun, the moon, and the stars, and different animals.[5]

EXPLORATION IN ARKANSAS—DEC. 10, 1721, TO MAY 25, 1722.

From "Journal of the Voyage in Louisiana" of Bernard de La Harpe. National Library of France. (VI Margry, 365.)

"The 9th (March, 1722) I sent one of my canoes to the village of the Arkansas, on the Mississippi, to trade for food and bring to me one Saint Domingue, a soldier, to serve as interpreter on my trip. The village of the Arkansas is so called because this nation came, as did the Zautoouys, from the direction of the Missouri, from the Kansas nation; they have taken, since then, that of Ougapa. It is situated on the banks of the Mississippi, in an isolated place. * * * The village of Tourima, or of "Potatoes," lies a league to the west of that of the Ougapa, and the Touginga are a league to the north of the former. These three villages are composed of four hundred persons in all; the principal chief is he of the Ougapas. The Zautoouys, likewise, recognize him as their chief; their language is the same and much like that of the Osages."

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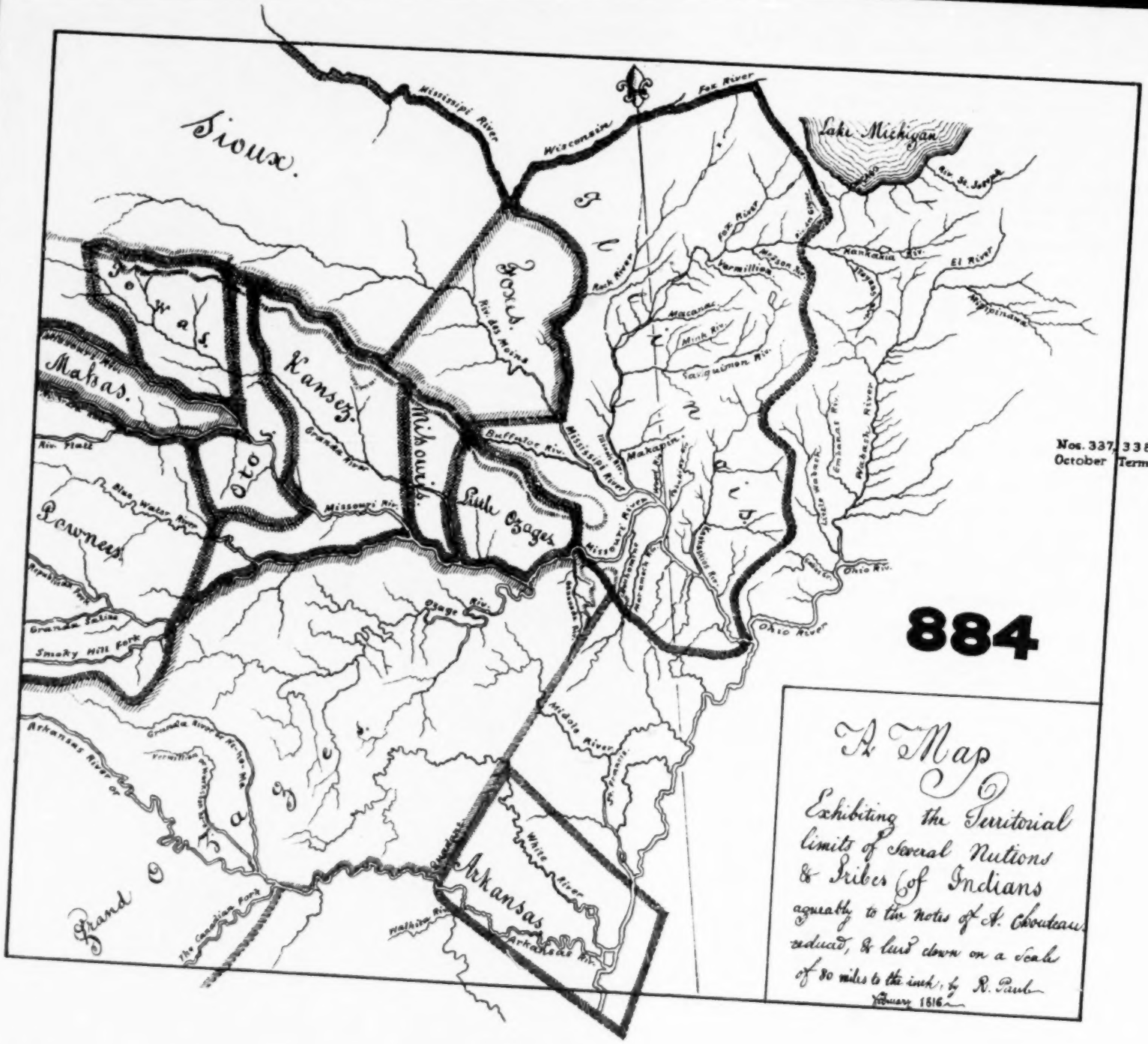
[1] He found there some rosemary, which is the only place where it has been found. (Journal historique, by Chev. de Beaurain.)

[2] Or break between two stones. (Beaurain.)

[3] But the quantity of rocks with which it is filled render navigation very difficult above the villages; so that it can only be undertaken from March to August. (Beaurain.)

[4] They also use shields and even vests of pressed leather, which are a great protection. (Beaurain.)

[5] What is peculiar is that these nations speak different languages, although making but one village. (Beaurain.)



Nos. 337, 338 & 339 October Term 1899. | Page 467.

UNITED STATES

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468 *A report of the name*
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amount of presents, other
Missouri Territory. (St.

Names of Indian tribes.	Probable No. each tribe Indians	
	No. of men.	No. of sou
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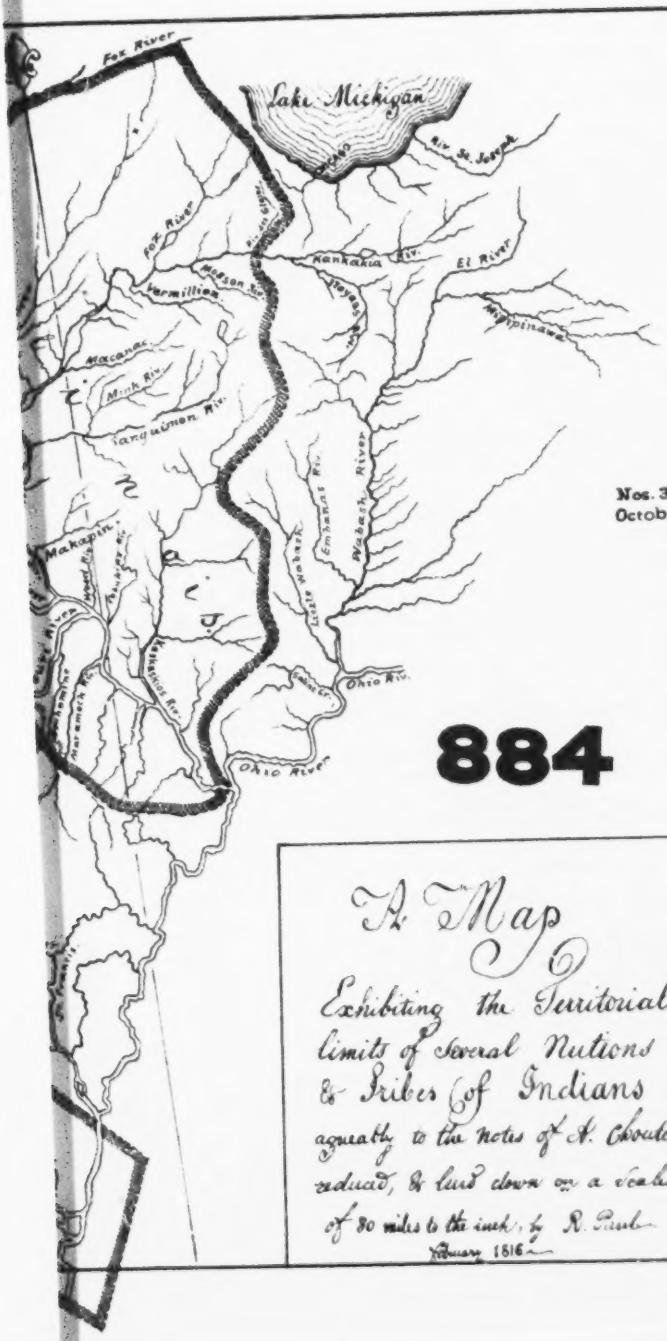

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A Map

Exhibiting the Territorial limits of several Nations & Tribes of Indians agreably to the notes of A. Chouteau reduced, & laid down on a scale of 30 miles to the inch, by R. Paul

February 1816

466 This map accompanies a certified copy of the notes of August Chouteau, of February 21, 1816, on file in the Court of Claims, a printed copy of which is contained in this record.

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

(Here follows map marked p. 467.)

468 *A report of the names and probable number of the tribes of Indians in the Missouri Territory, the amount of annuities paid them, the amount of expenses of provisions issued to them at the distribution of their annuities and on every other occasion, and the amount of presents, other than provisions, which ought to be distributed among them, Missouri Territory.* (*St. Louis, November 4th, 1816.*)

Names of Indian tribes.	Probable No. of each tribe of Indians.		Places where the tribe reside or rove.	Amount of annuities paid per annum.	The annual amt. of expenses of provisions issued and delivered to the tribes on every occasion.	The ant. of presents, other than provisions, which ought to be delivered among the tribes.	Total amount of provisions, presents, and annuities.
	No. of men.	No. of souls.					
Quapaws	340	1,060	In 4 small villages on the south side of Arkansaw River.	.....	$125	$1,000	$1,125

WM. CLARK.

NOTES.

The Indians of North America have always lived in a state of nature, deriving their subsistence from the wild animals of the forest, it follows that as their numbers multiplied and game became more scarce they found it necessary to divide themselves into tribes, and separating themselves from one another to seek new situation more favorable for the supply of their wants. The frequent recurrence of this necessity in a long succession of time has doubtless placed many tribes of the same nation at distances very remote from each other, and the traditions of their ancestors becoming less and less interesting to every new generation, have frequently been wholly forgotten, or too imperfectly recollected to furnish any satisfactory account either of their origin or the various migrations of their nations, and although it is not difficult in many cases to distinguish the different tribes of the same nation by a careful examination of their language, and sometimes by the physiognomy, yet after a separation of many years, and in the meantime mingling themselves with strangers, even these characteristic indications may be lost or become too equivocal to be relied on.

From these causes it frequently happens that different tribes claim the same land, and sometimes a tribe alone claims exclusively a country which belonged in common to the whole nation from which they originated, and hence it is difficult at the present day to ascertain the precise limits of the different nations of Indians who have inhabited the western parts of North America which now belong to the United States. The

following extracts from notes which from time to time I have made for my own satisfaction during a long residence in this country, and many years' intercourse with the Indians therein mentioned, I think may, however, be relied upon, for their general correctness. The first discovery of Chicago River Des Plains, and the communication of the Illinois River with that of the Mississippi, was made in 1672 by one Joliet,
469 a Canadian voyager, whose name will most probably descend to distant posterity from the circumstance of its having been given to an uncommonly beautiful elevation of ground situated in a large level prairie on the borders of the river Des Plains, which has been improperly called Chicago, about forty-five miles from the mouth of Garlick Creek, or the real Chicago on Lake Michigan. Mount Joliet, by which name it has long been called, is nearly one mile in circumference and about three hundred feet high, and, like many others mounds to be found in this section of America, was doubtless erected by the aborigines of the country. From the imperfection of the arts among those people at that early period and the consequent disadvantages under which they must have laboured, those works must have consumed much time and required great perseverance, but the inducements or objects for which they were erected can not be certainly developed and will most probably remain a subject of conjecture and speculation in consequence of indications of an opposite tendency, and various and contradictory traditions concerning them—and for the present I forbear to give my own opinion on this subject because it is not necessarily connected with the objects for which these notes are furnished.

The Illinois nation of Indians in 1673 was more numerous than any other one which then inhabited the country now included within the territories of Illinois and Missouri, and consisted of the tribes of Mascoutins, Miamies, Peorias, Michegamias, Cahokias, Kaskaskias, and Tamaroas, who possessed all the country within the following boundaries, to wit: Beginning at the mouth of the Ohio, running thence a NE. direction to and with the dividing ridge that separates the waters of the Wabash and Ohio from those of the Kaskaskias and Mississippi, thence along said dividing ridge to the head of a branch of the Wabash, thence nearly a north course to the mouth of river Des Plaines, thence including all the waters of said river, thence nearly a NW. line to Fox River of Green Bay, thence up Fox River to its sources, thence in a direct line to the Ouisconsin, thence down the Ouisconsin to its mouth, thence down the Mississippi to a point opposite the mouth of river Des Moins, thence west to the dividing ridge that separate' the waters of the Missouri and Mississippi nearly opposite the headwaters of Buffaloe Creek, thence nearly SE. along the said ridge to a point N. of the mouth of the Gasconade (neess-cou-shin-gaw), thence southwardly to the mouth of the Gasconade, thence to and with the dividing ridge that separates the waters of the Gasconade and Missouri S. eastwardly to the negro fork of Maramcck (or Fish) River, thence eastwardly to the mouth of the Ohio so as to include all the Prairie of Tawapatia.

Within this extensive tract of country all those tribes were settled. The Mascoutins in the northern parts thereof, the Miamis near Chicago, the Peorias on the borders of Lake Pemitewee (now called Peoria), the Michegamias on the right bank of the Mississippi at the spot where now

stand' the flo'rishing town of St. Louis, the Cahokias on the left bank of the Mississippi at the village which still bears that name, the Kaskaskias on the Kaskaskias River about twelve miles above its confluence with the Mississippi, and the Tamaroas on the Kaskaskias River about thirty miles above the village of the Kaskaskias.

470 Though separated by a considerable distance between them, those tribes remained in one general confederacy, making a common cause and uniting their joint efforts in all the wars in which they were engaged against their common enemies, who on the north were the Sioux, Chippawas or Orgeboas, Iroquois, Hurons, Episingles, Algonkins, Ottawas, Pottewattomis, Menomences, Sacks and Foxes, and on the south were the Choctaws, Cherokees, &c., and notwithstanding the very formidable adversaries who continually assailed them on every side they would have been able to have maintained their ground had it not been for the introduction of ardent spirits among them, in which they indulged to such excess as in a great measure contributed to destroy both their phisical and moral capacity to contend efficiently with so many powerful opponents. At length, however, the Mascoutins and Miamies, being the most exposed, were so constantly engaged in bloody conflicts with their neighbours and were so harrassed by their predatory incursions that they removed to a river in the State of Ohio (which since then has borne the name of the latter tribe). Encouraged and emboldened by the emigration of those two tribes, the northern hive of barbarians united their strength, and, redoubling their exertions, waged continual war against the Peorias, who, being deprived of their former assistance and protection and discouraged by repeated disasters, finally moved down to the mouth of the Illinois River; but even here their vindictive enemies soon pursued them—eventually compelled them to remove lower down the Mississip'i to a prairie, on which Fort Chartres was afterward built, to which place the Michigamias and Cahokias, being also compelled to remove from similar causes, soon afterwards followed them. Here those three tribes concentrated their whole forces, built a strong fort, and, having three thousand warriors, were able successfully to oppose their enemies, who, notwithstanding, continued to harrass them. But while by their change of situation they avoided the destructive tomahawks of their former foes, they acquired a greater facility of obtaining ardent spirits, which proved still more injurious to them, for, besides the diseases which arise from unlimited indulgence in the use of ardent spirits, they became so infuriated with it that they frequently killed one another, and instances have been known of whole families having been destroyed in the mutual retaliations of murders that were produced by intoxication.

The Kaskaskias and Tamaroas, having had the same enemies to contend with and being victims to the same vices, were also very nearly destroyed in the same way. So that of the once great and powerful nation of Illinois there remains (with the exception of the Mascoutins and Miamies) only about seventy persons, including men, women, and children, near Kaskaskias, and a few strag'ling Peorias about St. Genevieve. There is, however, a tradition amongst those Indians that before they had ever seen a white man a band of their nation, who was settled at the Saline, near St. Genevieve, where they had a large village, moved to the

Wabash country, since which time no accounts have ever been received concerning them.

That the Illinois Nation owned the tract of country above described as belonging to them neither my own knowledge nor the information which I have received in the course of my residence in this coun-
471 try will permit me to doubt; and, independent of the treaty concluded at Vincennes on the 13th of August, 1803, between the United States and the remnant of that nation, I have never seen or heard anything that could create a question upon the subject. In that treaty are contained the following words:

"The Kaskaskia tribe of Indians, so called, but which tribe is the remains and rightfully represents all the tribes of the Illinois Indians, originally called the Kaskaskias, Michigamias, Cahokia, and Tamarois, relinquish and cede to the United States all the lands in the Illinois country which the said tribe has heretofore possessed (excepting a very small part thereof), and declare the boundary line of said claim to be as follows: Beginning at the confluence of the Ohio River and the Mississip'i; thence up the river to the mouth of Saline Creek, about twelve miles below the mouth of the Wabash; thence along the dividing ridge between the said creek and the Wabash until/ it comes to the general dividing ridge between the waters which fall into the Wabash and those which fall into the Kaskaskia River, and thence along the said ridge until/ it reaches the waters which fall into the Illinois River; thence in a direct course to the mouth of the Illinois River, and thence down the Mississip'i to the beginning."

From the description of their country as here given it might be construed into an admission that their claim never extended beyond those boundaries. But either they cared nothing about the country they described, and were intent only on receiving the stipulated equivalent, or they must have been so depressed by the variety of their misfortunes and so stultified by their intemperance and debaucheries as to have totally forgotten all the traditions of their ancestors. It is worthy of remark that even the very spot where the village of Peorias stood, and at which the tribe whose name it bears actually long resided, is not included within the above-mentioned cession. And in opposition to the inferences which this treaty would seem to justify I beg leave to refer to the sale of two tracts of land which a part of those tribes sold on the 5th July, 1773, to Wm. Murray & Co., "one of them beginning at the mouth of Heron Creek, being about a leag'e below the mouth of Kaskaskia River; thence northward of east course in a direct line back to the Hilly Plains (8 leagues); thence the same course in a direct line to the Crab Tree Plains, 17 leagues; thence the same course in direct line to a place known by the name of Big Buffaloe Hoofs, 17 leagues; thence the same course in a direct line to the Salt Lick Creek, 7 leagues; thence crossing the said creek about one league below the ancient Shawnese town in an easterly or a little to the north of east course in a direct line to the river Ohio, 4 leagues; thence down the Ohio to the Mississip'i to the beginning, 33 leagues. The other beginning at a point on the Mississip'i opposite the mouth of the Missouri; thence up the Mississip'i to the mouth of the Illinois; thence up the Illinois to Chicagou or Garlick Creek; thence nearly a northerly course in a direct line to a certain

place, remarkable, being the ground on which an engagement or battle was fought forty or forty-five years ago between the Peorias and Fox Indians, 50 leagues; thence by the same course in a direct line to two remarkable hills close together in the middle of large prairie, 14 leagues; thence a north of east course in a direct line to a remarkable spring,
472 known by the Indians by the name of Foggy Spring, 14 leagues; thence the same course in a direct line to a great mountain to the northward of White Buffaloe Plain, 15 leagues; thence nearly a southwest course in a direct line to the point of beginning, about 40 leagues."

Whatever may be the force and effect of these sales, they at least afford strong corroborating testimony that those Indians then considered their claim much more extensive than it is represented to be in the treaty above referred to.

After the tribes of Mascoutins, Miamies, and Peorias had abandoned their residences in the delightful country which they had inhabited, it remained unoccupied by any particular tribe till the year 1743, when a part of the Pottowatimies who resided near Detroit, together with some bands of Ottawas and Chippewas, removed to it and settled themselves near Chicago and on some parts of the Illinois River, and have continued in the uninterrupted possession thereof to the present time. This possession is presumed to have been taken conjointly by those three tribes, in consequence of their having formerly, at Michilimakinac, entered into an alliance, offensive and defensive, with all the solemnities and ceremonies usual among savages on such occasion; and of their having under that alliance contributed their joint exertions in expelling the Illinois Indians from that country which they now claim by right of conquest. It appears, however, by the treaty concluded at St. Louis, of the 3th November, 1804, between the United States of the one part and the Sacks and Foxes of the other, that the latter ceded to the former the following tract of land, viz: "Beginning at a point on the Missouri River, opposite to the mouth of the Gasconade River, thence in a direct course so as to strike the river Jeffreon thirty miles from its mouth; thence down the Jeffreon to the Mississipi, thence up the Mississipi to the mouth of the Ouisconsin and up the same to a point which shall be thirty-six miles from its mouth in a direct line; thence by a direct line to the point where the Fox River (a branch of Illinois) leaves the small lake called Sakaegan (Liar), thence down the Fox River to the Illinois, and down the same to the Mississipi."

This cession includes the land on the Illinois which is claimed and occupied as aforesaid by the Ottawas, Chippewas, and Petowatomies, who state that they never heard of that sale till the latter part of the year 1815, when they immediately sent a talk to Gov'r Edwards, and enclosed an address to the President of the United States, asserting their own right, denying that of the Sacks and Foxes, and requesting that the title should be investigated. They contend that the Sacks and Foxes contributed but little to expel the Illinois Indians from any part of their possessions, and that whatever claim the Sacks and Foxes may have to the northern part thereof, they can have none to that which lies on the Illinois River, as they never occupied any part of it, nor had ever pretended to set up any claim in opposition to that of the Ottawas, Chippawas, and Potowatomies.

The Sacks formerly resided near Detroit, but being compelled by a war with the Hurons, who were assisted by the French, to abandon their native country in the year , they moved to Winabago Lake, where they took refuge among the Foxes. There they were again harrassed by the French and some of the northern tribes of Indians. The Foxes, who had afforded them their hospitality, found also themselves
473 engaged in a war with all the enemies of the Sacks, and, at length, these two tribes, finding it difficult to resist the attacks to which they were continually exposed, left their villages and removed to the Ouisconsin, on the left bank of which they settled. Here they were again besieged in the year (———) by the French and northern Indians, who overcame them, killed a great many of their men, and completely routed them. Those who escaped ran to the prairies where the branches of Rock and Fox rivers interlock, and there hastily erected a fort, but where soon afterwards again so closely besieged by the French and Indians (among which were the Illinois) that they were reduced by famine to the last extremities, all hopes of escape failing them, and seeing no other way to extricate themselves, two of their principal chiefs—La Biche (the lap dog) and La Peau Blanche (the white skin)—caused their arms to be tied, took a white stick in their hands, and, singing their death songs, presented themselves with the utmost humility to their assailants and earnestly begged for life and peace, which were indeed granted them by the French commanding officer, but upon hard conditions, which were imposed with the consent of all the Indian chiefs who composed a council that was held for that purpose. The peace thus concluded put a final end to the war and all controversies between the French and northern Indians of the one part and the Sacks and Foxes of the other part; but it eventuated in those latter tribes entering into the alliance that was formed to destroy the Illinois Indians, who, as has been already mentioned, found the combination against them too powerful to be resisted. The Sacks and Foxes, finding these Indians compelled to leave their country and in no situation to prosecute the war, left their village on the Ouisconsin, gradually descended the Mississippi, and in 1764 settled on Rock River, twenty-one years after the Potowatomies and their allies had settled on the Illinois River. The Foxes, or rather a band of them, also removed, in the same time, to a place called the Spanish Mines (Dubuque's), and no other tribe having opposed them they have for a long time continued in the uninterrupted possession of that tract of country which is bounded on the east by the Mississippi River, on the south by the country of the Illinois Nation, on the west by the dividing ridge that separated the waters of the Missouri and Mississippi rivers, and on the north by the country of the Sioux.

No other of the northern Indians are known to set up any claim to the lands of the Illinois Nation except the Ottawas, Chippawas, Potowatomies, Sacks, and Foxes; and if the circumstances above mentioned give them a right to that country I can see nothing to prevent the Hurons, Episingles, Iroquois, Menomenies, and Sioux from hereafter exhibiting their claims by right of conquest, the latter tribe in particular having contributed more than any other to drive the Illinois Indians off their lands.

That part of their original possessions which lies between the Missouri and Mississippi rivers as high up as the mouth of River Des Moins has never been occupied by any Indian tribes since the Michigamias left it, which was before the Sacks and Foxes settled on the Ouisconsin. From the first settlement of this country the last-mentioned tract of land was used by the French inhabitants as a hunting ground until the repeated thefts and depredations upon their property by the Little Ozages, whose land was adjoining that tract, compelled those French hunters to abandon it.

474 The Sacks, Foxes, Towas, and some other Mississippi tribes have of late years been in the habit of hunting there, but that alone can not give them any right; for if it could, the French people having been the first occupants in that way, after the Michigamias the right would clearly rest in the United States by virtue of their purchase of this country.

Of all the nations residing on the upper parts of the Mississip'i and Missouri rivers, the Sioux are greatly the most numerous and powerful, in consequence of which they have a great ascendency over all the other tribes; and never fail to take advantage of and abuse their power, whenever temptation and opportunity present themselves.

This nation is divided into tribes consisting of the Tetons, Sesetons, Antowans, Sioux of the Leaf, Sioux of Bois Crule (or burnt wood), Yanctons, Sioux of the Lake, Sioux of the Prairies, and Moingonas.

Those tribes have no fixed villages, but lead a wandering life, and are sometimes travelling through their immense prairies, at other times on the banks of the Missouri, Mississip'i, St. Peters, and other rivers which flow through their extensive country, changing their position with the different seasons of the year, and as either their wants or inclination induce them to pursue the different kinds of game with which their country abounds.

Living under one general confederacy, free from all jealousies of each other, pursuing the same object and being identified in the same interest, these tribes have uniformly preserved a national character; in peace they live together in the utmost harmony and cordiality; in war they are always united against adversaries, the cause of one being always considered by them as the cause of all.

Their country is bounded as follows, to wit: Beginning at a point opposite the mouth of the Ouisconsin; thence southwestwardly to the dividing ridge that separates the waters of the Mississip'i and Missouri rivers; thence along said dividing ridge to the waters of the river Des Moins; thence southwardly to the Little Sioux River, and down the same to the Missouri, and thence up the latter river to a very distant point which can not be specified with entire accuracy; thence to the Mississip'i River supposed to be somewhere about Red Lake, which is much frequented by the Sioux of the Leaf, and thence down the Mississip'i to the beginning.

The Ozages consist of the tribes of Grand Ozages, Little Ozages, Kansez, Mahas, and Arkansas; the country of the Grand Ozages is included within the following boundaries: Beginning at the mouth of the Gasconade River, ninety miles above the confluence of the Missouri and Mississip'i; thence with the boundary line of the Illinois country as before

described to a point nearly opposite the head waters of Bonhomme Creek; thence southwestwardly to a certain place called the Quadrant on the Arkansas River; thence up the Arkansas River to a point a little below the Canadian (or Ne-bra-la Fork thereof); thence including all the waters of the Arkansas River to its source in the mountains which separate all the waters of the Mississip'i from those of Rio Nel Norte; thence pursuing the general range of those mountains so as to include all the several branches of the Arkansas; thence eastwardly to and with the dividing ridge that separates the waters of Arkansas and the Smoky Hill Fork of Kansez River; thence to the mouth of said fork; thence down the Kansez and Missouri rivers to the beginning. The village of the
475 Little Ozages was on the left bank of the Missouri about two hundred and forty miles from its mouth, and consequently was on the land that belonged to the Grand Ozages, who most probably granted the former tribe the privilege of settling there as a refuge against the attacks of their northern neighbors, but the country which they claimed and used as their only hunting ground is bounded as follows, to wit: Beginning on the Missouri, at the mouth of Grand River, eighteen miles below their village; thence down the Missouri to a point opposite to the Gasconade; thence northwardly to the dividing ridge that separates the waters of the Missouri and Mississip'i rivers; thence along said ridge to the head waters of the first branch of Grand River; then down said branch and Grand River to the beginning.

By the treaty concluded at Fort Clark on the 10th November, 1808, between the United States and those two tribes, the latter ceded to the former all their lands lying east of a south line drawn from Fort Clark to the Arkansas River, and north of the southwardly bank of the same river, and also all their lands situated northwardly of the river Missouri.

The country of the Kansez is included within the following boundaries, to wit: Beginning at a point opposite the mouth of Kansez River; thence northwardly to the dividing ridge that separates the waters of the Missouri and Mississippi rivers; thence along said ridge to the head waters of Ni-she-nan-batone; thence to and down said river to its confluence with the Missouri; thence down the latter about twenty-four miles to the mouth of Big Ni-ma-ha River; thence up said river to its source; thence southwestwardly about thirty miles to the Blue Water River; thence the same course to the Republican Fork of Kansez River; thence down the same to the beginning.

The country of the Mahas is very extensive, but I can not precisely describe its western limits; it, however, commences at the mouth of the river Platt and runs up the Missouri, the river Platt, and the Potatoe Fork of the latter river to a very considerable distance.

The country of the Arkansas was bounded as follows: Beginning on the Mississippi at the Ile aux Chicots; thence to the Quadrant (on Arkansas River); thence with the line of the Grand Ozages to White River; thence to the mouth of the St. Francis; thence across the Mississippi thirty miles and including that distance on the east side thereof to a point opposite the beginning.

The tribes of Missouri, Otos (or Otactatos), Towas, and Winnebagoes formed one nation under the name of Missouris. The Missouri tribe built a village on the left bank of the Missouri River, and occupied it

under the protection of Fort Orleans (built in 1723 by Mr. Bourgmont). But when the French evacuated that fort and erected another near the village of the Kansez, the Missouris crossed the Missouri River, and, with the consent of the Grand Ozages, built another village on their land, six miles above the village of the Little Ozages, where they afterwards resided. The country of the Missouris was bounded as follows, to wit: On the north by the dividing ridge that separates the waters of the Missouri and Mississippi river', east by the country of the Little Ozages, south by the Missouri River, and west by the country of the Kansez.

The country of the Otos is bounded as follows, to wit: Beginning at the mouth of the Nishinanbatone; thence binding on the line of the
476 Kansez to the dividing ridge that separates the waters of des Moins and Grand river', thence westwardly with said ridge about fifty miles, thence southwardly to the mouth of the river Platt, thence up said river about ninety miles, thence by a direct line to the sources of Big Ximahas, about one hundred and eighty miles, thence down said river to the Missouri and up the latter to the beginning.

The Towas formerly had their village on the right bank of the Missouri, about eighteen miles above the river Platt, on the lands of the Mahas. They, however, pretended to claim that small tract of land on which necessity had compelled them to settle, but their country was bounded on the north by the dividing ridge that separates the waters of the Grand and des Moins rivers, east by the Otos, south by the Missouri River, which separated them from the Mahas, and west by the Sioux, their most inveterate enemies.

Afraid to hunt on their own lands lest they might be attacked by the Sioux, and constantly threatened by the Mahas and Otos, who wished to drive them from the small tract of country on which they had established, they determined on a removal to the country of the river des Moins, which had long before been abandoned by the Moingonas, a band of Sioux who formerly inhabited it, and for that purpose, in 1765, they sent a deputation to Mr. de Laclede, of St. Louis, who then had the exclusive trade of the Missouri, requesting to know whether, in case of their removal, he would send traders among them in the new situation which they proposed to occupy. His answer being favorable, about one-half of the tribe moved in the same year to the country they had designated, being about hundred and fifty miles up the river des Moins, and Mr. de Laclede, according to promise, sent La Becasse and Boudria, two of his traders, to reside among them, with merchandize to supply their wants. The balance of the tribe all removed to the same place in the course of two or three years.

Soon after their removal the French traders, equally anxious to preserve peace between the tribes with whom they traded, as well to render their trade the more profitable as to guard against the danger of war parties, who seldom discriminated between friendly traders and the Indians with whom they were at war, used their utmost endeavours to effect a peace between the Towas and Sioux, in which, by the cooperation of some of the Mississippi tribes, they eventually succeeded.

Concerning the Winnebagoes, I am not sufficiently informed to give any particular account either of them or the time at which they separated from their nation or their actual country. The tribes of Pawnees, Pawnee Mahas, Pawnee Republick, Black Pawnees, and Ricaries constituted

one formidable nation. The country of the three first-mentioned tribes is bounded as follows, to wit: On the east by the Kansez and Otos, on the north by the Mahas, on the south by the Ozages, and extending westwardly so as to include all the waters of the Platt and Kansez rivers. The village of the Pawnees Mahas is situated on the south side of the Potatoe Fork, ninety miles above its confluence with river Platt.

As to the other two tribes, I do not with sufficient certainty know the extent and limits of the country which they occupy.

St. Louis, February 21st, 1816.

AUG'TE CHOUTEAU

477 BELLE FONTAINE, M. T., *31st January, 1818.*

SIR: I have the honor to inclose herewith a communication received from Major Long, topographical engineer. He has just returned from an examination of the Arkansas as high as the three forks and the country between that point and Red River. Supposing his communication may interesting and possible useful/ previous to the Government making any disposition of that section of country, I have taken the liberty to enclose it for yo'r examination. A sketch of the country may be expected by next mail.

I have the honor to be, sir, with high respt., your obt. sevt.,

T. A. SMITH,
Brevt. Capt. U. S. A.

Honble. SECRETARY OF WAR,
Washington City.

BELLE FONTAINE, M. T., *30th Jan'y, 1818.*

SIR: Agreeably to your instructions, I have the honor to lay before you a brief statement, grounded upon the best intelligence I have been able to obtain, relative to the country situated between the Arkansaw and Red river'; the claims of the Indians thereto, which has not been extinguished by cession to the United States, legally authorized and confirmed; the inhabitants thereof, who have emigrated from other parts of the United States, as also to the importance of this section of the United States' territory in a military point of view.

This tract of country, with the exception of a range of mountains and hills commencing at the Washitan and extending westwardly to the Canadian River, about fifty miles in breadth and one hundred and eighty in length, is furnished with a rich and luxuriant soil suited to the cultivation of all the necessaries and many of the luxuries of life, and particularly to that of cotton, and is supplied with numerous rivers and creeks well adapted for mill ruts and other water machinery, as also with springs of pure water, salines, and medicinal springs. The extent of this tract, exclusive of that part of the State of Louisiana situated north of Red River, is probably from one hundred to one hundred and fifty miles in width and about three hundred in length, reaching from the Mississippi to an imaginary line running due south from the forks of the Arkansaw to Red River. The Indian claims to the tract have never been extinguished in such a manner as to give the United States a fair and unequivocal title to it; nor have the conflicting claims of different tribes been amicably adjusted, either between themselves or between them and the United States.

The Cadoes, a tribe that has dwindled to a mere handful and resides at present on the south of Red River, inhabited a part of the country before the cession of Louisiana to the United States and still make some pretensions to it. They pretended to claim all the country beginning at the Mississippi and extending westwardly between the two rivers above mentioned to the northwest "as far as they could fight off the Osages" and to the southwest indefinitely.

478 The Quawpaws, a small tribe residing on the south of the Arkansaw, between 100 and 150 miles above its confluence with the Mississippi, at present able to furnish no more than sixty or seventy warriors, next laid claim to a portion of the country, which they have enlarged from time to time, at the investigation of the French and other whites, who have resided and intermarried with them, till at length they pretend to claim all the country under consideration. The Quawpaws are a branch of the Osage Nation, as is plainly evinced by the similitude of their language, shape, and features, to those of the Osages, and claim the country under the same tenure, the right of conquest and possession. Their original claim was limited as follows:

Beginning at the lower end of the village or post of Arkansaw, on the south of the river, and running up the river on the same side to Michael Bon's settlement, thence southwardly in the nearest direction to the main fork of the Saline of the Washitan, thence down said fork, Saline, and Washitan, to a point nearest to the place of beginning, and thence northwardly to the place of beginning; including a tract about forty miles in width and fifty in length.

The claim of the Osages to this country appears to have a better foundation, and can probably be more easily substantiated than that of any other tribe or nation of Indians, not only in consideration of their having been the original stalk whence the Quawpaws separated, but also of the great extent of country in this quarter, recognized by the United States as having belonged to them, and of their former ability to keep possession of it, by resisting the encroachments of their Indian neighbours. These people had acquired by conquest from other Indians a vast extent of territory, having enlarged their possessions, so as to include all the country from Red River to the De Moyen. The Cadoes were among the Indians whose hunting grounds were wrested from them by the Osages, and altho' they profess to be the grand original of all the aborigines, they have now no possessions that are not contested by other Indians.

By a treaty recently made with the Osages by Mr. Lovely, late Indian agent, who, it is believed, had received no special instructions for that purpose, the Osages ceeded to the United States all the country under consideration, together with a large tract on the north of the Arkansaw, situated between the Verdigris River and the boundary line already established between the United States and the Osages. It appears, however, that it was not the intention of the Osages to have ceeded to the United States so large a tract on the north of the Arkansaw as that specified in the treaty alluded to; as Clermont, the principal chief of that nation, severely reprimanded his interpreter after the treaty was made for having deceived him in council in regard to the extent and limits of the country of which they were then treating. He afterwards declared that the country which it was his intention, as well as that of the Indians,

to relinquish to the United States was to be separated from that which they would still retain by a line commencing at the falls of the Verdigris and running due east to Lewis and Clark's line, or the present Osage boundary, and by another line beginning at the same place and running due south as far as their possessions should extend, and that all
479 the country previously claimed by them to the south and east of these two lines was by the treaty ceded to the United States, with the exception of the point of land situated between the Verdigris and Six Bulls or Grand River, which should be called the beloved ground and be held in common between them and all other people as sacred to councils and all public proceedings in which their nation might be concerned. The Osages still consider the country above specified as the property of the United States, never having been informed that the treaty was not duly authorized and confirmed; and have repeatedly solicited the Americans to settle near them, alledging that they sold the land under the expectation that the Americans would become their neighbours and teach them how to cultivate the ground and their women how to spin and weave, and thus enable them to live when the woods could afford them no more game for their subsistence. Such having been their views in disposing of their lands to the United States, they are not a little disappointed and chagrined at the arrangement recently made with the Cherokees, their inveterate enemies, by which the latter are permitted to settle upon the lands formerly owned by them, and are by this means placed in a condition to annoy them exceedingly, which has been done of late on repeated occasions.

The Osages have frequently manifested a strong desire to change their mode of life and have uniformly entertained the highest regard for the character and improvements of the Americans. Their old men say that altho' there will be game enough to satisfy the wants of their nation during their lives, yet the rising generation must have recourse to other means for a livelihood. They are sensible of the advantages the Cherokees have derived from the partial change that has been effected in their mode of life, and are zealous to imitate their example and even exceed them in their progress of becoming civilized. Indeed, the Osages so far as I can judge from the acquaintance I have had with their character, both from observation and inquiry, are subjects more worthy of the consideration Government, in their humane exertions to civilize, and better calculated to be wrought upon by the means authorized for the reclaiming of savages, than any other nation or tribe of Indians residing upon the waters of the Mississippi.

Besides the Quawpaws there are various other Indians residing upon the south side of the Arkansaw, who have no claim to the country they inhabit; among them are a considerable village of Chocktaws, a large number of Cherokees, several Shawnees, and a few Delawares and Creeks.

The American settlements which have of late become considerably numerous, have been made by emigrants from various parts of the United States, but principally from Indiana, Kentucky, Tennessee, and the Illinois Territory. The number of inhabitants, agreeably to a census taken in the course of the last summer, amounted to nearly two thousand, since which the increase by emigration has been so great that the number at present does not fall much short of three thousand. These settlements

were made under the supposition that the land was the property of the United States, which has uniformly been the impression in that part of the country till the orders which have been recently issued for removing settlers from Indian lands were made known.

It appears to be the desire and intention of the settlers to acquire an honest livelihood from the cultivation of the soil. A large
480 proportion of them have expended all their property in moving in this wilderness country, and, in the event of their being compelled to remove from it in their present circumstances, must encounter privations and sufferings that they are ill calculated to endure. The term of their residence in the country has been so short that they have not yet been able to realize any profits from the cultivation of the ground, and the surplus produce in the hands of the oldest settlers more than their familys absolutely require for their support, when equally distributed amongst those who have not been in the country long enough to raise a crop, would afford to each but a very scanty pittance. Such is the scarcity of provisions necessary for subsistence and the inability of the people to purchase more, that they will be under the necessity of procuring game for their subsistence, which has already become so scarce that it will be difficult to obtain a competent supply.

In a military point of view the objects that present themselves are: Firstly, to keep peace between the Cherokees and the Osages; secondly, to prevent the whites from hunting and committing other trespasses upon Indian lands, and thereby to secure our frontier settlements in this quarter from the depredations of the Indians.

The first of these objects will no doubt receive due attention from the United States Government, as they were instrumental in locating the Cherokees in the neighborhood of the Osages, and the two latter will probably be deemed of equal importance, as everything depends upon their accomplishment in securing and maintaining a friendly understanding with the Indians.

To effect these objects in part the detachments of the United States troops, under the command of Maj. William Bradford, has already been ordered into this part of the country and are now erecting works on the south side of the Arkansaw about twenty miles above the Osage line before mentioned or nearly five hundred above the mouth of that river. For a general character of the position they have occupied I beg leave to refer to my report dated Camp Smith, Belle Point, December 3rd, 1817.

By maintaining a garrison at this place those objects are easily attainable so far as it relates to occurrences that transpire through the medium of water communication by way of the Arkansaw. Transactions that take place remote from the Arkansaw will require military operations on a more extensive scale to hold them under due restraint. This can be accomplished only by a chain of military posts, connected by wads and of so formidable a character as to impose a dread upon the savages and enforce due respect to the laws of the land from outlaws and malefactors, more or less of whom are generally to be found in frontier settlements. Such a chain of works, however, can not easily be formed so as to cut the Arkansaw very low down on account of the uneven and broken surface of the country over which it must pass on both sides of that river. Between five and six hundred miles up this river (pursuing its courses)

the country becomes less hilly and broken till at length it subsides into a rolling country, abounding in extensive champaigns, and is said to be of this character from the Red to the Missouri River. Of course facilities are here presented for opening a line of communication along our western frontier which would give the military operations in that quarter a degree of efficiency not attainable in any other way.

481 Under this view of the subject may be considered also the advantages resulting from a settlement of the country between the State of Louisiana and the Arkansaw River, a country better calculated to admit of a numerous population than any other of equal extent on the west side of the Mississippi between the Missouri River and the State of Louisiana. By settling this country the chain of settlements on the west side of the Mississippi would be complete from New Orleans to St. Louis and supplies of every kind necessary for the subsistence of an army, should any future emergency require the presence of one to protect the western frontiers at any point, may be drawn from resources near at hand.

I would therefore suggest the propriety of communicating to the proper authorities any intelligence bearing upon this subject, and at the same time, as a step leading to the accomplishment of the objects above specified, as also to the relief of the numerous settlers in the Arkansaw and Red River country, would recommend the extinguishment of claims of the Osages, Quawpaws, and other Indians, should there be any whose claims ought to be recognized, to all or most of the land to the south and east of the two lines above specified. Also that the United States should have the privilege of improving a valuable salt spring on the Six Bulls or Grand River, about sixty miles above its mouth, should they not be able to purchase of the Osages the tract including it. And that the United States should have the privilege of opening communication, either by land or water or both, from Red River across the Arkansaw to the Missouri in any directions they may deem proper.

In the foregoing observations I may have touched upon subjects not immediately connected with my duties as a military officer, yet I have taken the liberty to communicate thus freely, under the impression that the whole was of sufficient public interest to invite some degree of consideration.

I shall endeavor to furnish a sketch of the country concerning which the foregoing statement has been made by the earliest opportunity.

I have the honor to be, sir, very respectfully, your most obt. and very humble servt.,

S. H. LONG, *Maj. T. Engineers.*

Brig'r Genl. THOS. A. SMITH.

E.

CHOCTAW AGENCY, *March 6, 1835.*

ELBERT HERRING, Esq.,
Comr. of Ind. Affairs.

SIR: It affords me pleasure to be able to state to the Department, upon information not to be doubted, that the wild tribes who sent in delegates with Col. Dodge last summer and with whom we held a council at Fort Gibson are so friendly disposed.

The firm of Coffee, Calville & Co., merchants from the Arkansas Territory, determined, if possible, to open a trade high upon Red River with these people. This company, consisting of about forty persons, took up their march about the first of August last, from Fort Smith. After proceeding to the Canadian River they made a halt until the result of the council alluded to should be known. The effects of the friendly relations established at the council between the wild tribes, the whites, and the eastern emigrant tribes, together with the Osages, has been such that the firm felt safe in making a location for the purpose of trade, at the old Pawnee village on the Red River, about 20 miles above the Cross-Timbers, and 100 miles below the Pawnee village visited by Col. Dodge. The trading house established is about 75 miles on a direct line above the mouth of the False Washitam. Mr. Calville, with whom I am now conversing, is a man of character, and whose statement may be relied on. He says that the Kiaways, Towa-ash, and Comanche tribes are delighted with their visit to Fort Gibson, and that he has seen the flag and medals given them at Gibson. He states that he has talked with the great Comanche chief who says that he is the chief and great captain of all these tribes, and that he asked a great many questions about the Big White Captain and says he must see him (meaning the President); that he wanted to talk to him. All these tribes are looking anxiously for the meeting spoken of, and recommended by Col. Dodge and myself; they say that then the great peace will be made, and that they will visit their white and red brothers, and go and see the Great White Captain. These tribes are now carrying on a war against the Mexicans on the frontiers of Chewawa and at the Pass. They have brought into their villages two prisoners (Spaniards and Mexicans). The firm, Mr. Calville says, have bought one of the prisoners, a boy 12 years old, taken not far from Chewawa; the other the firm expects to buy from the Kiaways, who have promised to sell him. Mr. Calville states that they have been treated kindly, and they attribute it in a great degree to the effects of the campaign and to Col. Dodge's course while with them, together with the very satisfactory meeting at Gibson, of which they speak with interest and delight.

I have also information direct from the Pawnees and Comanches, brought me by an individual who went from near Fort Gibson last fall very soon after the wild Indians left Fort Gibson. This man, Mr. Pennington, can be depended on, and his statement corresponds with that of Mr. Callvil's. Mr. Pennington was in the villages higher up the country; he speaks of the expected meeting already alluded to. Both of these gentlemen anticipate important results, which must, from every appearance, grow out of the contemplated assemblage of Indians for that purpose at some suitable point on the frontier.

I have the honor to be, your obt. sevt.,

F. W. ARMSTRONG, *A. S. W. T.*

NOTE.—The Indians say that it takes them sixty sleeps to travel in their way to Chihuahua, or as I have written in the communication, Chewawa.

F. W. A.

483 CHOCTAW AGENCY, *June 18, 1835.*

ELBERT HERRING, Esq.,
Commr. of Ind. Affairs.

SIR: In taking a prospective view of the contemplated meeting to take place between the commissioners and the wild tribes, in conformity with instructions from the department, I have reflected much on the general policy heretofore pursued by the Government in establishing peace and friendship with such Indians as are willing to have intercourse with our people under stipulations for that purpose.

The policy has always been to take a few of the leading men belonging to each nation and travel them to the city of Washington for the purpose of letting them see what can not be made known to them by any other mode. It is in vain to say to them that they are not as great as any nation and, indeed, equally as powerful. The Comanches in particular have those great conceptions of their own power. The Comanchee chief now says to our traders that he is the great chief of all these red people within the western territory, known as the wild Indians, and he says he wishes to see his great father, the President. The good effect growing out of what a delegation would certainly see on a visit of this kind can not be doubted. The correctness of this course seems to be acknowledged in this country by everyone, and is believed more important than any meeting. My situation requires that I should know the wishes and the policy of the department connected with the Indians in this region, therefor I have felt it my duty to make this communication, so that when the commissioners meet these people no step will be taken that is not in conformity with the views of the Government. Should an intimation of the wishes of the department be given me by an early reply to this, it will be in my power to make the suggestion in time to the commissioners, so that whatever is desired may be done. Before, however, closing this letter, it is right that I should give my own opinion because I have taken pains to know from various sources the views of these wild people. I am, therefore, decidedly in favor of having at least one or two of the principal men of each nation taken to Washington for the object stated. The good effects of the policy has never heretofore been doubted, and certainly it has never been more important.

I have the honor to be, your obt. sevt.,

F. W. ARMSTRONG, *A. S. W. T.*

HEADQUARTERS SOUTHWESTERN FRONTIER,
Fort Gibson, April 15th, 1835.

SIR: I have the honor to report that two Pawnee Picks and one Wahoe have arrived at this post, with the object, as it is believed, of ascertaining the time and place of holding a general meeting between their tribes and the different Indian nations on this frontier, as (it is understood) was promised them last fall by Col. Dodge. They are without an interpreter and I will therefore send to the Osages for one to-day, and at the
484 same time notify Maj. Armstrong of the measures I have taken,

that he may have an opportunity to confer with our visitors from the western prairies should he desire to do so.

I am, sir, very respectfully, your obdt. servt.,

M. ARBUCKLE,
Brigd. Genl. U. S. Army, Commd.

To Brigd. Gen. R. JONES,
Adjt. Genl., Washington City.

FORT GIBSON, *Jy 14th, 1835.*

The Hon. LEWIS CASS, *Secretary of War.*

SIR: In pursuance of your instructions, accompanying our appointment, we have made every exertion in our power to bring the Comanches, Caiaways, and other western tribes to Fort Gibson, as the most suitable place for holding the proposed treaty of pacification. We had sent out different parties and offered every inducement which our limited means would justify to obtain this object. Our last letters from Major Mason compel us to abandon all hopes of bringing in the great western tribes to this place. They alledge that Colonel Dodge promised that Commissioners of the United States should meet them, for the purpose of treating, on the great western prairie, and upon this promise they rely. We have accordingly made arrangements for holding the treaty on the 20th day of August, at Major Mason's camp, between Little River and the Canadian River. We shall take care to apprise you of whatever may be done in the progress of this business.

Considering the proposed treaty of pacification, as the Government seems to consider it, as of great importance to the Indians, as well as to the United States as their guardians and protectors; considering the vast number of Indians whose interests are intended to be promoted by this treaty, we can not but lament that the sum of money appropriated to this great object is far short of what might have been reasonably expected, and very far short of what might have been advantageously expended in furthering this great object.

As we are to meet a great number of Indians, we must take our presents with us, whether we make a treaty or not. For if we should make a treaty it would not be proper to detain several thousand Indians until the presents were sent for. We shall therefore make the best calculation we can of the unavoidable expenditures at this place and at the treaty ground, and shall take the amount of the balance with us in presents.

With much respect we are, sir, your obt. sevts.,

M. STOKES.
M. ARBUCKLE.

FORT GIBSON, *Sept. 15th, 1835.*

The Hon. LEWIS CASS, *Secretary of War.*

SIR: We have the honor to inform you that we have just returned from Camp Holmes, the place appointed for meeting the Comanche, Kioway, and Witcheta nations, and their subordinate bands.

485 We were deprived of the services and assistance of Major F. W. Armstrong, one of the commissioners, who died about the time we set out on the expedition.

Agreeably to your instructions, we desired to have the treaty with the western prairie Indians at this place, and we used all the means in our power to bring them in, but it was impossible. They insisted on the fulfillment of the promise made them by Col. Dodge to meet them on the border of the great western prairie, which is their hunting ground, and nothing could induce them to meet us at Fort Gibson. These people know that they have committed many murders, robberies, and other depredations upon the citizens of the United States and upon friendly Indians, and they are naturally suspicious, timid, and treacherous, and were unwilling to undergo so long a journey and place themselves in our power. We have reason to believe that we have, in a great measure, quieted these feelings of apprehension and distrust.

By appointment, through the means of Major Mason, we met the principal chiefs of the Comanche and Witcheta nations on the 20th day of August, and on the 24th day of the same month we were fortunate enough to conclude a treaty of peace and friendship with these chiefs, in which treaty is included all the friendly nations whose deputations had accompanied us. We have the honor to enclose herewith a copy of the treaty, the terms of which we hope will be satisfactory to the President of the United States.

As some confusion has existed, both here and elsewhere, with respect to the names of the nations of the great western prairie who reside or hunt to the west and southwest of this post, we deem it proper to inform you that there are but three distinct nations of these Indians, with the exception of one or two small tribes who reside far south of Red River, in the province of Texas. These three nations are the Comanches, who are the most numerous, but who have no fixed or permanent villages and follow the herds of buffaloe with their movable lodges, and are sometimes north and at other times south of Red River. The Witchetas consist of several bands, some residing north and some south of Red River. Those residing north of Red River are the Towesash and Wachos. They have fixed villages and raise some corn and vegetables. The Kioways have no fixed villages, but wander from the cross timber on the Arkansas, Canadian, and Red River to the Rocky Mountains, and are sometimes, but not often, south of Red River. We are sorry to inform you that from some cause, which we are not now able to explain, the Kioways did not meet us at the treaty. They were in considerable numbers a short distance from the treaty ground but a little time previous to our meeting, and left the place to go on their hunt. We had suspected a band of Osages as being the cause of alarming the Kioways and occasioning their going away without attending the treaty, but after investigating the affair as well as we could, we were not able to fix the charge unequivocally on this band, and we have therefore given them an opportunity of wiping off this charge by bringing in the chiefs of the Kioways to Fort Gibson, which they have promised to do. We are not without reasonable expectations that the chiefs of the Kioways will come in to Fort Gibson. We sent them a copy of the

486 treaty from the treaty ground and informed them that we had brought back the portion of presents intended for them, which should be bestowed upon them as soon as they came in and signed a similar treaty.

It is with pleasure we acknowledge the friendly services of Tally, Black Dog, and Wash-am-pe-che, and their Band of Osages, who assisted us all in their power, in allaying the fears of the Comanches and Witchetas, and inducing them to place confidence in the Government of the United States. Some of the Osages had accompanied Major Mason and remained with him until the treaty was made; and they had rendered him considerable service in procuring fresh game for the troops. We of course rewarded them for their fidelity by some small presents, which they well deserved. These presents were taken from those reserved for the Kioways; and should these last-named Indians come in and sign the treaty, perhaps a few hundred dollars may be necessary to make up the deficiency.

After the conclusion of the treaty the chiefs of the Comanches and Wichetas expressed a desire to visit the President of the United States, under a proper conductor; and to have Black Dog, of the Osage Nation as their companion. We think such a visit would be useful; and that Black Dog, who has proved himself to be a friend to the United States, might be permitted to accompany them.

We have only to add at present that the original treaty will be forwarded to Washington, by a safe conveyance in time to be submitted to Congress at their next session, should the President of the United States consider it proper.

We are, with great respect, your obdt. servants,

MONTFORT STOKES.
M. ARBUCKLE.

FORT GIBSON, *26 Sept., 1835.*

The Honbl. LEWIS CASS,
Secretary of War.

SIR: We had the honor of transmitting to you by the two last mails a copy of the treaty with the Comanchee, Witchata and other Indian tribes; and also an amount of the expenditures and disbursements in holding the said treaty.

We have now the honor to send herewith, by the hands of Lieut. Seawell, the original treaty above mentioned.

It is probable that we might have had other opportunities of forwarding the treaty to Washington in time to be laid before Congress at their next session; but Lieut. Seawell's family are at Washington, and he has expressed a desire to go there for them; and being a confidential officer of the Government and of the commissioners. General Arbuckle, with the approbation of Gov. Stokes, has consented that Lieut. Seawell shall take on the treaty; for which service the Government may make him such allowance as they may judge proper. We have made no agreement or promise to Lieut. Seawell on this subject.

Lieut. Seawell also takes on to the War Department a transcript of all our proceedings in regard to the treaty. Owing to the continued
487 rains and bad weather that prevailed during our conferences with the Indians and the small supply of provision on hand, our talks and consultations with the chiefs of the different tribes were necessarily short; but we trust that we have omitted nothing that was essential to the

interest of the Government of the United States or conducive to the harmony of the nations for whose benefit the treaty was made.

We have the honor to be sir, with the highest respect, your obt. servant,

M. STOKES.
M. ARBUCKLE.

FORT GIBSON, *May 5th, 1835.*

The Hon. LEWIS CASS,
Secretary of War.

SIR: We have had the honor of receiving your letter and instructions of the 27th March; and as the mail returns immediately, we can only now say that every means shall be used to have a meeting of deputations from the Comanches, Kioways, and other prairie Indians with those on this frontier as early as possible. We consider it a fortunate circumstance that there is now in this vicinity two men of the Towa-ash and one of the Wacho tribe, who are subordinate bands of the Comanches; and by them was proposed to send a message inviting their chiefs and those of the Comanches, Kioway, and other bands, to meet us in all the month of June.

We expect to see Maj. Armstrong in a few days, when immediate measures will be taken to assemble the principal men of the different nations who are interested in the proposed treaty.

We are with great respect, your obedt. servants,

M. STOKES.
M. ARBUCKLE.

FORT GIBSON, *May 14th, 1835.*

The Hon. LEWIS CASS,
Secretary of War.

SIR: We have had a full meeting of the board of commissioners, and have been two days in consultation with the three western prairie Indians mentioned in our letter to you of the 5th instant. They declare positively that it will be impossible to procure even an interview with the Comanche and other chiefs of their tribes until late in July. That a war party has gone over the Mexican line for the purposes expressed in Maj. Armstrong's letter to you; and that the remaining bands are hunting in the great prairie; and that neither party will return until the green corn raised by the subordinate bands is eatable. That annually these wandering bands visit the Pawnee villages for the purpose of procuring corn. This information is corroborated by the statement made last summer by Col. Dodge.

We made every effort in our power in endeavoring to have the treaty at in conformity with the views of the Government, and shall not aban-
don these efforts as long as there may remain a probability of
488 accomplishing the object; but Col. Dodge promised them last
year that commissioners of the Government would meet them on the Western prairie, and those Indians inform us that the chiefs of the Western tribes confidently expect the fulfilment of that promise. We have, therefore, concluded that Maj. Mason, with a party of dragoons shall leave this place immediately for the purpose of establishing a camp

near the head of Little River, a north branch of the Canadian, as a suitable place for meeting the Western chiefs, provided they cannot be got here; but we shall still continue our efforts to bring them to Fort Gibson, if possible. For this purpose the three Western Indians will accompany Maj. Mason, and we have procured and will also send an interpreter with two or three Osage guides well acquainted with the country and the best way to it. As soon as an interview can be had with the Comanche and other chiefs, Maj. Mason will inform us whether they will come here to treat, and will conduct them in. If they will not come we shall be compelled to meet them at the place selected in the West, and he will inform us of the time so as to enable us to assemble a portion of the tribes who are to accompany us.

As our instructions direct us to endeavor to make a permanent peace, not only between the United States and Comanche tribes, but also between them and the Indian nations near them and liable to suffer from their depredations, which includes the Choctaws, Creeks, Cherokees, Osages, Senecas, and Quapaws; and as we must have a portion of all these nations with us, we would respectfully suggest that ample provision should be made for their support without touching the appropriation, for if any considerable part of these expenses is to be taken from the amount placed at the disposition of the commissioners there will be little left for presents, and consequently the promises of the Government will not be fulfilled and the Indians be disappointed and dissatisfied.

The commissioners have consulted with Genl. Arbuckle, and find there is at this and other convenient posts a considerable supply of old flour and pork which if not consumed in this way will be nearly a total loss. The surplus provisions here alluded to the commissioners believe may be properly issued to the Indians making the treaty without being paid out of the fund appropriated.

We are, with great respect, your obdt. servants,

M. STOKES.
M. ARBUCKLE.
F. W. ARMSTRONG.

FORT GIBSON, *May 4th, 1835.*

Received the commission of appointment and letter of instructions from the Secretary of War, dated March 27th, 1835, directed to Hon. M. Stokes, Bvt. Brig. Genl. M. Arbuckle, Maj. F. W. Armstrong.

FORT GIBSON, *May 5th, 1835.*

The board met and entered on business.

Present, M. Stokes, M. Arbuckle, commissioners.

Wrote a letter to the Secretary of War acknowledging the receipt of the commission and instructions.

489 FORT GIBSON, *May 6th, 1835.*

The board met.

Present, M. Stokes, M. Arbuckle.

Wrote a letter and sent by express to Maj. F. W. Armstrong, at Choctaw Agency, notifying him of the appointment and requesting his attendance at Fort Gibson as soon as convenient.

FORT GIBSON, *May 7th, 1835.*

The board met.

Present, M. Stokes, M. Arbuckle.

Appointed Col. A. A. Chouteau interpreter of the Osage language and sent an express with a request that he bring in from Clermonts Town the two Towee-Ash and one Wacho Indians, together with the Towee-Ash woman to be used as an interpreter.

FORT GIBSON, *May 10th, 1835.*

The board met.

Present, M. Stokes, M. Arbuckle.

Col. Chouteau arrived with the three Indians from the Towee-Ash and Wacho villages and the Towee-Ash woman.

FORT GIBSON, *May 11th, 1835.*

The board met.

Present, M. Stokes, M. Arbuckle.

Held a talk with the three Western Indians on the subject of the proposed treaty with the Comanchee and other tribes. The Osage second chiefs Black Dog and Tally were present.

FORT GIBSON, *May 12th, 1835.*

The board met.

Present, M. Stokes, M. Arbuckle.

Held a council with the three Western Indians in presence of Black Dog, Tally, and others of the Osage Nation.

Explained to the Indians the views of the Government of the United States in proposing a treaty with the Comanche and other wandering nations and tribes on the Western frontier.

FORT GIBSON, *May 13th, 1835.*

The board met.

Present, M. Stokes, M. Arbuckle, F. W. Armstrong.

Held a further council with the three Western Indians in presence of and assisted by Black Dog, Tally, and other Osages.

FORT GIBSON, *May 14th, 1835.*

The board met.

Present, M. Stokes, M. Arbuckle, F. W. Armstrong.

Held a further council with the three Western Indians and the principal Indians present of the Osages. Considered it proper that Maj. Mason, with a party of dragoons, should proceed to the head of Little River of the Canadian and select a suitable place for having an interview with the chiefs of the Comanches and other tribes of the Western frontier.

Determined to send the three Western Indians, Col. Chouteau, the
490 Towee-Ash woman, and three Osage Indians, with Maj. Mason.

Engaged Tally for this purpose. Engaged the three Towee-Ash and Wacho Indians to assist in bringing in the chiefs of the Comanche tribes to Fort Gibson for the purpose of making the proposed treaty.

Wrote a letter to the Secretary of War, informing him of these arrangements.

FORT GIBSON, *May 15th, 1835.*

The board met.
Present, M. Stokes, M. Arbuckle, F. W. Armstrong.
Held a further council with the three western Indians and a number of the Osages. Obtained the promise of Black Dog and the Osages to refrain from any hostile acts towards the Comanches and other wandering western tribes.

FORT GIBSON, *May 16th, 1835.*

The board met.
Present, M. Stokes, M. Arbuckle.
Made arrangements for the departure of the western Indians, with the Towee-ash woman, purchased and gave them some small presents. Purchased a horse at the price of sixty-five dollars, for the Towee-ash woman to ride to the west, and to carry her child. Purchased stationery for the use of the commissioners. The name of the principal Towee-ash Indian is Nuck. The names of his two companions are Tanacaqueril and Chotalaces. The name of the Towee-ash woman employed as an interpreter is Asscinka.

FORT GIBSON, *Monday, May 18th, 1835.*

The board met.
Present, M. Stokes, M. Arbuckle.
This day Col. A. A. Chouteau, our Osage interpreter, arrived from his residence near the great Saline, in order to accompany the expedition to the west, under Maj. Mason.
The commissioners were this day employed in fitting out the western expedition. Purchased a horse at the price of thirty-five dollars for Nuck, the principal Towee-ash Indian, he having lost his own. Gave the three Towee-ash and Wacho Indians, and the Towee-ash woman employed as interpreter some presents, consisting of blankets, hats.

FORT GIBSON, *Tuesday, May 19th, 1835.*

The board met.
Present, M. Stokes, M. Arbuckle.
The board were engaged in completing the preparations, and preparing instructions for Col. Chouteau for the western expedition. Had a consultation with a Mr. Pennington, residing in the Creek Nation, relative to a war party of Texas Indians fitting out by the Texas Government against the Comanches and their subordinate bands. Genl. Arbuckle made arrangements with Col. Money, commandant at Fort Jessup, near Nacogdoches, and with Maj. Mason, commanding the western expedition, in order, if possible, to counteract and prevent any mischievous consequences to our trading house and to the Comanches from this war party of Texas Indians. This day dispatched Tally and the other Osage guides across the Arkansas River with a small outfit of powder and lead, and four rifles for the purpose of killing game for the party.

491 FORT GIBSON, *May 20th, 1835.*

The board met.
Present, M. Stokes, M. Arbuckle.
This day dispatched Col. Chouteau with Nuck, the principal Towee-ash and his two companions, with the Towee-ash woman Asceinka, who

crossed the Arkansas River and joined Maj. Mason on the western expedition.

FORT GIBSON, *May 20th, 1835.*

The board met.

Present, M. Stokes, M. Arbuckle.

Held a consultation with Clermont, principal chief of the Osage Nation, and twenty-five of his band on the subject of the proposed treaty with the Comanches, but having no interpreter the talk was not satisfactory.

FORT GIBSON, *May 21th, 1835.*

The board met.

Present, M. Stokes, M. Arbuckle.

Procured the assistance of Antoine Lombard as an interpreter and had a further consultation with Clermont, La Fou, and other chiefs and warriors of the Osages. They promised to attend the proposed treaty with the Comanches and designated the hunting ground of each band of the Osages, where they may be found until their summer hunt is over, which will be about the last of July. They earnestly begged for presents for their hunting outfit, but our means for presents and for the expenses of the treaty being extremely limited we only gave them a small quantity of tobacco to conciliate their good feelings towards the accomplishment of the views of the Government in the proposed treaty. Several of the warriors expressed a perfect indifference as to the success of the treaty, alledging that the plunder of Comanche horses and the unrestrained hunting of game on the prairie was more profitable to them than anything they received from the Government of the United States for acceeding to or aiding in a treaty of peace. These speeches of the Osage chiefs and warriors, as well as those of the commissioners, would have been recorded, but the commissioners have no secretary, and, from the circumscribed regulations of the Secretary of War, it is not probable a secretary can be procured on the terms prescribed in the instructions. The records of the proceedings of the board are kept by the voluntary labour of one of the commissioners.

FORT GIBSON, *May 31st, 1835.*

The board met.

Present, M. Stokes, M. Arbuckle.

This meeting of the board was at the request of Black Dog, an Osage warrior, and his party. They stated that they were desirous to meet the commissioners at the treaty to be held with the Comanches and other western tribes, but that themselves and their families were now suffering for want of provisions, and that that intention was to go immediately on their buffalo hunt in the western prairie, and from thence to the treaty when the time should be fixed. They stated that they were in absolute need of powder and lead for their hunt, but were unable to procure it, and intreated the commissioners to assist them. The com-
492 missioners taking into consideration the starving condition of this tribe furnished Black Dog and his band one keg of powder and fifty pounds of lead.

FORT GIBSON, *June 10th, 1835.*

The board met.
Present, M. Stokes, M. Arbuckle.
The commissioners having purchased sundry articles for the outfit and accommodation of the party, the guides and interpreters sent out with Maj. Mason's detachment for the purpose of inviting the Comanches and other Western tribes to a treaty; and the commissioners having occasion for other and further supplies, they drew a check on the Union Bank of Louisiana for five hundred dollars in favor of E. W. B. Nowland, who furnished the supplies aforesaid and engaged to furnish such others as may be required.

FORT GIBSON, *July 8th, 1835.*

The board met.
Present, M. Stokes, M. Arbuckle, commissioners.
Two Osages arrived at this post on the 6th instant on express from Maj. Mason's camp. The commissioners agreed to purchase and give them some presents for their services, which they had been promised by Maj. Mason.

FORT GIBSON, *July 11th, 1835.*

The board met.
Present, M. Stokes, M. Arbuckle, commissioners.
An Osage arrived this day on express from Major Mason's camp. The commissioners agreed to purchase and give him a few presents, which Major Mason had promised he should receive for his services. The board appointed the 20th of August for holding the treaty with the Western Indians, at Camp Holmes, near western border of the Cross Timbers, in the Creek Nation, and requested Gen'l Arbuckle to direct Major Mason to notify the Prairie Indians to attend there at that time.

FORT GIBSON, *July 17th, 1835.*

The board met.
Present, M. Stokes, M. Arbuckle, commissioners.
The commissioners being without a secretary, they addressed a letter to Lieut. W. Seawell, appointing him to that office.

FORT GIBSON, *July 19th, 1835.*

The board met.
Present, M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.
Gen'l Arbuckle reported to the board that he had just received a letter from Major Mason informing him that one of the principal and most of the influential chiefs of the Comanches had not yet arrived at his camp, but was expected in a few days. The board considered it proper that Major Mason should be immediately directed to endeavor to prevail upon this Comanche chief, as soon as he arrives at his camp, to bring in the principal chiefs and headmen of his nation, and also deputations from the different Western nations or tribes to this post for the purpose of holding a treaty.

FORT GIBSON, *July 23d, 1835.*

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The board met.
Present, M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.
A party of Comanches, consisting of eight men and seven women, having arrived at this post last evening, the board agreed to purchase

and present to them some pipes and tobacco. There is one principal chief among them.

FORT GIBSON, *July 24th, 1835.*

The board met.

Present, M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

This meeting of the board was for the purpose of holding a talk with the Comanches who arrived on the evening of the 22nd. The Comanches wished to know when the commissioners intended to meet the Western Indians for the purpose of treating. They begged for presents. The commissioners told them that the presents intended for their people would be taken to the treaty ground, and that after the treaty they would receive their share and not before, and that the treaty would take place at Camp Holmes on the 20th of August. The Comanches replied that if they waited until that time they would not receive any of the presents, and earnestly begged that their share should be now given them. The commissioners agreed to make them a small present, and purchased and presented to each a shirt, a handkerchief, and some tobacco, and told them they would receive more after the treaty.

FORT GIBSON, *July 29th, 1835.*

The board met.

Present, M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

The board met for the purpose of commencing the purchase of presents for the Prairie Indians. They considered it best to await the arrival of Major Armstrong, one of the commissioners, who was hourly expected.

FORT GIBSON, *July 30th, 1835.*

The board met.

Present, M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

The board decided to receive proposals for furnishing the presents for the Prairie Indians, and directed the secretary to advertise for them until 1 o'clock p. m. of the 1st of next month. Employed Sergeant Dannenburg of the 7th Infl. to proceed to Washington County (A. T.) to hire waggons and teams to take the presents to the treaty ground.

FORT GIBSON, *July 31st, 1835.*

The board met.

Present, M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

The board were engaged in ascertaining the amount to be expended in presents for the Prairie Indians. Paid Francis Beatte thirty-three dollars for his services as guide to Captain Lee's command.

494 FORT GIBSON, *August 1st, 1835.*

The board met.

Present: M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

The board were this day engaged in receiving and opening bids for furnishing presents for Indians and examining the samples furnished. Bids for furnishing some of the presents were accepted.

FORT GIBSON, *August 2nd, 1835.*

The board met.

Present: M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

The board were employed in purchasing presents to take to the treaty ground, and employed Serjeant Stoutenburg, at fifteen dollars per month, to attend to the receiving and safe-keeping of them. They received a letter from Major Armstrong, accompanied by his attending physician's certificate, stating that on account of his ill health his life would be endangered if he accompanied them to the treaty ground.

FORT GIBSON, *August 3rd, 1835.*

The board met.

Present: M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

The board were employed in purchasing presents to take to the treaty grounds. They addressed a letter to the Secretary of War, informing him of the progress they were making, and also the indisposition of Major Armstrong, which would prevent his attending the treaty. They also replied to Major Armstrong's letter, which they received yesterday. Purchased of S. Hill Indian presents amounting to thirteen hundred and ninety-one dollars, and paid Serjeant Dannenburg three dollars for expenses incurred by him in employing waggons to take Indian presents to the treaty ground.

FORT GIBSON, *August 4th, 1835.*

The board met.

Present: M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

The board directed the secretary to write a letter to Major Chouteau requesting him to notify the different Osage bands, in case they should have returned to their towns, that deputations from them were expected to attend the proposed treaty at Camp Holmes on the 20th instant; and also not to pay out the annuity to the Osages until after the treaty, and to tell them so.

FORT GIBSON, *August 5th, 1835.*

The board met.

Present: M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

The commissioners this day gave three checks on the Union Bank of Louisiana, amounting in all to six thousand three hundred and eight dollars and sixty-nine cents: One in favor of E. W. B. Nowland
495 for one thousand six hundred and sixty-seven dollars sixty-nine cents; one in favor of W. P. Tilton for three thousand and eighty-one dollars and ninety-four cents; and one in favor of Thomas E. Wilson for one thousand five hundred and fifty-eight dollars and thirty-nine cents. These checks were given to pay off the amounts, &c., against the commissioners for purchases of presents, &c.

PORT GIBSON, *August 6th, 1835.*

The board met.

Present: M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

The board agreed on leaving Fort Gibson this day for the treaty ground at Camp Holmes.

CAMP HOLMES, *August 19th, 1835.*

The board met.

Present: M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

The commissioners reached Camp Holmes this day and assembled the Comanche and Witchita chiefs. They asked them where the principal Kioway chiefs were, and if they could not be had here in ten days. They replied that the Kioway chiefs could not be got here in ten days, and that it was impossible to say when they could be got here; that they were like wolves, so difficult were they to be found. The commissioners asked them if any more of the chiefs and principal men of their nations were expected. They replied no; they will not come here; they were here and staid a long time, but their children were starving, and they have gone for good and will not return. The commissioners asked them if they were fully empowered to treat with the United States, and in case of making a treaty, if all their people would consider themselves bound to observe it? They replied yes; we were left here for the purpose of making a treaty of peace; our nations wished to be at peace with every person. When we were left here our people told us not to leave before you arrived; that they wanted to make a treaty, and that they would all observe it. The Kioways will also agree to any treaty we may make.

CAMP HOLMES, *August 21st, 1835.*

The board met.

Present: M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

The board having this day assembled in council the chiefs, warriors, and representatives of the Comanche and Witchita nations and their associated bands or tribes of Indians, and having introduced them to the chiefs and representatives of the Cherokee, Muscogee, Choctaw, Osage, Senecas, and Quapaw nations or tribes of Indians, who were also assembled in council, the following speeches were made by the commissioners and interpreted to the Comanche and Witchita nations. All the speeches, both of the commissioners and the Indian chiefs, are omitted, having been once furnished to the War Department in the communication accompanying the treaty. The treaty made with the Comanches and Witchitas is also omitted in this journal, having been forwarded to the Government and ratified by the Senate. The commissioners did not meet yesterday, in consequence of bad weather.

496 CAMP HOLMES, *August 23rd, 1835.*

The board met.

Present, M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

The commissioners drew a check on the Union Bank of Louisiana in favor of Thomas B. Ballard for four hundred and twenty dollars, being

amount due him in full for the hire of his waggons and teams, ployed in transporting Indian presents from Fort Gibson to Camp lmes.

CAMP HOLMES, *August 24th, 1835.*

The board met.
Present, M. Stokes, M. Arbuckle, commissioners; W. Seawell, secre-y.
The board was this day occupied in obtaining the signatures of the efs and representatives of the Comanche, Witchita, Cherokee, Mus-gee, Choctaw, Osage, Seneca, and Quapaw nations or tribes of Indians.

CAMP HOLMES, *August 25th, 1835.*

The board met.
Present, M. Stokes, M. Arbuckle, commissioners; W. Seawell, secre-ry.
This day was spent in making speeches and exchanging friendly tokens tween all the chiefs and head men of the eight nations assembled.

CAMP HOLMES, *August 26th, 1835.*

The board met.
Present, M. Stokes, M. Arbuckle, commissioners; W. Seawell, secre-ry.
The commissioners were this day employed in distributing of presents the Comanche and Witchita Indians.

CAMP HOLMES, *August 27th, 1835.*

The board met.
Present, M. Stokes, M. Arbuckle, commissioners; W. Seawell, secre-ary.
The commissioners agreed to leave Camp Holmes this afternoon for Fort Gibson. They settled with Ascinka for the sum of one hundred nd nineteen dollars, being the amount due her for her services as inter-preter of the Comanche and Witchita languages. Ascinka having received horse on the 16th of May from the commissioners, for which sixty-five dollars was paid; the balance of her amount, amounting to fifty-four dollars, was paid her in goods.

FORT GIBSON, *September 13th, 1835.*

The board met.
Present, M. Stokes, M. Arbuckle, commissioners; W. Seawell, secre-tary.
The commissioners drew a check on the Union Bank of Louisiana in favor of Thomas B. Ballard for four hundred and eighty-six dollars. This includes the one given Mr. Ballard at Camp Holmes on the 23rd of August for four hundred and twenty dollars, which he returned to
497 the commissioners and was destroyed, and also his account against the commissioners for the hire of his waggons and teams employed in transporting presents from Camp Holmes to Fort Gibson, and for services rendered by him.

FORT GIBSON, *September 15th, 1835.*

The board met.

Present, M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

The commissioners wrote a letter to the Secretary of War informing him of their return to Fort Gibson from Camp Holmes, and enclosed him a copy of the treaty which they concluded with the Comanche and Witchita Indians at Camp Holmes an the 24th of August.

FORT GIBSON, *September 20th, 1835.*

The board met.

Present, M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

This meeting of the board was for the purpose of settling with Col. A. A. Chouteau on account of his services as interpreter of the Osage language, amounting to four hundred and eleven dollars; and also with Serjeant Stoutenburgh for services rendered by him in receiving and taking care of Indian presents, amounting to twenty-one dollars. Both of these accounts were paid, and the commissioners drew a check on the Union Bank of Louisiana in favor of Thomas E. Wilson for four hundred and thirty-eight dollars and twenty-five cents for that purpose and also for the purpose of paying Thomas E. Wilson's account against the commissioners for six dollars and twenty-five cents.

FORT GIBSON, *21st September, 1835.*

The board met.

Present, M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

The commissioners received of Thomas E. Wilson the following checks drawn by them on the Union Bank of Louisiana, viz: One in favor of Thomas E. Wilson for one thousand five hundred and fifty-eight dollars and thirty-nine cents, given the 5th of August; one in favor of Thomas B. Ballard for four hundred and eighty-six dollars, given on the 13th September, and one in favor of Thomas E. Wilson for four hundred and thirty-eight dollars and twenty-five cents, given on the 20th September. These checks were all destroyed, and in lieu of them the commissioners drew one on the Union Bank of Louisiana in favor of Thomas E. Wilson for two thousand nine hundred and sixty-three dollars and twenty-three and three-fourth cents, which includes all the drafts destroyed as aforesaid and also the sum of four hundred and eighty dollars and twenty-two and three-fourth cents furnished by Mr. Wilson and paid over to Lieut. Kinny for provisions furnished Indians during the treaty.

FORT GIBSON, *23rd September, 1835.*

The board met.

Present, M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

498 The commissioners wrote a letter to the Secretary of War, enclosing him their accounts, &c., for all disbursements and expenditures made by them from the 4th of May to the 22nd of September, 1835.

FORT GIBSON, *26th September, 1835.*

The board met.
Present: M. Stokes, M. Arbuckle, commissioners. W. Seawell, secretary.
The board decided to send Lieut. Seawell to Washington City with the original treaty, and a transcript of all the proceedings of the board up to the present date; and they were forwarded accordingly.

(Signed) M. STOKES.
M. ARBUCKLE.

W. SEAWELL,
Lieut., 7th Inf'ry., Sec. to the Commissioners.

Hon. D. N. COOLY,
Com'r, etc., etc., etc.

DEAR SIR: Having gathered, from the C. & C. delegates, the ideas of the Secretary, I have, with a view to something more definite than can be reached by general conversation, taken the office draft of a treaty as a basis and attempted to make it express, with here and there an alteration, the wishes of the parties. At all events, the points of difference can now be narrowed down until, I trust and believe, they will disappear. Thinking I may, perhaps, be useful to our friends now, and perhaps facilitate your labours in this connection, I will be happy, if you find it altogether proper and agreeable, to call on you at your office at any hour you may name on any evening, or should your convenience be promoted it will give me great pleasure to see you at your house.

I think I see now an early agreement on all the knotty points.

I mention the evening, for I am in the midst of a court in Baltimore, and you are in the mornings anything but an idle man.

Very truly and respectfully,

J. H. B. LATROBE.

APRIL 4, 1866.

HEADQUARTERS, FORT ARBUCKLE, C. N.,
October 18, 1858.

Major MCDOWELL,
Asst. Adjutant-General, Head Q'rs. of the Army.

SIR: I arrived here October 12th, and the same day had the honor to receive your letter containing the instructions of the general in chief. I have given the subject since I received the letter my unremitting attention, and happily the materials and persons are in this vicinity to enable me to give all the facts required with some degree of confidence; but as I am required to report as speedily as possible I may venture some opinions, which I may ask the liberty to modify hereafter to a certain extent, but which will not in any degree materially effect the general conclusion.

499 As a preliminary fact necessary to be understood, which is probably known at headquarters, it is assumed that the 98th meridian of longitude, which defines the eastern boundary assigned to the Wichitas, does not run through Arbuckle, as laid down in Captain Marcy's map, but runs forty-two miles west of Fort Arbuckle; consequently the 100° meridian, which defines the western boundary of

the same tract, may be assumed to fall thirty miles west of Otter Creek, or the western base of the Wichita Mountains. For this I have the authority of a general map, published by the Department of the Interior in my name, and also the higher authority based upon the actual observations of the U. S. astronomer, Mr. Majors, now present at this post, in whose results I have entire confidence. This result at once excludes the Wichitas from the country in which they were recently settled and had planted corn for the last five or six years, and which was supposed, until Mr. Major's determination, to be between the 98th and 100' meridian of longitude, but which in fact is now proved to be 5 miles east of the meridian of 98.

Another preliminary question, in part connected with the above, is that of military jurisdiction between the Department of the West and the Department of Texas.

The Wichita Mountains, the strategic point of operations against the Northern Comanches, lies so near the line of these respective departments as to produce cross purposes in the action of both civil and military authorities, which has really occurred to some extent, as exemplified by recent occurrences. In considering the question it is therefore necessary to look at it in two points of view: First, that it belongs to the Department of the West; and, second, that it belongs to the Department of Texas. The whole district of country should, in fact, be one military department. When the two posts indicated by the commander in chief are established there will, I think, be no use for more than one company of horse, and that for a short time at Belknap, if these posts are assigned to Texas, for after they are established there will be no movement of Comanches in that vicinity, except a few straggling horse thieves. In the same way, if these posts, which will fall in the limits of the Department of the West, are retained in that department, there will be no necessity for keeping more than a company of horse at Arbuckle, whose duty it will be to chase straggling parties of marauders and keep the outposts advised of any occurrences.

Of "the propriety of establishing one or more posts in the Wichita country."

That such would be advantageous to the service I think there can be no doubt. Neither Indians or agents will attempt to occupy that country till protected by U. S. troops. The whole Wichita and Keechi Nation are now assembled about this post, having deserted their village forty miles west of this place and came into this post two days after my arrival, in apprehension of the Comanches.

Several eligible positions present themselves for a post on the southern slope of the Wichita Mountains, combining healthy climate, fertile soil, good permanent water, timber and stone suitable for building. Among these stands preeminently the site of the old Keechi and Wichita village, on the eastern branch of Cache Creek about fifteen or twenty
500 miles SE. from Mount Scott, the most prominent peak of the Wichita Mountains. There is also a point to the north of the Wichita Mountains on Clear Creek which runs into the Canadian River sixty miles east of the Antelope Hills, and several on the Washita River, but none combining the advantages of the first named in agricultural capabilities. Where troops are to be sustained, especially cavalry, the corn-growing

capacity of the country must be considered. The winters on the elevated plains near the base of the Wichita Mountains are cold, and grain is absolutely necessary to sustain animals in condition for efficient service, and the distance from the settlements is too far to haul it.

To give protection to the Wichitas in the peaceful occupation of their country and to enable them to cultivate the soil, for which they have shown a strong predisposition, I consider the point as indicated on Cache Creek as beyond all doubt the most eligible. Whether this post or any other single point can be selected, which at the same time will effect this object and will enable the command to keep a lookout on the northern Comanches and effectually check their depredations, is a matter of extreme doubt in my mind, and can only be determined by experiment.

The Comanches, like the Kiowas and Cheyennes, live at no particular place. They occupy ranges of country and move their camp whenever the grass is eaten up or burnt out. They are at present supposed to be ranging in the vicinity of the Antelope Hills and the regions about the head of Red River. They come down upon the settlements by trails leading both to the east and west of the Wichita Mountains. The post on Cache Creek if furnished with cavalry would watch the trails on the eastern side of the Wichita Mountains, including the unsettled country from thence to Arbuckle. It could not so effectually watch the trails on the western slope. To do that effectually a post on the west slope of the Wichita Mountains is necessary, and there are but two points which can furnish the necessary good permanent water, timber, and stone. The first is Otter Creek, or, as the Indians call it, Pecan Creek, which unites with the North Fork of Red River at the western base of the Wichita Mountains; and the other is Elk Creek, which unites with the same river thirty miles to the north.

Neither presents the advantages for cultivation of the point on Cache Creek south of Mount Scott, but they afford sufficient good water and wood and are healthy localities. West of these creeks for some distance all accounts concur in representing the water as bad and highly charged with salt of different kinds and the country as generally destitute of timber.

I therefore do not hesitate to recommend that two posts be established, one at Cache Creek and the other at Elk or Otter Creek, and that for the present neither Belknap or Arbuckle be entirely abandoned.

It is stated, and I believe truly, that a very large number of Indians, composed of Kiowas, Cheyennes, and Arapahoes, have joined the Comanches, and that the Comanches, among whom there was a peace party, are now united and act together, whether for peace or war is yet to be determined, but, whatever be their professions, the establishing of these posts will, for the moment, excite the combined opposition of all those Indians, and should not, in my opinion, be undertaken with less than four or six companies to each post.

501 In the meantime, the number of Indians collected about this post (Fort Arbuckle) under various pretexts and the unsettled condition of the Chickasaws on this frontier, many of whom have left their farms from apprehension of danger, would render inexpedient at this time the withdrawal of any considerable portion of the force from this post except for temporary purposes.

The whole country within a circuit of two hundred miles of the Wichita Mountains comes clearly within the same military relation, and to be governed efficiently must be governed by one head. At present it is divided between two departments, and the limits of these departments meet at the precise point where difficulties are most apt hereafter to arise. To which department the district should be assigned the General in Chief will be able to decide without any views of mine.

I may be pardoned, however, for the suggestion that it will not do to break up at this time the military communication through the half-civilized nations lying between this and the Missouri frontier. From what I learned along the road an occasional show of troops along that line is very necessary.

Supplying troops by the line of either the Red or Arkansas rivers has always been attended with vexatious delays and great expense, and in the end the new posts contemplated must, I think, look for supplies to some post on the Gulf of Mexico, to Helena or Gaines Landing, the nearest point on the Mississippi, or to Jefferson City, the present terminus of the Pacific Railroad. All are about equidistant from the Wichita Mountains; but the last has the advantage in the excellence of the road and the healthiness of the climate through which it passes, and the fact that most of it will traverse Indian Territory, which requires from time to time a show of military force though perhaps no permanent establishment.

In view of the great expense which will at first attend the subsisting of these new posts, it may not be out of place for me to suggest the propriety of establishing first the post for the protection of the Wichitas, who will probably raise corn enough the first season to supply that post, and who will, if judiciously directed, be enabled to supply the other post the following season.

Mr. Majors has been kind enough to furnish me a map of the country showing how the meridians run according to his determinations, defining the country within the two degrees leased for the use of the Wichitas &c., which I herewith submit.

I have the honor to be, your obedient servant,

W. H. EMORY,
Major, 1st Cavalry, Comdg.

HD. QRS. OF THE ARMY,
New York, Nov. 5, 1858.

The General in Chief approves the views of Major Emory, and he recommends the establishment of two posts in the district of country assigned to the Witchitas and Keechies Indians, one on Cache, the other on Otter Creek, for garrisons of two companies of cavalry and 1 of infantry, the post on Cache Creek to be established at once, the other
502 as early as may be practicable. Fort Smith, Arkansas, will be the proper depot for supplying the new posts.

The commander of the Department of Texas should have the direction of affairs in the Wichita country, and the General in Chief purposes to assign this portion of the Department of the West to the Department of Texas.

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Respectfully referred to the Adjutant-General for the information of the Secretary of War, by direction of the General in Chief.

L. THOMAS,
Asst. Adjt. Genl.

Respectfully submitted to the Secretary of War.

S. COOPER,
Adjt. Gen.

A. G. O., Nov. 8–58.

In the Court of Claims of the United States.

THE CHOCTAW NATION AND THE CHICKASAW Nation, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

No. 18932.

Deposition of a witness, produced, sworn, and examined at the hour of 1.45 o'clock p. m., on the 9th day of July, A. D. 1896, before me, the undersigned, a notary public, in a certain case now pending in the Court of Claims, wherein the Choctaw Nation and the Chickasaw Nation are the claimants and the United States and the Wichita and affiliated bands of Indians are the defendants, upon written interrogatories hereto attached:

Hugh L. Scott, having been produced as a witness on behalf of the defendant Indians, was by me sworn, before any question was put to him, to tell the truth, the whole truth, and nothing but the truth relative to the said cause; and thereupon deposed and said that his name is Hugh L. Scott; that his occupation is that of a captain in the United States Army; that he is 43 years of age; that his place of residence is at Fort Sill, in the Territory of Oklahoma; that he has no interest, direct or indirect, in the claim which is the subject of inquiry in this cause; that he is not related to the claimants, or any of them, or to the defendants, or any of them.

And thereupon the following interrogatories were put by me to the said Hugh L. Scott, who, in answer thereto, testified as follows:

1. Question. To what extent are you acquainted, if there be such, with the traditions of the Comanche tribe of Indians?

Answer. I have lived among the Comanches for more than seven years, and have had charge of some of them who were members of my troop of cavalry, and have talked with them almost daily for five years, sometimes about their traditions and beliefs.

2. Question. What, if any, are the traditions of the said tribe of Indians in regard to their inhabiting the tract of land known as the
503 "Leased district," between the Red and Canadian rivers, and the ninety-eighth and one hundredth degrees of west longitude; and also, if any, what are their traditions as to any other tribe or tribes inhabiting the same lands?

Answer. Tabananaca, one of the old Comanche chiefs, who died about 1892, told me upon one occasion that the Comanches came into this country before any other Indians (meaning the vicinity of the Wichita Mountains) except the Wichitas, who came first, and the mountains on the

North Fork of Red River, at the cattle-trail crossing, were named for the Wichita Indians, and so called by the Indians before the coming of the white man. Another old Comanche chief, White Wolf by name, now living on the Comanche Reserve, who grew up with Tabananaca, has told me within a week past that the Wichitas came to these mountains before any other Indians; that the Comanches were next, and afterwards the Kiowas and Kiowa Apaches.

3. Question. What are the sources from which you have derived the above information?

Answer. Tabananaca and White Wolf, old Comanche chiefs—the former dead and the latter now living.

The witness having answered the above interrogatories, in compliance with the rule of the court requiring him to state whether he knows of any other matter relative to the claim in question, and if he do to state it, says:

I have a copy of Catlin's "North American Indians." Catlin was an artist, and made a trip through this country with the First United States Dragoons in 1834. There is in this book a picture of the Wichita village on the North Fork of Red River as it was in 1834, at the base of the Wichita Mountains, in what is now known as "Devil's Canyon."

H. L. SCOTT,
Captain of Cavalry.

I, John G. Hewett, a notary public in and for the Territory of Oklahoma, certify that at the time and place aforesaid Hugh L. Scott, a witness on behalf of the defendant Indians in the above-entitled cause, was by me sworn, before any question was put to him, to tell the truth, the whole truth, and nothing but the truth relative to the said cause, and that the answers were taken down in my presence, and his deposition as above set forth was read over and signed by him before me at the time and place aforesaid.

In witness whereof I have hereunto set my hand and official seal this 9th day of July, A. D. 1896.

[SEAL.]

JOHN G. HEWETT,
Notary Public.

My commission expires March 14, 1897.

I consent to taking the deposition of Capt. H. L. Scott upon the foregoing interrogatories before any notary public, reserving the right to cross-examine the witness after publication of his deposition.

Washington, June 22, 1896.

H. E. PAINE,
Attorney for Chickasaws.

504 Cross-interrogatories to be propounded on the part of the United States to Capt. Hugh L. Scott, at Fort Sill, Okla., in his deposition begun July 9, 1896, the right to further cross-examination upon such answers as he shall make being reserved.

1. In question 2 you were asked as to the existence of certain traditions among the Comanche Indians, and in answer you state that Tabananaca and White Wolf told you that the Comanches came into the

vicinity of the Wichita Mountains before any other tribe except the Wichitas, and that the mountains were named for the Wichitas before the coming of the white man. Were any of the statements made by you on the authority of these two chiefs matters within the personal knowledge of eitheir of these chiefs (and if so, which statements), or do all these statements refer to matters occurring before the lifetime of these chiefs, and which were handed down to them as a matter of tribal tradition?

2. Did Tabananaca and White Wolf tell you about how long ago the Wichitas came to the vicinity of the Wichita Mountains; or what is the nearest date that you can give for their alleged coming, and on what do you base your statement?

3. What white men did you understand were referred to as coming into that part of the country?

4. What bounds can you give to the territory which you understand was actually occupied by the Wichitas north of the Red River; and on what do you base your statement?

5. How long did they continue to occupy all the country within those bounds; and on what do you base your statement?

6. You say, "The mountains on the North Fork of Red River at the cattle-trail crossing were named for the Wichita Indians, and so called by the Indians before the coming of the white man." Do you mean that the name of these mountains was "Wichita" before the coming of the white man; or if not, what do you mean?

7. Did not the Wichitas at one time cease to occupy any country north of the Red River, and did they not then occupy only country south of the river?

8. When did this cessation of occupancy occur?

9. Did the Wichitas actually occupy any country north of the Red River in October, 1820; and if so, within what bounds? On what do you base your statement?

10. When did the Comanches come into the district between the Red and Canadian rivers and the ninety-eighth and one hundredth meridians, sometimes known as the leased district?

11. What were the bounds of the territory actually occupied by them there; and on what do you base your statement?

12. Please answer the two preceding questions, substituting "Kiowas" for "Comanches."

13. Please answer the same as to the Kiowa-Apaches.

14. Are not Indian traditions very unreliable when it comes to matters of precise geography?

15. Is not the tendency in Indian traditions to magnify the tribe or other allied tribes, and to exaggerate the extent of their occupancy of territory?

505 Redirect interrogatories to be propounded upon the part of the defendant Indians to Capt. Hugh L. Scott, upon the cross-interrogatories on the part of the United States.

By Mr. WALKER, of counsel for the defendant Indians:

1. If you answer the sixth cross-interrogatory in the negative, please state, if you know, from what Indian language, if any, the word

"Wichita" is derived; the names by which the Comanche and Kiowa Indians, respectively, call the Wichita Indians and the Wichita Mountains, and the signification of these names in English.

2. In reference to the ninth cross-interrogatory, please state, if you know, where the Wichita Indians lived when they were, if they were, visited by the smallpox epidemic of 1818. Whither did they move after that, if they did so move? State the sources of your information.

3. In reference to the eleventh and twelfth cross-interrogatories, please state, if you know, whether the so-called leased district was, prior to the setting off of the Comanche-Kiowa reservation, the main portion of the Comanche-Kiowa habitat, if it was a portion of it; and, if you answer in the negative, state, if you know, where the main Comanche-Kiowa range lay, in relation to the leased district, before the said reservation was set off. State the sources of your information.

4. In reference to the thirteenth cross-interrogatory, please state, if you know, what differences of territory have existed within historic times between the Kiowas and Kiowa-Apaches. State the sources of your information.

Replies to cross-interrogatories hereto attached, concerning the case at issue between the Choctaw and Chickasaw Nations *v.* the United States and the Wichita and affiliated bands of Indians.

Reply to question No. 1. The statements referred to matters before the lifetime of these chiefs, and were handed down to them, as I understand them, by tribal traditions.

No. 2. They did not tell me how long ago.

No. 3. They spoke of it as the time before they knew of the existence of any white men.

No. 4. The Wichitas, Kiowas, and Comanches speak of the vicinity of what are called by the white people the Wichita Mountains, and as Indians lived largely by hunting (although these Indians did a little planting), it required a large extent of country to support them. In telling stories of old times they relate events which occurred in various places, which show that in a general way they occupied the country conjointly with the Kiowas and Comanches from the Cross Timbers on the east to the borders of the Staked Plains on the west, and from the Canadian on the north to the Red River on the south, although they sometimes went outside of those boundaries, and during a part of our civil war were on the Arkansas.

No. 5. I do not know.

No. 6. I mean that those mountains were named by the other Indians after those people the whites call the Wichita Indians, and who call themselves Kiddi ki dish.

No. 7. Not to my knowledge.

506 No. 8.

No. 9. As I have not made any investigation of this subject with reference to the point at issue, I can give only such points that have come up in the investigation. I have made reference to other subjects and there are many gaps in their history which I can not fill—this is one of them—and serving most of my time on the plains I have had but little access to libraries where these matters can be looked up.

No. 10. They say themselves that they came here from the Northwest at a time that they used dogs for pack animals and had no horses, and found the Wichitas here before them. One Comanche man mentioned the Caddos also as being here—Cabeya is his name. He also mentions having horses at time of separation from Shoshones, but is the only one who does that I have questioned.

No. 11. The Comanches say they were divided up into different bands which occupied different parts of the country at the same time (as the Sioux have always done within historic times). The Penetethka Comanches regarded central Texas as their especial country. The Quahadas occupied the Staked Plains and eastern borders; the Yapparikas the Arkansas, Canadian Red, and Washita rivers; also the Noconies.

Capt. John Pope reports (Ex. Doc. No. 78, Thirty-third Congress, second session, p. 14) that in 1853 the Comanches were variously estimated at from 15,000 to 40,000 souls. "They roam as far to the north as the thirty-eighth parallel of latitude, and passing the Rio Grande, 500 miles from their homes, they invade the dominions of Mexico within 250 miles of her capital" (p. 15). "During the summer months nearly the whole tribe migrates to the north to hunt buffalo and wild horses on the plains of the Upper Arkansas, but return in the autumn with the proceeds of their hunting expeditions to pass the *the* winter in the timbered country along the valleys of the Upper Colorado, Brazos, and Red Rivers" (p. 16). "The range of the Comanche Indians extends over the plains of the Arkansas from the vicinity of Bents Fort, at the parallel of 38°, to the Gulf of Mexico, and they occupy the country along the route of this expedition from the eastern base of the Llano Estacado to about the meridian of longitude ninety-eighth. (See Long, 1819; also Conspiracy of Pontiac, 1689, Parman.)

No. 12. The Kiowas state that they joined the Comanches and made peace with them near the head of Red River at a time they used dogs for packs; that they got horses from the Comanches, and have lived with them (in each other's camps) ever since. (See Pope; also, for Kiowas and K. Apaches; also, Long's Expedition, 1819.)

No. 13. (See answer for Kiowas.)

No. 14. The older Indians of this section can draw a better map of the landmarks and rivers of this country between the Arkansas River and the Rio Grande than the average white person can. I have in my possession evidence as to this fact in the shape of maps and trails drawn by Indians.

No. 15. It is the tendency of all peoples, as far as I can judge, to magnify their own importance; and it is believed that the English especially are exaggerating the extent of their occupancy in various parts of the world, notably in Venezuela.

507 Replies to redirect interrogatories by Mr. Walker, of counsel for defendant Indians:

No. 1. The Wichitas have told me that the word "Wichita" belongs to the Osage language, but I have not yet verified this statement. They call themselves "Kiddi-ki-dish," which signifies tatto'ed around the eyes. Their tribal sign is made by drawing a circle around the right eye or cheek bone with the point of the right forefinger.

The Comanches call them "To cana" in their language, which the veteran Comanche interpreter, H. P. Jones (who has been with the Comanches for over thirty years, and has been post guide and interpreter at Fort Sill ever since it was built), states means "dark houses," owing to the darkness inside of their thatched houses.

The Kiowas call them 'To-goo-a, or tatto'ed in rings, and the mountains 'To-goo-a 'co, in which the ' indicates an explosive t and c. When speaking of these mountains in the sign language the sign for Wichita is made with the sign for mountains.

No. 2. I do not know.

No. 3. It was one of the main portions of the Kiowa and Comanche habitat, as stated above by Pope, also by the stories told of occurrences both by Kiowas and Comanches that happened in this section, and by their traditions. (Price's Across the Continent with Fifth Cavalry, and Marcy.)

No. 4. According to the Kiowa and Apache traditions they both originated in the far north, about the head of the Missouri River; that they fought each other for a little while and then made peace, and have been close friends ever since; migrated south together, and the Kiowa Apaches made the seventh band in the Kiowa tribal circle when they assembled for their medicine dance.

H. L. SCOTT,
Captain, Seventh Cavalry.

508 In the Court of Claims of the United States.

THE CHOCTAW NATION AND THE CHICKASAW Nation, claimants,
vs.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.
No. 18932.

To the ATTORNEY-GENERAL,
On behalf of the defendant, the United States;

J. S. STANDLEY, Esq., and SHELLABARGER and WILSON,
On behalf of the claimant, the Choctaw Nation, and

H. E. PAINE, Esq.,
On behalf of the claimant, the Chickasaw Nation.

Please take notice that we shall take the depositions of Philip Walker, James Mooney, and Harry King, witnesses on behalf of the defendant Indians, in the above-entitled cause, at the office of J. M. Vale, esq., in the Atlantic Building, in the the city of Washington, on Monday, at one o'clock p. m., June 29th, 1896.

J. M. VALE,
A. A. LIPSCOMB,
Attorneys for the defendant Indians.

PHILIP WALKER,
W. C. SHELLEY,
Of Counsel.

WASHINGTON, D. C., *June 26, 1896.*

509 Service of a copy of the above notice is hereby accepted as of June 26th, 1896, with the understanding that counsel for the United States, if unable to be present, reserves all exceptions and right of cross-examination.

CHARLES C. BINNEY,
On behalf of the United States.

For the Choctaw Nation.

H. E. PAYNE,
For the Chickasaw Nation.

510 (Indorsed:) U. S. Court of Claims. No. 18932. The Choctaw Nation and the Chickasaw Nation *v.* The United States and the Wichita and affiliated bands of Indians. Evidence on behalf of defendant Indians. Exhibit No. Notice of intention to take testimony. June 29, 1896. Josiah M. Vale and Andrew A. Lipscomb, attorneys for said defendants. Philip Walker and William C. Shelley, counsel.

511 WASHINGTON, *June 29, '96.*

S. G. HOPKINS, Esq.,
Notary Public.

DEAR SIR: Prior to your certification of the deposition of Mr. Phillip Walker, in the case of the Choctaw and Chickasaw Nations *v.* United States et al., Court of Claims, No. 18932, please enter a reservation, on behalf of the Chickasaw Nation, of the right to object on the ground of incompetency, or irrelevancy, or any other lawful ground, to any documents filed as exhibits to said deposition.

Very respectfully,

H. E. PAINE,
Counsel for Chickasaws.

JUNE *30th, 1896.*

Delivered to me this 30th day of June, 1896, by H. E. Paine.

S. G. HOPKINS, *N. P.*

512 Deposition of a witness produced in accordance with the notice hereto attached, sworn, and examined at the hour of one o'clock p. m., on the 29th day of June, 1896, at No. 930 F street northwest, in the city of Washington, District of Columbia, before me, the undersigned, a notary public in and for the District of Columbia, in a certain cause now pending in the Court of Claims, wherein the Choctaw Nation and the Chickasaw nations are the claimants, and the United States and the Wichita and affil/iated bands are defendants; when were present, H. E. Paine, counsel on behalf of the claimant, the Chickasaw Nation; Shellabarger & Wilson having been notified of this session by a copy of the notice hereto attached being left in their office in the hands of Mr. Hoehling by Mr. Walker, counsel herein; and J. M. Vale and Philip Walker, counsel on behalf of the defendant Indians.

PHILIP WALKER, having been produced as a witness on behalf of the Wichita and affil/iated bands of Indians, was by me sworn, before any question was put to him, to tell the truth, the whole truth, and nothing but the truth relative to said cause; and thereupon deposed that his name is Philip Walker; that his occupation is that of an attorney at law; that he is 37 years of age; that his place of residence is Washington,

D. C.; that he has the following interest in the claim which is the subject of inquiry in this cause, to wit: The Wichita and affiliated bands of Indians entered into a duly approved contract with J. M.
513 Vale, Andrew A. Lipscomb, George D. Day, and Dennis W. Bushyhead, whereby the said parties, as attorneys for said Indians, are to receive 6½ per cent of any amount which may be recovered for the said Indians in this cause. By duly approved assignments the witness is entitled to one-twentieth of that compensation. That he is not related to the claimants or any of them, nor to the defendants or any of them.

And thereupon the said Philip Walker was examined by counsel for the Wichita and affiliated bands of Indians, and in answer to interrogatories testified as follows:

By Mr. VALE:

Q. Referring to the papers I now hand you, which have been prepared for exhibits in this case, having been so prepared with a view to filing the same herein under the stipulation entered into between the Indians who are claimants and the defendant Indians, and they are now so filed, bearing Nos. 1 to 27, inclusive, please state what the same purport to be and what you know of the authenticity thereof, and how they were prepared for use as evidence in this case?

A. They are all true copies of the originals which will be found in the places designated at the heading of each exhibit, having been compared with those originals by me.

Exhibit No. 2 is taken from the record in the Greer County case, in which it purports to be a translation of certain copies of the original
514 Spanish manuscript found in the general archives of Mexico.

Exhibit No. 7 is photograph from one of the illustrations in Catlin's Manners and Customs of North American Indians, which was prepared by the photographer of the Bureau of Ethnology.

Exhibit No. 14 includes extracts, translated by me from the original French, of a compilation prepared by Pierre Margry. I am fully conversant with the French language, and the extracts in this exhibit are an accurate translation of the original.

Exhibit No. 15 is a reduced copy of the John Senex map of North America, taken from the volume on Indians in the 11th Census of the United States. I have compared this map with an original on file in the Library of Congress and found it to be an accurate reproduction, upon a reduced scale, of that portion of the map which it purports to cover.

Exhibit No. 18 was also translated by me from the original French of Le Page du Pratz in his History of Louisiana. The same is a correct translation from the original French.

In exhibit 25 the map showing the cession of the Cherokee, Creek, Seminole, and Choctaw and Chickasaw nations by treaties of 1866, together with the lands retained by those nations, was prepared by me from said treaties upon the basis of the map of the United States published by the United States Geological Survey.

515 I may add that these exhibits contain everything, so far as I have been able to discover, in the works and papers from which they are extracted which refers in any manner to the tribes who are at controversy herein or the territory at issue in this cause.

Cross-examination by Mr. PAINE:

Q. In looking over a few of these papers which you have filed as exhibits in this case I find the names of the different Indian tribes. I would ask what designations of Indian tribes you apply to the defendant Indians in this case?

A. In all cases, whether in the English or in the translation from the French, I have given the name exactly as it appears in the original without attempting to give the tribe its modern designation, leaving that for the court to infer. The Wichita tribe is variously known in the exhibits as Wichita, Witchitaw, the Ouichita (which is the French designation), the Towiache, and various other names of almost identical sound but slightly different spelling, originating from the Spanish name of the same Indians, and Pawnee Picques and other names of similar sound sometimes applied to them by the early French from their relationship to the Pawnees. Associated with the Wichitas will be found the Towakarehu, sometimes called the Towakoni, which is a clan of the Wichitas,

515½ and is frequently described by other names having similar sound but different spelling from the two given. The Wacos, called by the Spanish the Hueco; the Caddos, called by the early French the Cadodaquious, and the Kechai, also, are designated by other names of similar sound but different spelling. The affiliated bands of Indians include some Delawares and the remnants of many otherwise extinct bands or tribes of Texas Indians who have become absorbed in the tribes or bands specifically designated.

Q. Are there any names in these exhibits in addition to those which you have already applied to the Wichitas which you apply to that tribe?

A. There are no other names of which I am now aware but what are idem sonans with those already mentioned, except perhaps the Paniouassa or Paniassa, which is, I find, under the latter name, placed upon Senex' map already referred to. The name of Nihata appears as a village on the upper Red River on the Senex map, and is also found in Exhibit 4 in John Sibley's report to the Secretary of War, under the name of Niteheta, as one of the towns of the Panis or Towiaches. This is probably not a tribal, but simply a village designation.

Q. Do you apply the name "Nihata" found on the map of John Senex to the Wichita?

A. I consider it as one of the Wichita villages on the Red River, from the description given of them by Sibley. I found no other reference to that name.

Q. Then you are disposed to make Nihata and Niteheta identical?

A. They are more nearly so than many other cases which I have found where two authors have attempted to indicate the same Indian sound by the English alphabet.

516 Q. Have you any other reason for the application of the name Nihata to the Wichita tribe than the fact that John Sibley names one of the Towiache villages Niteheta?

A. I have not.

Q. As I understood you, you stated that you had compared the exhibits which you have presented with the originals, and found them to be accurate copies. Did I understand you correctly?

A. I have compared the exhibits with the papers from which they were copied. In the Greer County Case I have considered as original the printed record of the case in the Supreme Court of the United States. Otherwise the exhibits have been compared by me with the original printed documents.

Q. You did not mean the original manuscript documents?

A. I have not filed as exhibits the copies of any manuscripts.

The examination by counsel being concluded, the witness, in compliance with the rule of the court requiring him to state whether he knows any other matter relative to the claim in question, and if he do to state it, says that he knows of nothing further relative to the matters as to which he has testified.

PHILIP WALKER,
501 D St. Northwest, Washington, D. C.

S. G. HOPKINS.

517 I, S. G. Hopkins, a notary public in and for the District of Columbia, certify that at the time and place aforesaid Philip Walker, a witness on behalf of the Wichita and affiliated bands of Indians, defendants in the above entitled cause, was by me sworn, before any question was put to him, to tell the truth, the whole truth, and nothing but the truth relative to said cause, and that the answers were taken down in my presence and his deposition as above set forth was read over to and signed by him before me at the time and place aforesaid.

In witness whereof I have hereunto set my hand and official seal this 30th day of June, 1896.

[SEAL.] S. G. HOPKINS, *Notary Public.*

[Of the exhibits to this deposition, Nos. 3, 5, 8, 10, 11, 20, 21, 22, 25, 26, and 27 are (by agreement of the counsel for the defendant Indians' filed May 19, 1899) omitted from this record, being copies of public documents or other matter published by authority of Congress and subject to judicial notice in the argument of the case.]

518 (Indorsed:) U. S. Court of Claims, No. 18932, the Choctaw Nation and the Chickasaw Nation v. the United States and the Wichita and affiliated bands of Indians. Evidence on behalf of defendant Indians. Exhibit No. . Deposition of Philip Walker, a witness for the defendant Indians. June 29, 1896. Josiah M. Vale and Andrew A. Lipscomb, attorneys for said defendants; Philip Walker and William C. Shelley, counsel. Filed Jun. 30, 1896, Court of Claims.

519 [Extract from the works of Hubert Howe Bancroft, Vol. XV: History of the North Mexican States, Vol. I, San Francisco, 1884.]

(Library of the U. S. Geological Survey.)

(Pp. 626-628.) In the mean time it had been decided, as we have seen, to establish a presidio with one hundred men on the Rio San Saba. The cause of Apache conversion found an enthusiastic and powerful promoter in the person of Pedro Romero de Terreros, conde de Regla, who in 1756 offered to pay the whole cost for three years, not including that of the military establishment already ordered, of as many missions not exceeding twenty as could be advantageously founded under the general

supervision of Padre Alonso Giraldo Terreros of the Queretaro College. The offer was accepted. The colleges of Santa Cruz and San Fernando were to furnish each half the needed friars, and Colonel Diego Ortiz Parilla was appointed to the military command. The expedition, including five padres, reached Béjar at the end of 1756, and proceeded in April, 1757, to the new field. The presidio was called in the viceroy's honor San Luis de las Amarrillas; and the mission of San Sabá was located a league and a half distant on the river. The Apaches were pleased and friendly, but declined under one pretext or another to congregate permanently at the mission. Padre Terreros was soon forced to admit in letters to his superiors that he had been grievously disappointed in the character of the natives, and that the prospects for successful mission work were far from encouraging; yet with two companions he remained and undertook the task.

The real motive of the Lipanes in favoring the founding of a presidio and mission was to utilize the Spaniards as allies against the Comanches and other hostile tribes, by whom they were hard pressed. The
520 northern inland bands, crediting the Apache boasts of their new alliance, became bitterly hostile to the Spaniards, and formed a league to defeat their new foes. The Apaches, well pleased with the course of events, gave warning of the approaching danger, a warning that caused so much terror at the different forts that but little attention was given to the protection of San Sabá. Yet Parilla sent a force of seventeen men to reenforce the guard; and the next day, March 16, 1758, the savages appeared some thousand strong under the command of a Comanche chief at the mission. Too late to effect a surprise, they obtained admittance by pretending friendship and soon began their work of destruction. The buildings were plundered and burned. The only survivors were Padre Molina and two or three soldiers, who managed to conceal themselves and escaped at midnight. Padre Terreros was killed with a bullet, and Padre Santistévan was beheaded. The number of victims is not known, but they included a party sent from the presidio and drawn into an ambush. Only a few Apaches were present to share the disaster.

In his report of this affair Parrilla recommended a removal of the presidio, an increase of the force to one hundred and forty men, and an expedition to chastise the savages. Only the last suggestion was approved in a junta held in Mexico, in June; and a conference of officers at Béjar, in January, 1759, made plans for the campaign. At the same meeting Padre Morales presented a defence of the friars, who it seems had been blamed for the late disaster, and even offered in behalf of the college to give up the mission; but his proposal was declined. The army
521 of five hundred soldiers and volunteers, with a large force of Apache auxiliaries in the best of spirits, started in August under the command of Parrilla. After marching some hundred and fifty leagues they surprised a ranchería, killing fifty-five of the foe and taking many captives. Then they advanced against the towns of the Taovayases, and in the region of what was later called San Teodoro found six thousand Indians of different tribes in a strongly fortified position, many of them armed with muskets, and displaying a French flag, though there is no reason to suppose that they were in any way aided by the foreigners.

The savages did not wait to be attacked, but made a sortie in force, and the Spaniards fled in a panic, only the Apaches making a slight resistance. Thus an expedition which had cost $60,000 accomplished nothing.

522 (Indorsed:) U. S. Court of Claims. No. 18932. The Choctaw Nation and the Chickasaw Nation, v. The United States and the Wichita and affiliated bands of Indians. Evidence on behalf of defendant Indians. Exhibit No. 1. Extract from the works of Hubert Howe Bancroft, Volume XV. S. G. Hopkins. Josiah M. Vale and Andrew A. Lipscomb, attorneys for said defendants; Philip Walker and William C. Shelley, counsel. Filed Jun. 30, 1896. Court of Claims.

523 [Extracted from the record in cause No. 4, original, October term, 1891, Supreme Court of the United States, entitled "The United States vs. The State of Texas," known as the "Greer County Case," pages 860 et sequitur.]

It is there stated that the said extracts are translated from copies of the original reports in the Bancroft Pacific Coast Library, at San Francisco, California.

524 DOCUMENTOS, P. 264 B, VOL. II.

[Extracts and letters of Lieutenant-Colonel Mesieres, taken from books 27 and 28, general archives of Mexico, copies of which are in the Bancroft Pacific Coast Library at San Francisco, California.]

EXPEDITION OF LIEUTENANT-COLONEL DON ANTONIO DE MESIERES.

No. 1. With one lieutenant and 22 soldiers from Bexar, six militiamen from Natchitoches, and his two sons, he started from Bexar to Bucarely, whither he arrived on the 9th day of March, '78.

With no delay but that which was necessary to provide himself with subsistence, he despatched to Don Bernardo Galvez the letter which had been entrusted to him.

At the Santa Cruz fort he left the royal road, which he resumed above the frequented crossings of the Guadalupe. He passed over a rough and pathless country, where the Comanches had their pens and houses, but without finding any sign of these Indians, who left more than one year ago to commit their depredations elsewhere.

Next to the Guadalupe he crossed the Colorado and Brazos, abounding in all sorts of birds and fishes, and on their margins there are valuable timber and quarries. There is here an abundance of cows and estray horses. The interval between the rivers is covered with buffaloes, deer, bear, wild goats, wild boars, hares, partridges; turkeys seen in those prairies.

The climate is salubrious, moderately hot and cold, with luxuriant pasture and various medicinal weeds, several creeks running per-
525 manently, and lofty trees on their banks, also fruits maturing in proper season, such as grapes, persimmons, nuts, and acorns.

The settlement of "Nuestra Señora del Pilar de Bucarely" is situated in a spacious prairie, watered by the large Trinity River. There has been so far no irrigation, although the commandant assures that it may be easily obtained at the short distance of six leagues, although comfort may be secured without it.

This settlement ought to be encouraged for the following reasons:

1st. Because, being at an equal distance from Bexar, Natchitoches, and the northern nations, communication may be promptly established with those points.

2d. Because, being a neighbor to the Tancagues, Taucanas, and Yecanis to the north, and to the south to the Orcoquizas and Atacapas, a close friendship may be entertained with them, and by means of the former advice may be obtained of incidents in the north, and of the latter of what may happen on the coast and adjacent islands.

3d. Because, being adjacent to the small Vidaes, San Pedro, and Nacogdoches tribes, necessary assistance may be looked for from their old, invariable friendship.

4th. Because, it being demonstrated that the Trinity River is navigable to the sea, and that launches may through it reach the port of Opelousas, where a river empties that leads to New Orleans, the three crops of flour made here might be transported at a small expense; also tallow, grease, hides, and horns, which ought to become very
526 plentiful at Bucarely, and thus foreigners would be deprived of the advantages offered them by Louisiana.

The Videaeas Nation has about a hundred warriors, having lost an equal number of men during the epidemy, in which the zeal of Reverend Father Joseph de la Garza was so conspicuous. These people are roving and lazy; having given up hunting, go begging in the settlement, and are very annoying.

He (De Mésieres?) heard from a trusty trader who came from the coast that a party of ninety Carancagues were visiting among the Orcoquizas, to whom they told that several families of their nation had gone to live on an island lying between the mouths of the Colorado and Brazos, where they found anchors, bells, kettles, artillery, and other wrecks of ships cast by the sea. The same trader told him that many of the Carancagues speak our language, from which he infers that they are apostates, and that if that establishment is not destroyed others will join it, to the great injury of the mission; for this reason he refused trading with them, as they desired.

Opposite that island there are twenty families of Cocos and Mayeyes; also deserters from the missions of San Antonio and La Bahia.

Bucarely, March 18, 1778.

No. 2. On the 18th he started with the same troops (except one soldier who remained sick at Bucarely), being joined by thirteen militiamen, their captain, and Father Garza, all of that new settlement. Course north.

At 18 leagues he found a party of Quitreys Indians with twenty warriors, who, having parted with the main body of their nation, had
527 established themselves there in a large and fertile valley, where they keep their horses. There are in the vicinity salt pits, which they avail themselves of for selling and salting the deer they kill for food, keeping the skins for trade.

Here the road passes over steep, rocky hills, deep vallies, creeks, lagoons, and bogs, which, with the rain, caused them much trouble. He praises the spirit and zeal of the Spaniards in overcoming them, but the whole of this mean road affords a prodigious quantity of grapevines, which, although

wild, yield a fruit often not inferior to that of Castile, in the opinion of experts. There are also found viperine, "contrayerba," sassafras, and small potatoes, which have sometimes been used as food at Bucarely.

"Rancheria" of the Quitreys, March 23d, 1778.

No. 3. He started from here on a western course, and for the space of fifteen leagues there was not a handbreadth of soil that is not suitable for cultivation, being composed of woods and prairies interspersed by many streams, until the place is reached called by the natives "La Tortuga" (the turtle), an eminence that overlooks a wide plain, and from which a crystalline spring gushes forth.

In the vicinity the Tancagues live, not in a village, but under tents made of skins. They are divided into several squads that act and move at the whim of their chief. They are 300 warriors, including not a few apostates. They are bold and inclined to theft. They took a great part in the insults offered by the presidios of San Saba, Bexar, and Bahia, in which they would persevere were they not restrained by the example, influence, and threats of the Tuacanas and Yscanis.

He did not find the captains who had gone scattered in different
528 directions, but he sent them notice to be assembled when he returned, intending to seriously insist personally that they should surrender the captives, preserve good harmony, and engage them to form a settlement where they might live in peace and devote themselves to the cultivation of the soil, for did they persevere in their evil practices, result of their brutal mode of living, they would be prohibited trading and exposed to starve and be destroyed by their enemies.

Tortuga, May 28th, 1778.

No. 4. One soldier from Bexar and two militiamen of Natchitoches were left sick at La Tortuga. De Mesieres followed the same western course, and for the space of sixteen leagues admired the same disposition of the land, the woods, and the waters, until reaching the Brazos, which was swollen, but, with the assistance of the Tuacanas settled on the opposite bank, he crossed it promptly. He was received with demonstrations of sincere love. On the next day the principal men of the nation assembled, and he informed them of the arrival in the provinces of the superior commanding officer; spoke of his genial kindness to the natives and of his powerful protection which he bestows on the friends, among whom they are, owing to their loyalty, which was gratifying to them.

Next he spoke to the Xaramane apostates who had sought a refuge there, advising them jointly with Father Garza, but they made no answer. Seeing their reluctance, he induced the Tuacanas to oblige them, either by kindness or by threats, to return to their jurisdiction, as it was the order of the commanding general. They showed such zeal that none of them declined, and all of them gave him their word to comply with it upon the return of
one of their parties who had gone hunting. Whereupon, and at
529 the request of the apostates, he wrote to the governor to send orders to the mission of Espiritu Santo to prepare supplies and horses and the necessary escort to receive them on the Colorado River and thence to the mission from which they had fled more than 16 years ago. They are, all told, more than one hundred persons.

He recommends the part taken by Padre Garza, the retired lieutenant, Don Antonio Treminio, Lieutenant Don Joseph Menchaca, of Bexar, and the captain of militia, Don Antonio Gil y Barbo.

This Tuacana village contains about 150 warriors. It is situated in a fertile prairie and protected from the overflows of the river by a high wall, at the foot of which there is a spring which supplies the inhabitants with water. They might even obtain irrigation from it, but they do not know the advantages of it. They are industrious and are very friendly to us, as is proved by the surrender of the apostates and by their giving food to the people of Bucarely without even reserving a sufficiency for their own support until the next crop, for which due thanks were returned to them.

They complain bitterly of the Comanches, who, having established themselves on the same river, insult them, which may compel them either to withdraw or jointly with the neighboring nations to form a serious determination against that common enemy.

They are violently opposed to the apostates and have resolved to go and seek them in the places where they know them to be raising crops.

He expressed to the captain of the Tuacanas the pleasure that would be caused to the commanding general if their neighbors, the Tan-
530 cagues, would live in villages, devote themselves to the cultivation of the soil, and forego their wretched vagrant mode of living, otherwise he would certainly deprive them of trade. This proposition seemed very just to them. A captain of the Tancagues came to whom the other captain spoke with such earnestness on the subject that he does not doubt that that end will be attained.

Tuacane settlement, April 5, 1778.

No. 5. Followed the same western course on the Brazos, which is navigable a greater part of the year and here especially beautiful. One of its margins is a prairie and the other fine hills. At a distance of eight leagues, on the same bank, there is another Tuacana settlement. Its lands are even better than those of the former settlement and more abundant in what might be desired by an industrious community, such as timber, limestone, and grind and hewing stone, all of which he saw with his own eyes. There are so many springs that, in a short space, he counted eleven of them, very abundant, which could be united without difficulty and thus bring about desirable advantages. The genius of the people is exactly alike that of the former settlement and they are greater in numbers. Their love for De Mesieres is such that they offered to accompany him till the end of his expedition.

They do also complain very much of the Comanches, who penetrated among them without accounting for this proceeding, which De Mesieres reported to the governor of Texas for his information. Their hatred to the Lipans is such that they always refer to it in their conversations, and De Mesieres attributes a great part of the love they show to him to the care with which he made them understand that he, too, is their enemy.

Main settlement of the Tuacanas, April 7, 1778.

531 No. 6. De Mesieres, being persuaded of the importance of the conversion of the Xaramanes, informed, by agreement with them, the governor of Texas, the Baron de Ripperda, of their resolution, asking for the needed assistance for their journey; and in case that this small number of men might be exposed to risks from the Comanches, he detailed Lieutenant Menchaca, from whose zeal, galiantry, aad experience he anticipated a successful issue, to escort them. Father Garza is also

returning to Bucarely, the Xaramanes having applied for him to be their minister. It was therefore considered proper that Captain Gil y Barbo should accompany the father with his militiamen, who having neither arms or supplies are considered as unfit to accompany the expedition, and with their industrious chief, to whom several errands were entrusted to be discharged on the road, may devote themselves to raising crops and taking charge of their families.

He remained with a few soldiers and five militiamen, whom he kept with the retired lieutenant, Tremiño, to go and see the Tavaoiases and Mahas, to assure them of his good will due to that which they entertain for us, and to advise them to establish themselves in the locality selected for them, which, as they desire, will be either on the Brazos or on the San Xavier river, where they may conveniently oppose the Comanches, against whom they have causes of dissatisfaction, and check or rout them with the assistance of other nations equally interested in the destruction of those robbers. He concludes with the assurance that he will report his action without ever swerving from the instructions he has received.

Tuacana, April 8, 1778.

532 SECOND REPORT. P. 271 b.-280 b., Vol. II.

No. 1. After having despatched to Bucarely Lieutenant Menchaca and Captain Gil y Barbo, of the militia, De Mesieres continued on his journey, being accompanied by six soldiers from Bexar, four militiamen from Bucarely, four from Natchitoches, a Tauacana captain with nine Indians, and a Comanche, who having been a prisoner at Bexar obtained his liberty, and having been well treated, gratefully offered to serve as guide, interpreter, and mediator with those of his nation.

After seven days' march he reached the Taovaiase village. The beauty of the country over which he traveled, eighty miles, is beyond expression, being interspersed by many streams that will afford irrigation of the prairies and the banks of which are covered with forests. The rocky foundation of their beds will render easy the opening of ditches, and, finally, it abounds in buffaloes, herds of deer and antelopes, turkeys, partridges, geese, cranes, rabbits, and hares, that contribute both to pleasure and to comfort on the road.

From the Brazos River, on which the Tuacanas dwell, to the stream that waters the Taoaviase village, there is seen on the right a [forest], un monk, justly called by the natives the Big [Forest], el grande (the cross-timbers?). It is very thick, although not very wide, and seems to have been placed there by Providence to guide the inexperienced traveler or to offer a shelter in its narrow extent to those small in number or lacking resolution.

Taovaiases, April 18, 1778.

533 No. 2. The Taovaiase nation is divided into two villages, one situated north of the "Rio Bermejo" (Red River) or of Natchitoches, and the other fronting the first and on the opposite bank. The former village is composed of thirty-seven houses, and the latter of 123 houses. Every house contains from ten to twelve beds, from which it is computed that the number of men, including the youths, reaches beyond 800. The number of women and children of both sexes is very large. They wear only shirts, and their shoes are of skin. Their jackets,

shields, and horse equipment are of the same material. Their foresight in supplying themselves with food is creditable to their industry. There is no house where there are not four or five bulls and vessels full of corn, containing ordinarily four and a half "fanegas," with a great quantity of beans and pumpkins, the latter being kept one year to be curiously adorned like mats. They raise also melons and tobacco in abundance. Spring water is used to drink and moisten and irrigate their seeds. The river water is brackish and a great attraction for the stock that grazes on the banks and is killed at any hour. Fish is of the best kind, but they are not fond of it. They have fuel at hand in that big forest above mentioned and extending eighty leagues in length and one, two, or more leagues in width, where bear and wild hogs are found.

Nor are they deficient in useful timber, such as cottonwood, ash, elm, mulberry, black and white walnut, the first available for boards and the last for its oil. The quarries are used by the Indians only for extracting grindstone to sharpen their arrows, for grinding corn, and the white stone for pipes, flint stones to head their arrows and make fire. The climate is neither too hot nor too cold. Finally, in order that
534 they may be in want of nothing, there is in the middle of the river a salt bank, from which they extract excellent salt which is growing there so that when any quantity is removed the loss is soon restored, some samples of which have been preserved.

These *da*vantages are counterbalanced by their difficulties with the Osages, who are waging bloody wars against them; the Apaches, who molest them incessantly, and the Comanches, who, under the cloak of friendship, frequently visit and rob them, which they overlook, not to make more enemies than they have already.

Their government is democratic, women not being excluded from it, since they contribute to the welfare of the commonwealth. They tan, dye, and sew the skins, fence in the fields, gather the crops, cut and carry fuel, cook, build houses, and raise the children, to relieve and please their husbands, engaged only in hunting and war. From the former they acquire comfort and from the latter fame and become chiefs, not owing to the powess of their ancestors, but to their own gallantry, to which should be added their persuasions to obtain happiness in a future life. They practice little or, rather, no worship, their veneration for fire being most conspicuous among ridiculous superstitions. They are cheerful, affable, and tractable in their intercourse, kind to the sick, orphans, and widows, respectful for old age, liberal with strangers, and attentive to their guests; yet they are more inclined to resentment for offenses than to gratitude for favors, as is demonstrated by the atrocities inflicted to their enemies, the relation of which would cause horror.

The "Rio Bermejo" runs from the mountains of New Mexico at about four days' travel from the Tabaoiaces and forms three forks, which
535 unite near the village. The north fork contains the salt bank above referred to. At the junction there is yet little water except in the risings, which do not last, owing to the swiftness of the stream. It receives other streams that render it navigable, and, flowing into the Mississippi sixty leagues before it reaches New Orleans and five hundred leagues, following its meanders, from its head, it affords communi-

cation with Natchitoches and the neighboring nations. It runs E. N. E. and divides the province of Texas from that of Louisiana.

Taohiases, April 18, 1778.

No. 3. De Mesieres having previously sent notice of his approach to the Taovayases, the chiefs went out to receive him out of the village, dismounted from their horses, and raised him on their shoulders. They did the same with Lieutenant Antonio Tremiño, whom they love dearly, as they had taken him prisoner, treated him as a son, given him his liberty, and accompanied him to his country. They showed the greatest pleasure at seeing and entertaining for the first time the Spaniards of Bexar. They had their arrival heralded, inviting the women and children to come and see them, and this notification was followed by such gathering as is habitual to see strange sights. During their sojourn in the village they brought them all sorts of food in abundance. The day appointed by De Mesieres having come for a general assembly to present to them the gifts sent to them by the commanding general, through the governor of Texas, he assured them of the good will and protection of the two chiefs of the internal provinces and Louisiana. They were so pleased that they ordered instantly the building of a house where our people who might hereafter come to visit them could live without
536 being disturbed, and not satisfied with these demonstrations they asked De Mesieres to request the commanding general to send Spaniards who would settle among them, assuring him that the necessary assistance for a new settlement would not be wanting. He gave them his word to do so, and gave to the two villages the names of San Teodoro and San Bernado, in honor of the two chiefs, and urged them to carry out this demonstration of their affection.

He believes that the occupation of this site by a good population would be of the greatest advantage in the present and future, it being our key to the north, from which intercourse might be kept up with friendly nations, such as the Comanches and Osages, and full knowledge of the more remote ones might be obtained and any undertaking or invasion by the neighboring English might be checked. Prompt and easy communication might be obtained with Natchitoches, the Illinois, New Mexico, and Bexar, in the center of which this village is, with no obstacles from rivers as far as Natchitoches when traveling eastward, while there is the advantage that to reach other localities situated to the west, north, and south the rivers oppose no obstacles, being near their heads. The advantages offered to new colonists are rendered obvious by the description above made of the climate, soil, waters, &c. He insists also upon the harvest to be made by an evangelical minister among these gentle and plain people, who have no special religion that may prevent them from admitting the true religion, much more so were he accompanied by some families of Tlaxcultecas, whose example would be useful in the foundation of one of the most opulent and useful settlements in these kingdoms.

Villages of San Bernardo and San Teodoro of the Taovayases, April 19, 1778.

537 No. 4. Two Englishmen introduced themselves into the vicinity of the Taovayases by the Arkansas River, which empties into the Mississippi and runs parallelly to that of Natchitoches, asking admission in their villages to trade and make friendship with them. The Taovayasses did not admit them. On the contrary, having been cautioned

by De Mesieres on his former visit, they violently took from them the goods they were carrying, giving them only the liberty of withdrawing. He praised highly their former action and censured the latter, telling them again that they were bad men, vagabonds, and our enemies, as was evidenced by the assistance they gave to the Osages, and therefore ought not only to be deprived of their goods, but arrested and notice of it given to De Mesieres, and should they present themselves hereafter arms should be resorted to against them in case of resistance. They promised to do so. Therefore he begs the commanding general to approve whatever serious determination the Taovayasas may take upon this subject agreeably to his persuasion, which is not dictated from private hatred, but from love to the country, in view of the pride, boldness, and wickedness of so pernicious foreigners, evidences of which they gave in Canada ever since its foundation until its last revolution and ruin. This first introduction of Englishmen took place at the close of the year 1777.

San Teodoro and San Bernardo, April 19, 1778.

No. 5. He asked the Taobayases to surrender the two bronze cannons which Colonel Don Diego Ortiz Parrilla abandoned in the fatal campaign which he undertook against them. It is their intention to haul them to Bucarely and thence to forward them to Bexar, whence they came.

San Teodoro and San Bernardo, April 19, 1778.

538 No. 6. De Mesieres found among the Taobayases ten Spaniards of New Mexico, prisoners bought from the Comanches. They are of both sexes and distinct ages and casts. They are well treated and hope for their freedom, owing to the friendship of their masters to us. He did not confer upon their ransom (which he does not believe to be expensive) without first consulting the commanding general, nor did he believe it to be opportune, as it might excite ill-will among the enemies and induce our friends to become greedy of odious lucre.

San Bernardo and San Teodoro, April 19, 1778.

No. 7. De Mesieres having been instructed to visit the Obage or Panis Mahas nation, who came down last year from the banks of the distant Missouri River, where they had their village, to join the Taobayases, regretted not to find them in their settlement. He found only a captain, nephew of the chief, with ten Indians, the others having gone to the N.W. to found a settlement, at a distance of sixty leagues from San Teodoro. He called and welcomed him, and, securing his confidence and friendship, and complained gently of the fickleness which induced his people to abandon a place where they might live quietly and in happiness under the powerful protection of the commanding general. The Indians understood these reasonable considerations and acknowledged their mistake, and promised to make up for it by bringing back his people and establishment of them in a fine locality designated by De Mesieres, where they might live not as guests, but as lords and owners of their lands and enjoy trade with us.

They will oppose the Osages, their enemies, without allowing to others a share in the laurels acquired by themselves with their own arms
539 and avail themselves of trade with us, to which traffic with the neighboring villages will be added. The Taobayases praised highly this determination, giving their word to the captain to look upon and assist him as a brother, and as an evidence of their good faith they

gave him two horses, that he might accelerate his journey, which he undertook at once.

The place where the Obages are to be established is at a distance of two and a half days' journey from the Taobayases, at the same distance from the Cadodachos, and is situated on the southern bank of the river that waters these two places and Natchitoches, whence (as it is navigable thus far) the goods needed by them will come by water, thus avoiding the cost, damages, and labor incident to transportation over land. Besides this advantage, by extending the cordon of friendly Indians against the Osagues, the hunters from Louisiana will be benefitted with the aid of our new settlers and the advantages offered by this opulent river, of which they are deprived owing to their well-grounded dread of the Osages.

The Obages or Mahas are docile, honest, and industrious, engaged in hunting and war, and indefatigable, as is shown by the laborious marches on foot in which they have been raised. The captain spoke a great deal to De Mesieres of the numerous nations that dwell in the vicinity of the Missouri River; also of another nation which has its home at a distance of "two moons," through rough roads to the WNW., and is seen at certain times by the natives who dwell there on a great lake of wholesome water, on which they navigate on boats with oars and sail. They wear heavy dresses; their arms are the gun and the sabre; they are swarthy (if his report deserves credence); they seem to be Asiatics, an observation which is so old and so often repeated that there is no doubt as to its truth and our neglect to go and see them.

San Teodoro, April 19, 1778.

540 No. 8. De Mesieres met at San Teodoro eight of the Comanches, who live on the bank of the Brazos River above the Tuacanas. They told him that a party of their people had a fight on the road from Bexar to Rio Grande, out of which they came without loss and with many horses and one scalp, which they said was that of the paymaster of Bexar, who, however, was to be at that time on the way to Saint Louis. They added that their robberies at Bexar and its missions had ceased because there was nothing left there to lay their hands upon, and the post is well defended, so they directed themselves to Laredo and surrounding ranchos that were well supplied; all of which leads De Mesieres to suppose that the Comanches are the authors of the death of Xeponneceno Travieso, a resident of Bexar, which had been attributed to the Apaches.

This news prevented him from going and see them, as he was unwilling to extend his hand to those whose hands were dyed in our blood; to avoid seeing their spoils, and not to offer them afriendship which they would attribute to fear; nor to threaten them, not to expose his small escort to insults from them.

However, he consulted with Taovayase chiefs, who approved his resolution to avail himself of the Comanche who had been a prisoner at Bexar, was attached to us, and was known to enjoy influence among his people, and send him to say to them that their robberies and hostilities had reached their highest point; that he (De Mesieres) was sent by the great captains of the internal provinces and Louisiana to offer them their protection, provided that they would desist their perverse practices and

become worthy of such benefaction; otherwise he would not conceal their conduct from the superior authority; that he was only awaiting
541 their final word, not frivolous, as has been so often their habits, but supported by experience and specially by deeds, such as surrendering the horses of which mention was made above; that they alone disturbed the peace of these territories; that the neighboring villages, mindful of their own preservation and enraged by their continual excesses, had their arms in hand, and that the commanding general, notwithstanding his kindness, could not but approve their making use of them unless he saw prompt and good proof of their repentance.

The Comanches left with these instructions with the greatest wishes for the success of his errand, although De Mesieres entertains little hope of a good result, for if the Comanches refused the satisfaction demanded of them, and he urged the Texas, Tancague, Tuacana, and Taovayase nations to avenge their own wrongs, as they wish and have manifested, they would be short of war supplies to inflict to them a violent blow that would punish those thieves and put an end to their rapines. Communication and trade would cease between them, and reciprocal hatred and hostilities would be increased, whilst at a slight expense from the royal exchequer—powder, balls, and arms—the sufferings of our soldiers and inhabitants might be avenged when the commanding general, now engaged on more important business, will make a serious resolve.

San Teodoro and San Bernardo, April 19, 1778.

No. 9. De Mesieres returned to Bucareli, where the only news he heard was that the Yaramane apostates had already left for their mission, except one man called Andres, who presented himself to him at the Quitrey village. He ordered two soldiers to put him on horseback and keep watch over him, a determination which was approved by the gentiles.

542 A daughter of that man, being absent, remained behind, but when she returns she will go and join her father, who was turned over to the judge of Bucareli, who will send them to their mission.

A man and a woman named Cayetano and Marcela are still wanting and will be arrested by the Taobayases, with several apostates who live among them and the San Pedro and Texas Indians, on which business he will insist until its conclusion.

Failing to meet the Tancaigues, who are continually scattered and roving, he ordered the traders to bring them before him at Natchitoches, where he will tell them that we have a full knowledge of their evil doings, resulting from their idleness and plundering expeditions, and did they immediately bring them to an end, form a village, and devote themselves to agriculture, trade and intercourse with them would cease and they would be exposed to starve or perish by the hands of their enemies.

Bucarely, May 2d, 1778.

543 (Indorsed:) U. S. Court of Claims. No. 18932. The Choctaw Nation and the Chickasaw Nation v. the United States and the Wichita and affiliated bands of Indians. Evidence on behalf of defendant Indians. Exhibit No. 2. Extracts from the reports and letters of Col. Anastacio de Mesieres, taken from books 27 & 28, general archives of Mexico. J. W. Harrison. Josiah M. Vale and Andrew A. Lipscomb,

attorneys for said defendants; Philip Walker and William C. Shelley, counsel. Filed Jun' 30, 1896, Court of Claims.

561 ["Letters and Notes on the Manners, Customs, and Condition of the North American Indians," by George Catlin, 2 vols., New York, Wiley and Putnam, 1844. Third edition.]

(Library of the Smithsonian Institution.)

EXTRACT FROM LETTER NO. 43, PAGE 70, VOL. II.

The above letter, it will be seen, was written some time ago, and when all hands (save those who were too sick) were on the start for the Pawnee village. Amongst those exceptions was I, before the hour of starting had arrived; and as the dragoons have made their visit there and returned in a most jaded condition, and I have again got well enough to write, I will render some account of the excursion, which is from the pen and pencil of my friend Joe (Chadwick), who went with them and took my sketch and note books in his pocket.

"We were four days travelling over a beautiful country, most of the way prairie, and generally along near the base of a stupendous range of mountains of reddish granite, in many places piled up to an immense height without tree or shrubbery on them, looking as if they had actually dropped from the clouds in such a confused mass, and all lay where they had fallen. Such we found the mountains enclosing the Pawnee village on the bank of the Red River, about ninety miles from the Camanchee town. The dragoon regiment was drawn up within half a mile or so of this village and encamped in a square, where we remained three days. We found here a very numerous village, containing some five or six hundred wigwams, all made of long prairie grass, thatched over poles, which are fastened in the ground and bent in at the top, giving
562 to them, in distance, the appearance of straw beehives, as in plate 173, which is an accurate view of it, showing the Red River in the front and the mountains of rock behind it.

"To our very great surprise, we found these people cultivating quite extensive fields of corn (maize), pumpkins, melons, beans, and squashes. So, with these aids and an abundant supply of buffalo meat, they may be said to be living very well.

"The next day after our arrival here Colonel Dodge opened a council with the chiefs, in the chief's lodge, where he had the most of his officers around him. He first explained the friendly views with which he came to see them and of the wish of the Government to establish a lasting peace with them, which they seemed at once to appreciate and highly to estimate."

EXTRACT FROM LETTER NO. 45, PAGE 82, VOL. II.

Since we came in from the prairies and the sickness has a little bated we have had a bustling time with the Indians at this place (Fort Gibson). Colonel Dodge sent runners to the chiefs of all the contiguous tribes of Indians with an invitation to meet the Pawnees, &c., in council at this place. Seven or eight tribes flocked to us in great numbers on the first day of the month, when the council commenced. It continued several days and gave these semicivilized sons of the forest a fair

opportunity of shaking the hands of their wild and untamed red
bretheren of the West—of embracing them in their arms with
563 expression of friendship and of smoking the calumet together, as
the solemn pledge of lasting peace and friendship.

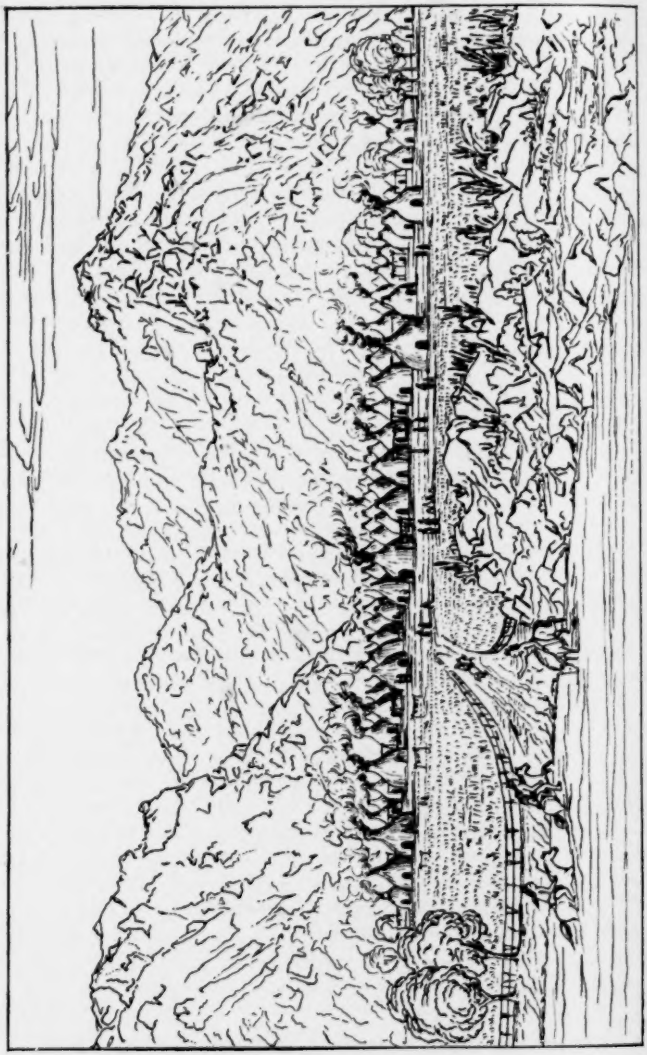
Colonel Dodge, Major Armstrong (the Indian agent), and General Stokes (the Indian commissioner) presided at this council, and I can not name a scene more interesting and entertaining than it was; where, for several days in succession, free vent was given to the feelings of men civilized, half-civilized, and wild; where the three stages of men were freely asserting their rights, their happiness, and friendship for each other. The vain orations of the half-polished (and half-breed) Cherokees and Choctaws, with all their finery and art, found their match in the brief and jarring gutterals of the wild and naked man.

After the council had adjourned, and the fumes of the peacemaking calumet had vanished away, and Colonel Dodge had made them additional presents, they soon made preparations for their departure, and on the next day started, with an escort of dragoons, for their own country. This movement is much to be regretted, for it would have been exceedingly gratifying to the people of the East to have seen so wild a group, and it would have been a great service to them to have visited Washington—a journey, though, which they could not be prevailed upon to make.

564 (Indorsed:) U. S. Court of Claims. No. 18932. The Choctaw Nation and the Chickasaw Nation *v.* The United States and the Wichita and affiliated bands of Indians. Evidence on behalf of defendant Indians. Exhibit No. 6. Extracts from Catlin's "Manners, Customs, and Condition of the North American Indians." S. G. Hopkins. Josiah M. Vale and Andrew A. Lipscomb, attorneys for said defendants; Philip Walker and William C. Shelley, counsel. Filed Jun' 30, 1896. Court of Claims.

565 (Indorsed:) U. S. Court of Claims. No. 18932. The Choctaw Nation and the Chickasaw Nation *v.* The United States and the Wichita and affiliated bands of Indians. Evidence on behalf of defendant Indians. Exhibit No. 7. Wichita village, on the Red R., 1834. Fig. 173, in Catlin's Manners and Customs of the North American Indians. S. G. Hopkins. Josiah M. Vale and Andrew A. Lipscomb, attorneys for said defendants; Philip Walker and William C. Shelley, counsel. Filed Jun' 30, 1896. Court of Claims.

(Here follows picture marked p. 566.)



Copy of figure 173, Catlin's Manners and Customs of the North American Indians. "Wichita village on the North Fork of the Red River."

567 [Extracts from "Commerce of the Prairies, by Josiah Gregg, 2 vols., New York, 1844."]

(Library of the Bureau of American Ethnology.)

(Vol. II, p. 9.) An unconquerable propensity to return to prairie life inclined me to embark in a fresh enterprise. The blockade of the Mexi-

an ports by the French also offered strong inducements for undertaking
uch an expedition in the spring of 1839.

(P. 17–18.) We had just reached the extreme edge of the far-famed "Cross-Timbers" when we were gratified by the arrival of forty dragoons, under the command of Lieut. Bowman, who had orders to accompany us o the supposed boundary of the United States. On the same evening ve had the pleasure of encamping together at a place known as Camp Holmes, a wild, romantic spot in latitude 35° 5′, and but a mile north of the Canadian River. Just at hand there was a beautiful spring, where, in 1835, Colonel Mason, with a force of U. S. troops, had a "big talk" and still bigger "smoke" with a party of Comanche and Wichita Indians. Upon the same site Col. Chouteau had also caused to be erected, not long after, a little stockade fort, where a considerable trade was subsequently carried on with the Comanches and other tribes of the southwestern prairies. The place had now been abandoned, however, since the preceding winter.

From the Arkansas River to Chouteau's Fort our route pre-
568 sented an unbroken succession of grassy plains and fertile glades, intersected here and there with woody belts and numerous rivulets, most of which, however, are generally dry except during the rainy season. As far as Camp Holmes we had a passable wagon road, which was opened upon the occasion of the Indian treaty before alluded to, and was afterwards kept open by the Indian traders.

(P. 19.) We were now about to launch upon an unknown region; our route lay henceforth across that unexplored wilderness of which I have so frequently spoken, without either pilot or trail to guide us for nearly 500 miles. We had to depend entirely upon our knowledge of the geographical position of the country for which we were steering, and the indications of a compass and sextant. This was emphatically a pioneer trip; such a one also as had, perhaps, never before been undertaken—to convey heavily laden wagons through a country almost wholly untrod by civilized man, and of which we, at least, knew nothing.

(P. 153.) As the forest of Cross Timbers was now beginning to be seen in the distance, and fearing we might be troubled to find a pass way through this brushy region south of the Canadian, we forded this river on the 29th, without the slightest trouble, and very soon entered our former trail, a little west of Spring Valley.

569 (Pp. 179–180.) If we look at the great western prairies independently of the political powers to which portions of them respectively belong, we shall find them occupying the whole of that extensive territory lying between the spurs of the Rocky Mountains on the north and the rivers of Texas on the south—a distance of some seven or eight hundred miles in one direction; and from the frontiers of Missouri and Arkansas on the east to the eastern branches of the southern Rocky Mountains on the west—about six hundred miles in the transverse direction; the whole comprising an area of about 400,000 square miles, some 30,000 of which are within the original limits of Texas, and 70,000 in those of New Mexico (if we extend them east to the United States boundary), leaving about 300,000 in the territory of the United States.

This vast territory is not interrupted by any important mountainous elevations except along the borders of the great western Sierras, and by

some low, craggy ridges about the Arkansas frontier—skirts of the Ozark Mountains. There is, it is true, high on the dividing ridge between Red River and the False Washita, a range of hills, the southwestern portion of which extends about to the 100th degree of longitude west from Greenwich; that is, to the United States boundary line. These are generally called the Witchita Mountains, but sometimes Towyash by hunters, perhaps from toyavist, the Comanche word for mountain. I inquired once of a Comanche Indian how his nation designated this range of mountains,
which was then in sight of us. He answered, "Toyavist." "But
570 this simply means a mountain," I replied. "How do you distinguish this from any other mountain?" "There are no other mountains in the Comanche territory," he rejoined; "none till we go east to your country, or south to Texas, or west to the land of the Mexican."

(Pp. 199–201.) The celebrated Cross Timbers, of which frequent mention has been made, extend from the Brazos, or perhaps from the Colorado of Texas, across the sources of Trinity, traversing Red River above the False Washita, and thence west of north to the Red Fork of Arkansas, if not further. It is a rough, hilly range of country, and, though not mountainous, may perhaps be considered a prolongation of that chain of low mountains which pass to the northward of Bexar and Austin City, in Texas.

The Cross Timbers vary in width from five to thirty miles, and entirely cut off the communication betwixt the interior prairies and those of the great plains. They may be considered as the "fringe" of the great prairies, being a continuous brushy strip composed of various kinds of undergrowth, such as black-jacks, post oaks, and in some places hickory, elm, etc., intermixed with a very diminutive dwaft oak, called by the hunters "shin oak." Most of the timber appears to be kept small by the con-
tinual inroads of the "burning prairies;" for, being killed almost
571 annually, it is constantly replaced by scions of undergrowth, so that it becomes more and more dense every reproduction. In some places, however, the oaks are of considerable size, and able to withstand the conflagrations. The underwood is so matted in many places with grapevines, green briars, etc., as to form almost impenetrable "roughs," which serve as hiding places for wild beasts, as well as wild Indians, and would, in savage warfare, prove almost as formidable as the hammocks of Florida.

South of the Canadian a branch of these Cross Timbers projects off westward, and afterwards cross the stream; and, having continued up for a hundred miles, it inclines northwest beyond the North Fork, and ultimately ceases, no doubt, in the great sandy plains in that direction.

The region of the Cross Timbers is generally well watered, and is interspersed with romantic and fertile tracts. The bottoms of the tributaries of Red River, even for some distance west of the Cross Timbers (perhaps almost to the U. S. boundary), are mostly very fertile, and timbered with narrow stripes of elm, hackberry, walnut, hickory, mul-
berry, bur oak, and other rich growths.

572 (Indorsed:) U. S. Court of Claims. No. 18932. The Choctaw Nation and the Chickasaw Nation v. the United States and the Wichita and affiliated bands of Indians. Evidence on behalf of defendant Indians. Exhibit No. 9. Extracts from Gregg's Commerce of the Prairies, Vol. II. S. G. Hopkins, Josiah M. Vale, and Andrew A.

Lipscomb, attorneys for said defendants. Philip Walker and William C. Shelley, counsel. Filed Jun' 30, 1896. Court of Claims.

573 [Extract from "The Pawnee Indian; a Sketch," by John H. Dunbar. Reprinted from the Magazine of American History, April, 1880.]

(Library of the Bureau of Ethnology.)

"The traditions of three of the bands, the Xau'-i, the Kit'-ke-hak-i, and Pit-a-hau-e-rat, coincide in stating that the Pawnees migrated to the Platte River region from the south, and secured possession of it by conquest. The period of 'his migration is so remote that they have failed to retain any of its details, except in a very confused form. The language affords some evidence that their residence in the valley of the Platte has been of some duration. O-kut-ut and Oku-kat signify, strictly, above and below (of a stream), respectively. Now, their villages have usually been situated upon the banks of the Platte, the general course of which is from west to east. Hence, each of these words has acquired a new meaning, i. e., west and east. So, also, Kir-i-ku-ruks-tu, toward or with the Wichitas, has come to mean south. Such developments are perfectly natural in the history of a language, but require time. The Wichitas, I am told, have a tradition that the primitive home of themselves and the Pawnees was upon the Red River, below the mouth of the Wichita. This would place them in close proximity with the Caddos. The Wichitas also attempt to explain their own southern position by alleging that, having had reason to be dissatisfied with the migration or its results, they attempted to return to their old home. The

Pawnees also state that the Wichitas accompanied them on the
574 migration, but left them long ago and wandered away to the south, though silent as to the reason. This much may be safely claimed, that the separation must have occurred long since, as is indicated particularly by the marked diversion of the Wichita dialect. There are certain facts which may be referred to here as affording something of vraisemblance to the tradition of this migratory movement from the south: 1. The Pawnee has always been remarked among the northern tribes for his fondness for and skill in the use of horses. It was a great ambition with each of them to be the owner of a drove of them. His wealth and, to some extent, his social standing were determined by the number he possessed. For the increasing of his stock he made frequent predatory incursions upon neighboring tribes, especially upon those toward the south, and sometimes these expeditions were extended to a great distance. Personal names were often derived from successful exploits of this kind. 2. The Pawnee warrior always preferred a bow of bois d'arc, and besides the bow in actual use, he would often have in his lodge a stock of the same material, which at his leisure he would be working into shape as a provision against possible exigency. Bows of this wood were rarely traded away. Bois d'arc, however, was to be obtained only in the south, and for the purpose of procuring it a sort of commerce was kept up with certain tribes living there. Now, in both

these respects, his fondness for horses and his preference for the
575 bois d'arc, the Pawnee is remarkably at one with the tribes of the southern plains, and though they may not be cited as proof of his

southern origin, they are at least indications. The Pawnee usually locates the Mississippi to the southeast and the sea to the south. This is perfectly natural if his present indistinct knowledge of them is the remnant of a more intimate acquaintance that he once possessed in the south.

"The original inhabitants of the conquered territory, the three bands already named, claim to have been the Otoes, Poncas, Omahas, and Ski-di. It is in the subjugation of these tribes that the Pawnee finds his heroic age. The tradition is that the Otoes and Omahas were entirely expelled from the country, but, after a long absence to the northward, returned, or rather were driven back by the Dakotas, and were allowed by sufferance to occupy lands adjacent to the Missouri, as the Poncas had continued to do since the first conquest. From that time they have remained wards of the Pawnees. This much at least is true: The Pawnee always spoke of the Otoes, Poncas, and Omahas as subjugated tribes and when together in council, on war or hunting expeditions, though generally acknowledging their prowess, especially that of the two former, he still treated them as dependants, and in times of impending danger from the common foe, the Dakotas, they uniformly looked to him for succor."

576 (Indorsed:) U. S. Court of Claims. No. 18932. The Choctaw Nation and the Chickasaw Nation v. The United States and the Wichita and affiliated bands of Indians. Evidence on behalf of defendant Indians. Exhibit No. 12. Extract from "The Pawnee Indian; Sketch," by John H. Dunbar. S. G. Hopkins. Josiah M. Vale and Andrew A. Lipscomb, attorneys for said defendants; Philip Walker and William C. Shelley, counsel. Filed Jun. 30, 1896. Court of Claims.

577 MIGRATION OF THE WICHITA INDIANS, BY ALBERT S. GATSCHET

[From American Antiquarian, September, 1891.]

(In the Library of the Bureau of Ethnology.)

At a council of the Witchita people, held on the Washita River, May 19, 1885, Chief Niastor, of the Tawakoni Indians, made the following statements:

When the Wichita Indians lived on the Arkansas River other Indians crowded upon them from the north and east, and, after a fight, drove them southward. The chief of the Wichitas at that time was Todekisadie. He said that for times immemorial his people had lived in the same country, and was driven from it only through the onset of the Indians above mentioned. In a council it was decided to send a party of explorers to look out for a new tract to settle upon. The selected party went southwest, and when it struck the Wichita Mountains the surrounding country pleased them so that they decided to report in favor of going there. After their return a council was called, and the party of explorers pleaded for emigration to that portion of land. The removal was decided upon, and as horses were then unknown, the whole people, which was then very numerous, had to walk the distance on foot. Arriving from their villages upon the Arkansas River at the banks of the North Canadian River, they followed it upstream and arrived at the bend

of the river, at the Red Sand Hills. There they stopped, built
578 lodges, and sowed their corn. From this location a part of the Wichitas were called Tawakoni, for this Wichita word signifies "river bend among red or sand hills." Having lived there several years, they felt a desire to remove, and led by Todekitsadie they started for the Wichita Mountains, supposing that the soil there was better adapted for raising Indian corn. After the Wichitas had settled there, Todekitsadie died. Niastor also made the additional statement, obtained from his mother, that after leaving the Red Sand Hills on the Canadian River they did not travel directly to the Wichita Mountains, but remained a few years north of the (False) Washita River, set up farms near the mouth of Sugar Creek (north of Anadarko), and were forced from there only through a general inundation, which flooded all the lands around the Washita, of which Sugar Creek is a tributary, joining it from the north near the agency buildings. They then fled to the Wichita Mountains, and this occurred in the time of Niastor's grandfather. Niastor was born there in 1837, near Mount Scott, and his mother was also born in the Wichita Mountains; but the earlier emigration of the people from the Arkansas River took place at the time of his great-grandfather. The tract where their villages then stood was in the neighborhood of Wichita City, Sedgwick County, southern Kansas, and flint heads, with pottery, are now found at their former settlements. To this abstract of the tradition I add the deposition made by Niastor in its original terms, since many points are made more clear by it. I have received this document through the kindness of Mr. H. Kuhn, clerk of the Comanche, Kiowa, and Wichita Agency, under date of August 23, 1885.

579 At a council of the Wichitas, May 19, 1885, Niastor, chief of the Tawakonie, said: "My mother told me that her father said she was born on the Arkansas River, below where the town of Wichita now is, and where there were holes in the ground in which could be found flint heads for arrows and also pottery, near where the Osage country now is. My great-grandfather told my mother that when the Wichitas lived on the Arkansas River the Indians from the north and east crowded and fought them, and drove them this way; that at that time To-de-kits-a-die (meaning 'boy chief') was the chief of the Wichitas. He told my mother that our people had always lived there, but after the Indians fought them our people held a council and concluded to move away from there. Some of our people were selected to go and look out for a country. The party selected went southwest until they saw the mountains now called Wichita Mountains, and liked the country very much. They returned to the village, and then our chief men called a council and heard what the returned party said about the land they had seen, that it pleased them, and that they wanted all of our people to go there. At that time there were a great many Wichitas, and our people had never seen any horses (there were none in the country), and when our people left their villages on the Arkansas River to go south they all had to walk. When they arrived at the North Canadian they traveled up that river till they came to the Red Sand Hills in the bend of the river, where they made villages and raised corn. It was there that some of our people were first called 'To-wa-co-nies,' because they lived in sand hills in the bend of the river. To-wa-co-nie is a Wichita

580 Indian word, meaning 'bend in the river among red hills or sand hills.' Our people, after living there some years raising corn, got tired, and the 'boy chief' (To-de-kits-a-die) told them that they would all go to the Wichita Mountains, which was a better country for raising corn. To-de-kits-a-die died after our people had settled in the Wichita Mountains.

"I forgot to tell you that my mother told me when the Wichitas moved from the Red Hills, on the Canadian River, they remained for some years north of the Washita River and made farms near the mouth of Sugar Creek, and while they lived on the Washita there was a big freshet, which covered all the bottoms and flooded the whole country, after which our people moved to the Wichita Mountains. This was during the lifetime of my grandfather, and my mother was born in the Wichita Mountains. I am now forty-eight years old, and was born near Mount Scott. My mother was very old when she died, thirteen years ago. She was much older than Es-quit-cho is now.

"The Wichitas a long time ago were called Pawnee Picques, but our people did not call themselves by that name, and I do not know why we were called by that name.

"NI-AS-TOR (his x mark),
"*Chief of the Towaconie.*"

Witness:
(Signed) E. B. TOWNSEND.

581 For a better understanding of the relations among the Pani tribes in the Indian Territory it will be well to consider that the name Wichita represents a tribe as well as a clan of that tribe. The Wichita tribe had the following seven clans, as ascertained by Rev. Owen J. Dorsey, in 1881, from a Tawakoni man called Na-ashtuwi, who is probably identical with our Niastor:

1. Witchita. 2. Towakarehu. 3. Wee-ko (Weko, Waco, Hueco). 4. Akwetch. 5. Sidahetch. 6. Kishkat. 7. Kirieshkitsu.

Here the difficulty is to find out whether these names represent originally different tribes who became the allies of the Wichita, or totemic gentes, into which the main stock of the Wichita had gradually diverged. The language of the Towakarehu or Towakoni is about identical with that of the Wichita, but that of the Weko shows more disparity.

The name by which the Wichita originally called themselves was Tawayash, Tawaihash; also spelled Towiache, Towache, Toayas, Toweeash. Their present appellation, Wichita, which they apply to themselves, is thought to be of Osage origin, and to mean "migrating," "removing."

The other name, as mentioned by Niastor, is French, and should read Pawnees Piques (not Picques), that is, the tatto'ed Pawnees. Another appellation—Pawnee Picts—smacks of book learning, for it is taken from the Scotch tribe of the Picti or "tatto'ed," so called by a Latin term at the time of the Romans. The third name mentioned by Niastor as applied to the Wichita Indians—Kitikades, or "Painted Eyelids," as he renders it—is the name given to them by the Pawnees proper, and is pronounced Kirikurus or Kidikurus.

582 James H. Deer, a Caddo interpreter, consulted by me in 1886, during his presence in Washington, D. C., agreed with the state-

ment given above, that Wichita was an Osage term, signifying "moving about," and as to the name Tawakoni, he heard from the Wichita that it belonged to their language and signified "sand-hill bend." The Wacos, another cognate tribe, now count only seventy people, and their name means "migrating" in Wichita, by which, he said, their travels or raids into Mexico are referred to. The Red Sand Hills, above mentioned, are now known as the Red Hills, and lie on the banks of the North Canadian within the Cheyenne and Arapahoe Reservation, ten miles above Darlington, Indian Territory.

The remnants of all these tribes have been gathered for the last twenty years or more in the Indian Territory, north of the Washita River, and in 1889 showed the following population: Wichita Indians 176, Tawakoni 145, Waco 64, Kichai 63, Caddo 539; total 987.

583 (Indorsed:) U. S. Court of Claims, No. 18932. The Choctaw Nation and The Chickasaw Nation v. The United States and The Wichita and affiliated bands of Indians. Evidence on behalf of defendant Indians. Exhibit No. 13. Migration of the Wichita Indians, by Albert S. Gatschet, from the American Antiquarian, Sept., 1891. S. G. Hopkins. Josiah M. Vale and Andrew A. Lipscomb, attorneys for said defendants. Philip Walker and William C. Shelley, counsel. Filed Jun' 30, 1896. Court of Claims.

(Here follows map, marked p. 584.)

586 THE ARCANCAS POST.

[Historical Memoires of M. Dumont in French's Historical Memoires of Louisiana, Part V, New York, 1853, pages 34-6.]

(Library of the Bureau of Ethnology.)

This post is properly only a continuation of the establishment formed by the French around the house which Joutel and his companions reached in the month of July, 1687, and where, before arriving, they perceived a cross planted, which consoled them in their pains and hardships. From that time to the present the nation has always remained in possession of that territory; and when M. le Blanc sent men to take possession of the grant made him on the Yazoux River, a hundred and forty leagues from the capital, the little garrison, kept till then by the company at that place, retired to the Arcancas post, then commanded by the Sieur de la Boulaye. There is no fort in the place, only four or five palisade houses, a little guardhouse, and a cabin, which serves as a storehouse. This French post was established as a stopping place for those going from the capital to Illinois.

* * * * * * *

In 1721, some visionaries having assured the company that there was an emerald rock on the Arcancas River, Captain de la Harpe was sent to look for it. He had with him a detachment of twenty-two men, with the Sieur de Franchomme as lieutenant, and one Bessan for sergeant, and, as I was then at the Yasoux as lieutenant and engineer, he took me along as mathematician. We ascended the river for more than two
587 hundred and fifty leagues without being able to discover this pretended treasure, probably because it existed only in imagination; we even advanced nearly fifty leagues further by land into the

country, till, complaints arising in the troop, the Sieur de la Harpe, who apprehended a fate similar to La Salle's, resolved to retrace his steps and return to the capital. If, in this expedition, we had not the good fortune to discover the emerald rock, which gave it rise, we had the satisfaction of traversing a very beautiful country, fertile plains, vast prairies covered with buffalo, stags, does, deer, turtles, etc. We saw rocks of jasper marble, at the foot of which lay slabs cut by nature's hand, other of slate and talc, very fit for making plaster. I have no doubt there are gold mines in the country, as we discovered a little stream which rolled gold dust in its waters. At some distance from this stream in the Arcancas River itself is a salt spring, though it is nearly three hundred leagues from the sea. With care and labor it would undoubtedly furnish salt.

588 (Indorsed:) U. S. Court of Claims. No. 18932. The Choctaw Nation and the Chickasaw Nation v. The United States and the Wichita and affiliated bands of Indians. Evidence on behalf of defendant Indians. Exhibit No. 16. "The Arcancas Post." Extracts from French's Historical Memoires of Louisiana, Part V. S. G. Hopkins, Josiah M. Vale, and Andrew A. Lipscomb, attorneys for said defendants; Philip Walker and William C. Shelley, counsel. Filed Jun. 30, 1896, Court of Claims.

589 EXTRACT FROM THE EXPEDITIONS OF ZEBULON MONTGOMERY PIKE, BY ELLIOTT COUES, NEW YORK, 1895, VOL. II, P. 560. (NOTE.)

(Library of the U. S. Geological Survey.)

Arkansas Post perpetuates the name of the oldest establishment of whites in the Lower Mississippi Valley. The present village is on the N. bank of the Arkansaw R., in the county and State of Arkansas, 73 m. SE. of Little Rock, the capital. Though never a locality of much importance, its place in history is secure and permanent. Early in the year 1685, Henri de Tonti, the famous trusty lieutenant of La Salle, was reinstated in command of Fort St. Louis of the Illinois, with titles of captain and governor, by order of the French king Louis XIV. Tonti learned that La Salle was in trouble somewhere in New Spain (Texas), and organized an expedition for his relief. On Feb. 16th, 1686, he left Fort St. Louis with 30 Frenchmen and 5 Indians, descended the Illinois and Miss. rivers to the Gulf, and scoured the coast for miles, but saw no sign of his great chief. He wrote a letter for La Salle, which he committed to the care of a chief of the Quinipissas for delivery, should opportunity offer, and retraced his way up the Miss. R. to the mouth of the Arkansaw, which latter river he ascended to the village of the Arkensa Indians. There, on lands which La Salle had already granted him, he stationed six of his men, who volunteered to remain in hopes of hearing from the distant commander. This was the origin of the Post aux Arkan-

590 sas. La Salle was murdered by the traitor Duhaut, one of several ruffians among his own men who conspired to his foul assassination, some say on one of the tributaries of the Brazos, at a spot which has been supposed to be perhaps 40–50 m. N. of present town of Washington, Tex.; the date is March 19th or 20th, 1687. Seven of the survivors of La Salle's ill-starred colony at Fort St. Louis of Texas reached Arkansas Post after a journey computed at the time to have been

250 leagues, in the summer of 1687, and found Couture and De Launay, two of the six whom Tonti had stationed there the year before. (See Wallace, Hist. Ill. and La., etc., 1893.) This Tonti (or Tonty), b. about 1650, died at Mobile, 1704, was the son of Lorenzo Tonti, who devised the Tontine scheme or policy of insurance. Arkansas Post was the scene of Laclede's death, June 20th, 1778. The place was taken by the Unionists from the Confederates Jan. 11th, 1863.

591 (Indorsed:) U. S. Court of Claims. No. 18932. The Choctaw Nation and the Chickasaw Nation v. The United States and the Wichita and affiliated bands of Indians. Evidence on behalf of defendant Indians. Exhibit No. 17. "Arkansas Post." Note from Coues' "Expeditions of Z. M. Pike." S. G. Hopkins, Josiah M. Vale, and Andrew A. Lipscomb, attorneys for said defendants; Philip Walker and William C. Shelley, counsel. Filed Jun. 30, 1896. Court of Claims.

592 TRANSLATED FROM HISTORY OF LOUISIANA, LE PAGE DUPRATZ, 3 VOLS., PARIS, 1758.

[Library of the Bureau of Ethnology.]

(Vol. I, page 6.) When he (La Salle) had given M. Colbert an account of his voyage, this great minister, who knew of what importance it would be to the State to be assured of so fine and large a country, did not hesitate to give him a vessel and a small frigate to go to explore the Gulf of Mexico and the mouths of the St. Louis River (Mississippi). He departed in 1685. But the observations which he had taken had, without doubt, not the exactness necessary, so that when he reached the gulf he passed the river, going too much towards the west, and entered the Bay of Saint Bernard. Some misunderstanding existing between him and the officers of his vessels, he disembarked with the party that was under his orders, and having established a post in this place, he set out overland to find the great river. But after having marched several days, some of his people, being much irritated against him on account of the labor to which he had put them, profited by a time when he was with them away from his troup, and dishonorably assassinated him. The troup, although deprived of its chief, continued on its route, traversed a great number of rivers, and finally arrived at that of the Arkansas, where they found, contrary to all expectation, a newly established French post. The Chevalier de Tonti had descended from the fort of the Illinois to the mouth of the river (Mississippi) about the time that he expected M. de la Salle to arrive by sea. Not having found him he returned up the river to reach his post, and having entered on the way into the river of the Arkansas as far as the village of that nation,

593 made an alliance with them, some of these people begging him to establish himself with them, which he did. He left ten men there, and this small house was sustained and fortified.

* * * * * * *

(Vol. I, page 150.) The river of the Arkansas, which is thirty-five leagues below (the St. Francis) and two hundred from New Orleans, is so named because of the nation of Indians who live upon its borders a little above its confluence with the (Mississippi) River.

* * * * * * *

(Vol. I, page 152.) About ten leagues from its (the Red River's) mouth it receives the Black River or the river of the Ouachitas, which takes its source rather near that of the Arkansas. This source, they say, forks near its origin, one branch forming the Arkansas and the larger branch forming the Black River.

* * * * * * *

(Vol. II, page 242.) From the Red River to the Arkansas there is no nation. There was one on the Black River; this was the Ouachitas, who have given their name to that river. At present there remains nothing of this nation, the Tchicachas having destroyed the greater part, and the rest having retired to the Cadoaquioux, where the Tchicachas do not dare to molest them.

* * * * * * *

(Vol. II, page 243.) Four leagues from the mouth of the Arkansas River and on its banks resides the nation which has given it its name. This nation is rather strong. The savages are as good warriors as they are able hunters. The Tchicachas, always unquiet, have wished to prove the bravery of the former, but they have found them so
594 firm that they have not thought it proper to continue to know their valor, especially since their Kappas and a part of the Illinois have retired among them, as have the Mitchgamias. So there is no more mention of the Kappas and the Mitchigamias, since they retired among the Arkansas, who have adopted them, all together now making but one nation.

595 (Indorsed:) U. S. Court of Claims, No. 18932. The Choctaw Nation and the Chickasaw Nation v. The United States and the Wichita and affiliated bands of Indians. Evidence on behalf of defendant Indians. Exhibit No. 18. Extracts translated from the French of Le Page du Pratz, History of Louisiana. S. G. Hopkins. Josiah M. Vale and Andrew A. Lipscomb, attorneys for said defendants. Philip Walker and William C. Shelley, counsel. Filed June 30, 1896. Court of Claims.

596 DEPOSITIONS TAKEN IN "THE GREER COUNCY CASE," ENTITLED "THE UNITED STATES vs. THE STATE OF TEXAS," BEING ORIGINAL NO. 4, OCTOBER TERM, 1894, SUPREME COURT OF THE UNITED STATES, AND EXTRACTED FROM THE RECORD THEREIN

597 [Extracts from the depositions taken in the Greer County Case, U. S. *v.* Texas, Supreme Court, U. S.]

J. J. Sturm (*p. 605, record*).

"In August, 1857, we came from Texas; arrived on 20th day of August, 1857, with a portion of the Indians that are living here. The Wichitas had been living in the Chickasaw country since Van Dorn's fight on Rush Creek, when they abandoned their village there. A portion of the Caddos came from the Choctaw Nation and joined those who had come from Texas. I should have said living in the Choctaw and Chickasaw. There were some living in each nation."

"The Wacoes and Towakanees came from the Brazos Reservation in Texas, and a small number of Keechis. They were moved in 1857 to

this reservation. The Wichitas were ordered here to meet us and they had already moved up on the Washita on this reservation, about twelve miles below here (Anadarko), when we got here."

Bull Wilson, Delaware (p. 619).

"I came from Texas. I was quite a young man when I first came to this country; all these Delawares—they all came from Texas."

598 *Deposition of James Mooney (p. 665 to p. 673).*

Whereupon James Mooney, having been first duly sworn, testified as follows:

Direct examination by Mr. ALLEN:

1. Q. What is your age, residence, and occupation?

A. My age is thirty-three; headquarters, Washington; ethnologist in the United States Bureau of Ethnology.

2. Q. How long have you been employed in that department of the Government?

A. Nine years.

3. Q. For how long a period have you made the question of the manners, customs, and tradition of the various Indian tribes in the northwestern portion of the United States a matter of study?

A. My work more or less takes notice of all the tribes of North and South America. I have been giving attention to that subject for twenty years. Most of my attention during that time has been given to the tribes within the United States or north of the United States.

4. Q. For how long a period have you been familiar by study or experience with the manners, customs, and modes of living of the Kiowa, Comanches, Wichitas, Caddo, and Delaware tribes of Indians?

A. My general study of those tribes is included with the study of the other tribes for the same period named. The special study is for the term of about five years past with regard to those particular tribes.

599 5. Q. Have you within a recent period visited the Red River country with a view of examining any particular locality touching the origin of the remains of former habitation found in that region?

A. Yes, sir.

6. Q. When did you go and to what particular section of country?

A. Since 1890 I have made, perhaps, five or six visits to the Kiowa and Comanche reservation, and in last October, 1893, I visited the upper region of Red River and adjoining the reservation.

7. Q. Did you, on the occasion of your trip in October last, see the alleged sites of any old Spanish settlements in the neighborhood of the Wichita Mountains? If so, describe, as nearly as you can, their location.

A. I saw a location there on upper Red River that had been said by some persons in that part of the country to be the remains of Mexican or Spanish settlement sites. As nearly as I can remember, the particular places or the largest apparent settlement site was about fifteen miles from Navajoe, in Greer County, on the northeast bank of North Fork.

8. Q. Of Red River?

A. Of Red River; with the Greer County side—low country on one side of the river and the Wichita Mountains backed up close against the stream on the other side—on the reservation side.

* * * * * * *

600 9. Q. Who accompanied you on this expedition?

A. I had a boy as driver. I do not remember his name. I had Mr. Passmore—I think John Passmore—Mr. Blalock, both, I think, of Navajo, in Greer County.

10. Q. Do you know the location of the Devils Canon?

A. Yes.

11. Q. How near to the Devils Canon was the location to which you have referred?

A. One end of it is immediately at the mouth of the canon. The other remains around the spur of the mountain, very near to the same place.

12. Q. Now, if you please, describe all the evidences of former habitation discovered by you in that locality. I am asking you to tell me only what you discovered.

A. I have said that one part of the old settlement remains was immediately at the mouth of the canon, and the other portion some little distance further down on the same side of the North Fork. From the head to the mouth is down the stream. It is nearer to the mouth—that is, it would be nearer, I believe, as the stream runs, there. It would be southeast of the mouth of the canon. There was a piece of level ground of several acres, I do not know how much, and in that piece of ground it was almost entirely bare of timber. Between the stream and the mountain I found the remains—I found a number of circular depressions, perhaps—well, maybe forty or fifty, and they were all of pretty uniform size. I should judge now, without my notes, that they were about forty or fifty feet in diameter on an average. They were usually about

601 two or three feet below the general surface, and around the outside edge there was a slight elevation of earth. Then in the immediate neighborhood, in searching around, I found among other things a cleft in the rock right in the side of a ridge and that was partly filled with some kind of dust. I took some of that dust with me and brought it back to Washington and had it examined to see what it was; then, going further around toward the canon, we came to another space pretty nearly bare of timber and running up to some small brushwood. On that bare place we found scattered about a number of large metate stones. Metate is the name given by the Mexicans to the rudely shaped stones upon which they grind their corn. Stones of somewhat similar pattern are used by the Pueblo Indian tribes generally, and by Navajoes. I have seen them used among those tribes. These metate stones were all rudely shaped. They were made of a rough, granular, reddish sandstone, with a slight depression in the top which had been worn from use. We also found there one or two fragments of the grinding stone that are used for rolling out bread. I sent, I think, two of those metates to Washington, and I suppose they are now in the National Museum. I also brought back, and have in the bureau in my room, a fragment of metate—perhaps two. I also found a stone hatchet and an iron arrow-head. I also found a piece of iron tube which my companion said was a fragment of gun barrel. In this same clear space, near the mouth of the canon, we found a number of places, of perhaps eight or ten feet across, of an approximately square or rectangular shape. In th

602 places the earth had been depressed and there were a number of boulders scattered about of the general sandstone of the mountai

adjoining and a great many bones. All of the larger bones that I examined had been split to pieces. I took back some of the bones and have them now in the bureau. I have not tried to find out what kind of bones they are, of what animal, or whether they are human bones. On the edge of the clear space, close along the side of the mountain, there is a small ravine, and on one side of the ravine there is higher ground than on the adjoining level, and along there I found a number of small circular depressions resembling very much the remains of wells that had been partially filled in and left to fall into disorder. I do not recollect just now of anything else of importance that we found there.

13. Q. Did you find any vessels or utensils of any kind during your search?

A. I might add—I do not think that we did. No; I did not. We did not find any vessels at all. I believe that I found one small piece of what seemed to be a piece of china plate—that is, an ordinary earthern plate of white ware. That is the only thing of that kind that I found according to my recollection, and in making this search I went over all the ground pretty carefully around what was the settlement site, apparently, and spent a portion of two days in the search. We dug into the bone pits to find what might be there and went through a number of the depressions that I have first mentioned—those large circular depressions; went over the clear ground and hunted around in the underbrush.

603 14. Q. From your knowledge and experience of the Indian tribes, their manners, customs, habits, and modes of life, could you reach any intelligent conclusion as to the most probable origin of the old settlements you have just described?

A. I have an explanation which is, I think, correct, from my own knowledge of Indians and from what those particular tribes in that neighborhood have told me of their old habits.

* * * * * * *

15. Q. Did you notice whether the circular depression showed any evidence of having at one time had openings in the circle?

A. It would be difficult to say, positively, as to that. They were overgrown with grass.

16. Q. Was there any evidence of fires ever having burned in any of them?

A. Yes; we found ashes and coals in some of them.

17. Q. State, from your own knowledge solely, what conclusion, if any, you formed as to the origin of these old sites.

A. With regard to the large circular depressions, they look like the remains of the circular earth lodges, as they are called, built and occupied in former times by a number of the prairie tribes in the West, and still occupied, as I have seen them, by Omahas, Pawnees, and several other tribes.

18. Q. Of what general Indian tribe was the Pawnee a branch?

604 A. They are a part of the same stock as the Wichitas and Caddoes. They are the northern emigration of the Caddoes and Wichitas, whose principal home was and is along Red River.

19. Q. Do you know of any tribe of Indians located or roaming over that section of country in past years who were known or are known to-day as having been in any degree agricultural in their pursuits?

A. All the tribes relating to the Caddoes, Wichitas, and Pawnees were, and, I believe, still are, agricultural.

20. Q. Have you any personal knowledge of their methods of preserving for winter or for future use their agricultural products?

A. One of their methods is to dry their corn, pumpkins, and some other things that can be dried that they raise, and hang them up within their lodges or in small houses for that particular purpose. That is personal knowledge of to-day among those tribes in that section. Formerly, within the last twenty years and before that time, when they were at war with various tribes around them, they and those other tribes about them say that they would preserve their corn frequently in caches in the ground. They have described to me how these caches were built, and I have seen similar caches in use very recently among the Navajoes for the same purpose.

21. Q. Do you know of any habit among the Indians which would account for the discovery you made as to the large bones being invariably split open?

605 A. It is a common custom with Indian tribes, and more particularly with the prairie tribes, to split open the larger bones to get at the marrow. I have seen that done in camp.

22. Q. To whom did you turn over the material found by you in the cave or canyon?

A. All those things are the property now of the Bureau of Ethnology—all the things found on that exploration. The dust or powder found in the cave I submitted to Dr. Diller.

23. Q. Give his full name, please.

A. Joseph S. Diller, Geological Survey. I turned it over to Dr. Diller, of the Geological Survey, for examination. He made a microscopic and chemical examination of it.

24. Q. What are the habits of the Wichita Indians in regard to their habitations in different seasons of the year?

A. They are beginning now to be affected by civilization in habit, but the majority of them, I believe, still live in tepees in the winter and in grass houses in the summer time, and they have still among them one or two earth lodges. By "earth lodges" (that was the common term used) I mean circular lodges of logs covered with earth and with earth banked up around the outside near the ground.

25. Q. Please describe what you mean by tepees and grass houses, respectively.

A. A tepee is the Sioux word which is now used throughout the plains for the conical lodges of the nomadic tribes. These lodges were

606 formerly made of buffalo skins stretched over a framework of poles, open at the top. They are now made usually of canvas in the same fashion. They can be put up and taken down in very short time, and are consequently best suited for wandering tribes. The grass houses used by the Wichitas and Caddoe tribes along Red River are built in the general shape of a tepee—that is, made of grass over a framework of poles. The interior arrangement is somewhat different from that of the tepee. I had a sample model of the Wichita grass house made for the World's Fair, and it is now in the National Museum, and it was made by the Wichita Indians. The earth lodge of the prairie tribes and the southern tribes is circular, built usually of upright logs inserted in the

round, roofed over with longer poles and coming to a point at the top, nd the whole thing, as nearly as possible, is covered with earth, the roof nd the sides banked up somewhat considerably at the top. Those earth odges were more permanent than the tepees, and were used for the per- nanent villages, while the tepees were used when they got out further nto the plains. As the tribes were drifting from east to west out into he buffalo country some of them discarded the more permanent form and ook, instead, the tepee.

26. Q. Mr. W. F. Cummings, assistant State geologist of the State of Texas, has testified in this case that he examined the two old towns in regard to which you have been testifying to-day, and describes them as "the town farthest west is what I should call the old Mexican town, and the one farthest east the old Indian town." Will you please describe the difference, if any, as observed by you, in the remains of former
607 habitations found in the two places respectively? You have already described fully those in the town farthest east. I want you, in reply to this question, to describe more particularly those in the town to the west.

A. What I considered the remains of habitations of houses are only those circular depressions further east. The very small circular depressions west, near the mountain, I should judge, might be the remains of caches. The place in which I found bones I should consider to be small bone pits. They were too small in my opinion to have been indications of habitations, and on digging down we seemed to find nothing at all but a confused mass of split bones, with the rocks lying about, which might have been boulders originally on top of the deposit.

27. Q. Mr. Cummings, describing these places, says: "The houses were from twelve to eighteen feet long and generally about twelve feet wide; they seem to have been constructed of unburnt bricks or sun-dried bricks, or they may not have been bricks at all; but it was evident that they were constructed of the clays of the immediate vicinity." What was your observation in regard to such evidences at that place?

A. We did not find, and I do not think there could have been found, anything there among those that I call bone pits eighteen feet long; they were smaller. There were no evidences whatever that we could find, after careful investigation, of anything like adobe, sun-dried bricks, or any other kind of brick. I asked my companions, who were
608 well acquainted with the location, whether there had been anything more evident since they had known it, and one of them, I believe, had accompanied Mr. Cummings on one of his exploring trips there. I asked him if any adobe bricks had been found or taken back by Mr. Cummings. I also asked another man who had been there about that time—I think at the same time—Mr. Meers, who had been surveyor of Greer County, and he also said that no adobe bricks had been taken down by Mr. Cummings. After searching carefully over the whole ground around those bone pits, and the rest of the level, we could not find any trace of adobe. I have been in New Mexico and Arizona and know what an adobe is and seen houses of adobe, and have seen adobe, before being put in the wall, stacked up on different occasions, and if adobe has been there at that time I do not think we could have missed finding it.

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A. (Continuing.) There is something else, possibly, that is in that connection. After hearing of the first official notice of this location by the State geologist of Texas, or his assistant, the Bureau wrote down officially a letter to him, stating that as archæology was a part of our province we should be glad to have the opportunity to examine any of the ancient remains—pottery or anything else of the kind—that had been found there. They sent back word, which was in effect that they had not anything that they could show us, and we have not seen any of those things. The official request was made by the Bureau of Ethnology, and the reply was made by the assistant State geologist of Texas.

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609 29. Q. I will ask you to get them and furnish them to the commissioner. Mr. Cummings also says, in reference to these last-named places: "The ashes which I suppose to have been in the fireplaces were always in one corner or end of the building. The openings or doors faced in no particular direction in the different buildings, and there were no depressions in the center." What was your observation in regard to these matters?

A. Suppose I look at that a moment, so I can recollect better. (After examining deposition of the witness Cummings.) I should say that the shapes were too irregular to say that there was anything that could be called the "end" definitely. I should say that those could not be described at all as buildings; that there is no evidence at all or any indication of doors or windows in any part of them; that there is no indication of walls.

29. Q. From your knowledge and experience through travel in New Mexico and Arizona, can you state whether any of the remains of former habitation in the neighborhood of the Wichita Mountains visited by you bore any resemblance to any evidences of habitation of Mexicans or Spaniards which you have met with in your travels?

A. The Mexicans usually built their houses of the adobe bricks. We could find no indication of adobe in these locations.

30. Q. Did you notice any evidences of the cutting down of timber in the vicinity of *of* either of those old towns?

A. Yes.

610 31. Q. Please describe what you saw.

A. We found several old stumps. We found several places where the trees had been recently cut down.

32. Q. Was there anything particular as to the manner in which these trees were cut down which would give any indication of what race of people they had been cut by?

A. I should not be able to decide anything upon the manner of cutting, and could not say. I will say, however, that the recent cutting in all probability had been done by white men from the other side of the river, as I found them taking wood from that side—on the reservation side—while I was out there.

33. Q. Do you know of any tribe of Indians located or ranging through that country who have been in the habit of working in any kind of metal or the manufacturing of ornaments, arrowheads, or common jewelry?

A. The Navajoes, who live further west, and formerly, until about twenty-five years ago, used to range at times across into that country

(Navajo Mountain, immediately adjoining this location, was named from them), are expert silver and iron workers. The prairie tribes who belong in that particular region were not really metal workers, but they would take old iron and grind it down with stones into arrowheads and into knives, and they would take German silver or some similar metals procured from the traders, and sometimes take silver coins, and beat and cut this down into various ornamental pieces. They still do the same thing.

611 *Deposition of Charles W. Pressler* (*Record, p. 991*).

45. Q. Have you investigated the names by which the North and South forks (of the Red River) are and have been known?

A. Yes, sir; I have read a good deal about it.

46. Q. By what name was the South Fork known to the Spaniards and Mexicans?

A. Well, the oldest name that I have seen is the Rio Blanco; that was in 1888.

* * * * * * *

49. Q. By what name was the North Fork known to the Mexicans and Spaniards?

A. I have seen different names for it. * * * The earliest explorer' call it the "Rio 'e Las Plumas."

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59. Q. By whom was the North Fork called Rio de Las Plumas?

A. By Fragoso.

60. Q. How far down the Red River did he go?

A. He went from Santa Fe to Natchitoches; all the way through.

61. Q. What did he call the Red River below the Big Wichita?

A. He called it Rio Blanco.

* * * * * * *

40. X. Q. In your direct testimony you have said that the South Fork was known as early as 1788 as Rio Blanco?

A. Yes, sir.

41. X. Q. Is not that virtually the name by which one branch of the head waters is known to-day?

612 A. No, sir; it is known as "T'erra Blanco."

42. X. Q. When did you first glean the information that Fragosa possessed this knowledge in the last century?

A. Well, it was when the report of the boundary commission was published, in 1886.

43. X. Q. Is it not a fact that those Spanish records of Fregosa's travel and exploration were in the Spanish record office of the State of Texas, and were never made public until about '86, as you have stated?

A. They were on file there, but I did not know anything of it until then.

Deposition of Gen. Hamilton P. Bee, of San Antonio, Tex. (*Record, p. 1225*).

12. Q. When was your earliest acquaintance, if any, with the upper waters of the Red River or Natchitoches?

A. In the spring of 1843.

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10. X. Q. Can you locate, approximately, the point at which you struck Cache Creek?

A. Where the Cache Creek empties into Red River.

* * * * * * *

A. to 15 X. Q. We ascended Cache Creek a distance, I suppose, of thirty miles, to a village of the Wichita Indians situated on the south side of the Wichita Mountains.

* * * * * * *

29. X. Q. Was the Wichita village to which you refer located on Cache Creek?

A. It was upon the head waters of Cache Creek, at the foot of the mountains, near where Fort Sill now is.

613 (Indorsed:) U. S. Court of Claims. No. 18932. The Choctaw Nation and the Chickasaw Nation *v.* The United States and the Wichita and affiliated bands of Indians. Evidence on behalf of defendant Indians. Exhibit No. 19. Extracts from depositions taken in the "Greer County Case." S. G. Hopkins. Josiah M. Vale and Andrew A. Lipscomb, attorneys for said defendants; Philip Walker and William C. Shelley, counsel. Filed Jun' 30, 1896. Court of Claims.

632 EXTRACTS FROM TREATIES WITH CHEROKEE, CHOCTAW AND CHICKASAW, CREEK AND SEMINOLE NATIONS MADE IN 1866.

(Pages refer to "Revision of Indian Treaties.")

CHEROKEE TREATY (1866) (14 STAT. L., 799).

(Pp. 92 & 93.) Article 15. The United States may settle any civilized Indians friendly with the Cherokees and adjacent tribes within the Cherokee country, on unoccupied lands east of 96°, on such terms as may be agreed upon by any such tribes and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz: Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country, they shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens. And should any such tribe thus settling in said country decide to preserve their tribal organizations and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have a district of country set off for their use by metes and bounds equal to one hundred and sixty acres, if they should so decide, for each man, woman, and child of said tribe, and shall pay for the same into the national fund such

price as may be agreed on by them and the Cherokee Nation, subject to the approval of the President of the United States, and in cases of disagreement the price to be fixed by the President.

633 And the said tribe thus settled shall also pay into the national fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees. But no Indians who have no tribal organizations or who shall determine to abandon their tribal organizations shall be permitted to settle east of the 96° of longitude without the consent of the Cherokee national council, or of a delegation duly appointed by it, being first obtained. And no Indians who have and determine to preserve their tribal organizations shall be permitted to settle, as herein provided, east of the 96° of longitude without such consent being first obtained unless the President of the United States, after a full hearing of the objections offered by said council or delegation to such settlement, shall determine that the objections are insufficient, in which case he may authorize the settlement of such tribe east of the 96° of longitude.

Article 16. The United States may settle friendly Indians in any part of the Cherokee country west of 96°, to be taken in a compact form in quantity not exceeding one hundred and sixty acres for each member of each of said tribes thus to be settled, the boundaries of each of said districts to be distinctly marked, and the land conveyed in fee simple to each of said tribes, to be held in common or by their members in severalty, as the United States may decide.

634 Said lands thus disposed of to be paid for to the Cherokee Nation at such price as may be agreed on between the said parties in interest, subject to the approval of the President; and if they should not agree, then the price to be fixed by the President.

The Cherokee Nation to retain the right of possession of and jurisdiction over all of said country west of 96° of longitude until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied.

(Concluded July 19, 1866; ratification advised, with amendments, July 27, 1866; amendments accepted July 31, 1866; proclaimed July 30, 1866.)

635 CHOCTAW AND CHICKASAW TREATY (1866). (14 STAT. L., 769.)

(Pp. 286 & 287.) ARTICLE 3. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent, in trust for the said nations until the legislatures of the Choctaw and Chickasaw nations, respectively, shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said

nations, except in the annuities, moneys, and public domain claimed by or belonging to said nations, respectively; and also to give to such persons who were residents aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections, as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of
636 three-fourths to the former and one-fourth to the latter—less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules, and regulations shall elect to remove and actually remove from the said nations, respectively. And should the said laws, rules, and regulations not be made by the legislatures of the said nations, respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the Choctaw and Chickasaw nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper, the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations.

(Concluded April 28, 1866; ratification advised, with amendments, June 28, 1866; amendments accepted July 2, 1866; proclaimed July 10, 1866.)

637 CREEK TREATY (1866). (14 STAT. L., 785).

(Pp. 116 & 117.) ARTICLE 3. In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain, to be divided by a line running north and south; the eastern half of said Creek lands, being retained by them, shall, except as herein otherwise stipulated, be for'ver set apart as a home for said Creek Nation; and in consideration of said cession of the west half of their lands, estimated to contain three million two hundred and fifty thousand five hundred and sixty acres, the United States agree to pay the sum of thirty (30) cents per acre, amounting to nine hundred and seventy-five thousand one hundred and sixty-eight dollars, in the manner hereinafter provided, to wit: Two hundred thousand dollars shall be paid per capita in money, unless otherwise directed by the President of the United States, upon the ratification of this treaty to enable the Creeks to occupy, restore, and improve their farms, and make their nation independent and self-sustaining, and to pay the damages sustained by the mission schools on the North Fork and the Arkansas rivers, not to exceed two thousand dollars, and to pay the delegates such per diem as the agent and Creek council may agree upon, as just and fair compensation, all of which shall be distributed for the

638 purpose by the agent, with the advice of the Creek council, under the direction of the Secretary of the Interior. One hundred thousand dollars shall be paid (in money and divided) to soldiers that enlisted in the Federal Army and the loyal refugee Indians and freedmen who were driven from their homes by the rebel forces, to reimburse them in proportion to their respective losses; four hundred thousand dollars be paid (in money and divided) per capita to said Creek Nation, unless otherwise directed by the President of the United States, under the direction of the Secretary of the Interior, as the same may accrue from the sale of land to other Indians. The United States agree to pay to said Indians, in such manner and for such purposes as the Secretary of the Interior may direct, interest at the rate of five per cent per annum from the date of the ratification of this treaty, on the amount hereinbefore agreed upon for said ceded lands, after deducting the said two hundred thousand dollars; the residue, two hundred and seventy-five thousand one hundred and sixty-eight dollars, shall remain in the Treasury of the United States, and the interest thereon, at the rate of five per centum per annum, be annually paid to said Creeks as above stipulated.

(Concluded June 14, 1866; ratification advised, with amendments, July 19, 1866; amendments accepted July 23, 1866; proclaimed August 11, 1866.)

639 SEMINOLE TREATY (1866). (14 STAT. L., 755.)

(Pp. 812 and 813.) Article 3. In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Seminoles cede and convey to the United States their entire domain, being the tract of land ceded to the Seminole Indians by the Creek Nation under the provisions of article first (1st), treaty of the United States with the Creek and Seminoles, made and concluded at Washington, D. C., August 7, 1856 (see page 104, revision). In consideration of said grant and cession of their lands, estimated at two millions one hundred and sixty-nine thousand and eighty (2,169,080) acres, the United States agree to pay said Seminole Nation the sum of three hundred and twenty-five thousand three hundred and sixty-two ($325,362) dollars, said purchase being at the rate of fifteen cents per acre. The United States having obtained by grant of the Creek Nation the westerly half of their lands, hereby grant to the Seminole Nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole Nation are bounded and described as follows, to wit: Beginning on the Canadian River where the line dividing the Creek lands, according to the terms of their sale to the United States, by their treaty of February 6, 1866, following said line due north to where said line crosses the north fork of the Canadian River; thence up said north fork of the Canadian River a distance sufficient to make two hundred thousand acres by running due south to the Canadian River; thence down said Canadian River to the place of beginning. In consideration of said cession of two hundred thou-

640 sand acres of land described above, the Seminole Nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of one hundred thousand dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written. The balance due the Seminole Nation, after

making said deduction, amounting to one hundred thousand dollars, the United States agree to pay in the following manner, to wit: Thirty thousand dollars shall be paid to enable the Seminoles to occupy, restore, and improve their farms, and to make their nation independent and self-sustaining, and shall be distributed for that purpose under the direction of the Secretary of the Interior; twenty thousand dollars shall be paid in like manner for the purpose of purchasing agricultural implements, seeds, cows, and other stock; fifteen thousand dollars shall be paid for the erection of a mill suitable to accommodate said nation of Indians; seventy thousand dollars to remain in the United States Treasury, upon which the United States shall pay an annual interest of five per cent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools; the remainder of the seventy thousand dollars, being twenty thousand dollars, shall remain a permanent fund, the interest of which shall be paid annually for the support of the Seminole government; forty thousand three hundred and sixty-two dollars shall be appropriated and expended for subsisting said Indians, discriminating in favor of
641 the destitute; all of which amounts, excepting the seventy thousand dollars to remain in the Treasury as a permanent fund, shall be paid upon the ratification of said treaty, and disbursed in such manner as the Secretary of the Interior may direct. The balance, fifty thousand dollars, or so much thereof as may be necessary to pay the losses ascertained and awarded as hereinafter provided, shall be paid when said awards shall have been duly made and approved by the Secretary of the Interior. And in case said fifty thousand dollars shall be insufficient to pay all said awards, it shall be distributed pro rata to those whose claims are so allowed; and until said awards shall be thus paid, the United States agree to pay to said Indians, in such manner and for such purposes as the Secretary of the Interior may direct, interest at the rate of five per cent per annum from the date of the ratification of this treaty.

(Concluded March 21, 1866; ratification advised July 19, 1866; proclaimed August 16, 1896.)

642 SKETCH MAP OF THE INDIAN TERRITORY, SHOWING THE CESSIONS OF THE CHEROKEE, CREEK, SEMINOLE, CHOCTAW, AND CHICKASAW NATIONS, BY THE TREATIES OF 1866, TOGETHER WITH THE LANDS RETAINED BY THOSE NATIONS.

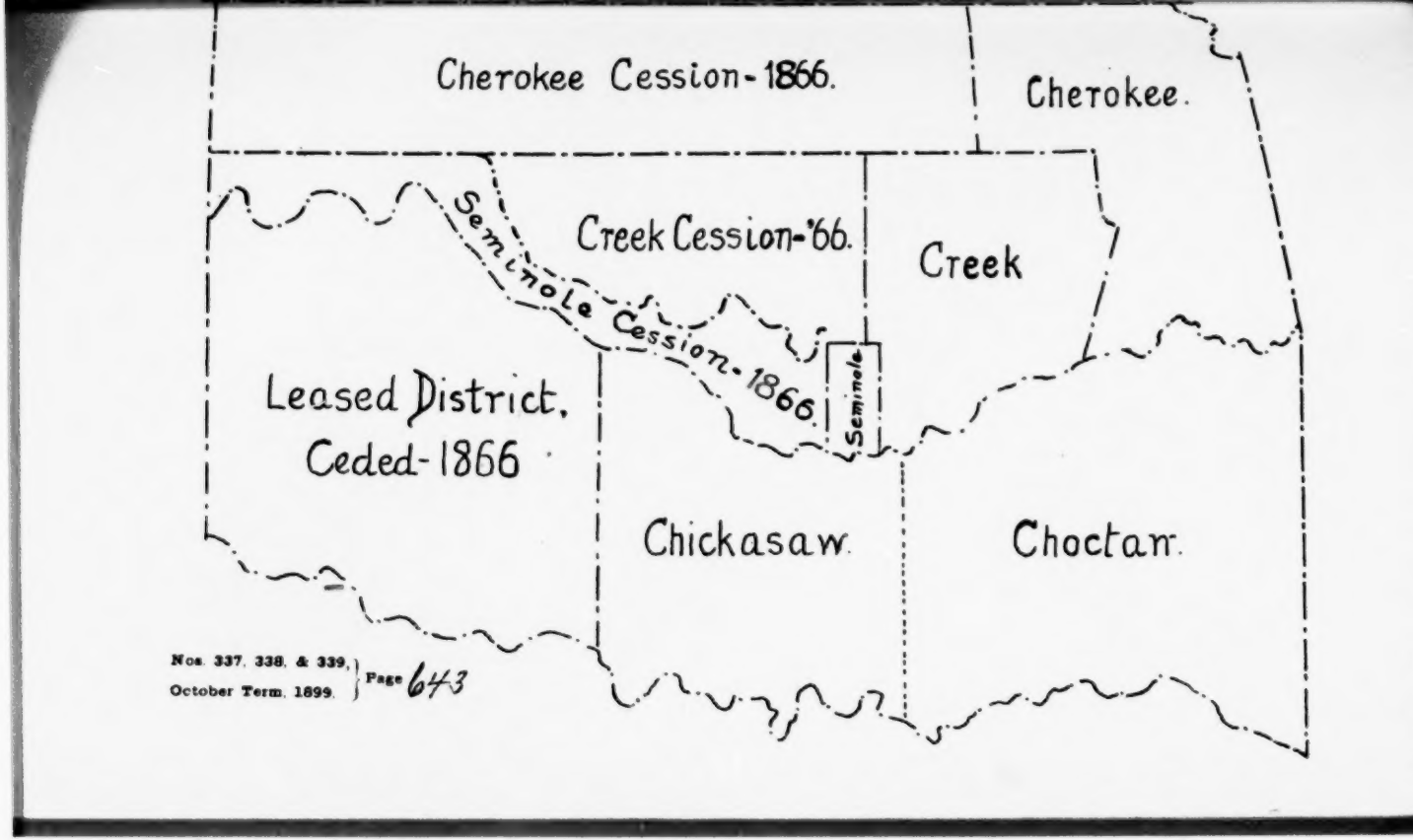
(NOTE.—The Seminole reservation was contained in the Creek cession.)

(Here follows diagram marked p. 643.)

644 (Indorsed:) U. S. Court of Claims. No. 18932. The Choctaw Nation and the Chickasaw Nation v. The United States and the Wichita and affiliated bands of Indians. Evidence on behalf of defendant Indians. Exhibit No. 25. Extracts from treaties (and maps) showing cessions to the United States, in 1866, by the Cherokee, Creek, Seminole, and Choctaw and Chic'asaw nations. S. G. Hopkins, Josiah M. Vale and Andrew A. Lipscomb, attorneys for said defendants. Philip Walker and William C. Shelley, counsel. Filed Jun. 30, 1896. Court of Claims.

645 *Extracts from deposition of W. F. Cummins, Grear County Case (Record, p. 965 et seq.).*

Have been assistant State geologist, Texas, for four years (1893).

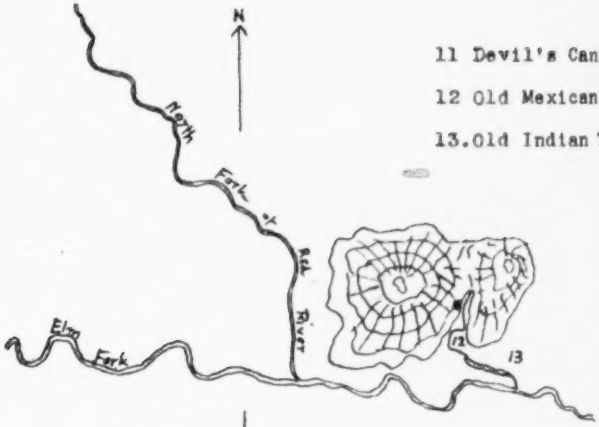


Nos. 337, 338, & 339,
October Term, 1899. } Page 643

11301

Map, "Exhibit A", to deposition of

W. F. Cummins,



11 Devil's Canyon.

12 Old Mexican Town.

13. Old Indian Town.

Nos. 337, 338, & 339.
October Term, 1899. } Page 646

6. Q. Did you ever examine what purported to be the ruins of two old towns near the Wichita Mountains, east of Red River, or the North Fork of Red River, as it is sometimes called?

A. I did.

7. Q. Please state under what circumstances you made the examination, and particularly and minutely what you found in each of those towns, and state the manner of their construction.

A. I went under the instruction of the State geologist, Mr. Dumble.

* * * * * * *

8. Q. Where are those towns situated with reference to Red River, or what is sometimes called the North Fork and the Wichita Mountains?

A. They are between the mountain and the river, towards the western end or the termination of the range—the Wichita range.

9. Q. Are they east or west of the North Fork?

A. They are on the north side. The Red River runs almost directly east at that place.

* * * * * * *

21. Q. Did you make a map of this immediate section and locate upon it the two old towns to which you refer?

A. I did.

22. Q. Will you please identify it in some way, so that it may be attached to your deposition?

(Identified by marking "Exhibit A.")

(Here follows diagram marked p. 646.)

647 (Indorsed:) U. S. Court of Claims. No. 18932. The Choctaw Nation and the Chickasaw Nation v. The United States and The Wichita and affiliated bands of Indians. Evidence on behalf of defendant Indians. Exhibit in sur-rebuttal. Extract from deposition of W. F. Cummins, Grear County Case, page 965. The clerk will file. Josiah M. Vale and Andrew A. Lipscomb, attorneys for said defendants; Philip Walker and William C. Shelley, counsel. Filed Aug. 31, 1896. Court f Claims.

648 In the Court of Claims.

THE CHOCTAW NATION AND THE CHICKASAW Nation, v. THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians.	No. 18932.

Motion for a rule upon the Secretary of the Interior to furnish copies of official papers on file in the Department of the Interior.

Come now the defendant Indians by their attorneys and move the court for a rule upon the Secretary of the Interior to furnish the court with duly certified copies of the papers hereinafter designated to be used in the trial of the above-entitled cause, as evidence on behalf of the defendant Indians, viz:

(1) Clark's report of census of tribes in 1816.

(2) Letter of T. A. Smith, maj. general, to the Secretary of War, dated January 31, 1818, enclosing letter from S. H. Long, major of engineers, U.S.A., dated January 30, 1818, including said letter of Maj. Long.

649 (3) Letter from Commissioner of Indian Affairs to Secretary of War, dated March 25, 1856, estimating cost of bringing Wichita Indians to Washington, D. C.

(4) Letter from J. H. B. Latrobe, dated April 4, 1866, relating to Choctaw and Chickasaw treaty of 1866, to be found in Choctaw files marked Choctaw L. 91.

(5) Letter of F. W. Armstrong, A. S. W. S., written at Choctaw Agency March 6, 1835.

(5) Letter of same date June 18, 1835.

(5) Letter of Gen'l M. Arbuckle, dated as follows: April 15, 1835.

(5) Letters of M. Stokes and M. Arbuckle, as follows: July 14, 1835, Sept. 15 and Sept. 26, 1835.

(6) Journal of the commission appointed to make the Comanche-Wichita treaty, with the book marked A referred to in said papers.

(7) Letter of Wm. Clark to Sec. of War, dated February 6, 1818.

(7) Letter of Wm. Clark and Col. Aug. Choteau, dated Sept. 6, 1818, transmitting Quapaw treaty of August 24, 1818.

(8) Letter of M. Stokes and M. Arbuckle of May 5, another letter of Stokes, Arbuckle, and F. W. Armstrong of May 14, 1835, to Secretary of War, explaining arrangements for treaty between Wichitas and other tribes, with instructions from Secretary of War on same subject.

Map 884 in tribe 702, 1816, of Indian tribes, with copies referred to in memorandum made by Paul Bodie in 1884.

Map of Indian Territory 497. Tribe 469, section thereof from lat. 33–30′ N. to 36; long. 97° W. to 100 W.

J. M. VALE,
A. A. LIPSCOMB,
Attorneys for Defts. Ind.

PHILIP WALKER.
W. C. SHELLEY,
Counsel.

(Indorsed:) In the Court of Claims. No. 18932. The Choctaw Nation and the Chickasaw Nation, claimants, v. The United States and the Wichita and affiliated bands of Indians. Motion for a rule on the Secretary of the Interior to furnish the court copies of certain official papers. J. M. Vale, A. A. Lipscomb, attorneys for the defendant Indians.

650 DEPARTMENT OF THE INTERIOR.
Washington, June 25, 1896.

JOHN RANDOLPH, Esq.,
Assistant Clerk Court of Claims.

SIR: I acknowledge receipt of call of the Court of Claims, dated June 6, 1896, for papers in the Indian depredation claim of the Choctaw Nation and Chickasaw Nation, numbered 18932, etc.

In response thereto, I transmit herewith report of June 23, 1896, from the Commissioner of Indian Affairs, inclosing papers pertaining to certain of the cases referred to.

Very respectfully, WM. H. SIMS,
Acting Secretary.

3715 Ind. Div. 11 inclosures.

650½ (Indorsed:) 18932, reply of Interior Dept. Filed Jun' 27, 1896. Court of Claims.

651 [11 enclosures.]

Refer in reply to the following: Land, 21690–1896.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, June 23, 1896.

The Honorable,
The SECRETARY OF THE INTERIOR.

SIR: I have the honor to acknowledge the receipt, by Department reference for report, of a communication, dated June 6, 1896, from the Court of Claims, requesting the Department to furnish the court, that the same may be used in evidence in the trial of the cause now pending in said court entitled The Choctaw Nation and the Chickasaw Nation, claimants, vs. The United States, No. 18932, any information or papers (or duly authenticated copies of same) on file in this office, embraced in the call made by Messrs. Vale et al., in the accompanying rule allowed by Chief Justice Richardson.

In compliance with said reference, I have the honor to submit herewith a certified copy of the papers called for, viz:

1. Supt. Wm. Clark's report of census of Indian tribes in 1816.

2. Letter of Major-General Smith to the Secretary of War, dated January 31, 1818, enclosing letter of S. H. Long, major of engineers, U. S. A., dated January 30, 1818, including said Long's letter.

652 3. Report from this office to the Secretary of War, dated March 25, 1856, estimating cost of taking Wichita Indians to Washington, D. C.

4. Letter from J. H. B. Latrobe, dated April 4, 1866, relating to certain portions of the Choctaw and Chickasaw treaty of 1866.

5. Two letters from F. W. Armstrong, one dated March 6, 1835, and the other dated June 18, 1835; letter from General M. Arbuckle, dated April 15, 1835; three letters from M. Stokes and M. Arbuckle, dated July 14, September 15, and September 26, 1835, all relating to negotiations with the wild Indian tribes west of the Mississippi.

6. Journal of the commission appointed to make the Comanche-Wichita treaty.

7. Letter from Supt. Wm. Clark to the Secretary of War, dated February 6, 1818, and letter from said Clark and Col. Aug. Chouteau, dated September 6, 1818, transmitting the Quapaw treaty of August 24, 1818.

8. Letter from M. Stokes and M. Arbuckle, dated May 5, 1835; letter from Messrs. M. Stokes, M. Arbuckle, and F. W. Armstrong, dated May 14, 1835, to the Secretary of War, explaining their arrangements for treaty between the Wichitas and other tribes, with instructions from the Secretary of War on the same subject.

9. Map No. 884, prepared in 1816, by Aug. Chouteau, with notes of Indian tribes occupying the country designated on said map, etc., by said Chouteau, dated February 21, 1816.

653 10. Section of map of Indian Territory between 33° 30′ and 36° north latitude, and 97° and 100° west longitude, known as Map No. 497.

The papers submitted are herewith respectfully returned.

Very respectfully, your obedient servant,

D. M. BROWNING,
Commissioner.

654 [Indorsed.]

COMM'R OF INDIAN AFFAIRS, *June 23, 1896.*

Returns call of Court of Claims for certified copy of papers in claim 18932: The Choctaw and Chickasaw Nation vs. U. S., with report thereon.

12 enclos.

No. 18932. The Choctaw Nation and Chickasaw Nation, clmt., v. The U. S., accompanying letter, reply of Interior Dept. Filed Jun. 27, 1896. Court of Claims.

659 DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, June 23, 1896.

I, D. M. Browning, Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true copy of the original as the same appears on file in this office.

In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, on the day and year first above written.

[SEAL.] D. M. BROWNING, *Commissioner.*

660 WAR DEPARTMENT, OFFICE INDIAN AFFAIRS.
March 25, 1836.

SIR: In compliance with your direction, I respectfully submit an estimate of the amount that will be required to defray the expenses of a visit of a deputation of Indians from the western prairie to this city. In preparing this estimate I have availed myself of the practical information Major Mason has been able to furnish.

There are three principal tribes, the Camanches, Witchetas, and Kioways. Of each of these there are several bands. It is considered advisable to bring here at least one of each band; but there is reason to believe that all the bands of the Camanches can not be reached in season. It is proposed, therefore, by Major Mason to bring eight of Camanches, eight of the Witchetas, and four of the Kioways. For these it will be necessary to have four interpreters—one for each of the tribes—and an Osage, through whom communications may be held with each of them. These Indians will of course come to Fort Gibson mounted, and their horses must be fed there during their absence. If the state of the waters will permit they will proceed from Fort Gibson to Wheeling in steamboats, otherwise they will go by land from Fort Gibson to Little Rock. In the latter event the expense will be greater than the estimate, which is based upon the supposition that a water passage will be practicable. For the expenses that must be incurred for the deputation while in this city and travelling through the States, the accounts of the expenditures for Black Hawk and his party have been assumed as a guide in determining the amount.

661 The estimate is conjectural, and to meet other expenses that may be caused by detentions upon their route or by other circum-

11305

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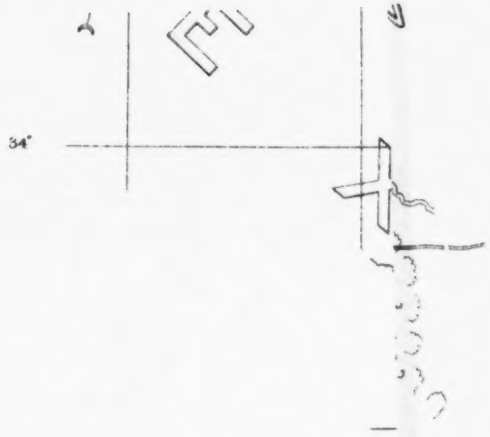

tances that can not now be foreseen, it is respectfully suggested that not ess than seventeen thousand dollars should be appropriated.

ELBERT HERRING.

Very, &c.,

Hon. LEWIS CASS,
Secretary of War.

Estimate.

662

Eight Camanchas, eight Witchetas, four Kioways, four interpreters, one military officer, and two assistant conductors.

	Amounts.
Steamboat fare from Fort Gibson to Wheeling, 27 men, at $30.00 each	$810.00
Stage fare to this city, 27 men, at $18.00 each	486.00
Subsistence from Fort Gibson to this place, 27 men, 40 days, at $2.00 each	2,160.00
One interpreter (Osage), $3 a day; three interpreters, $1.50 a day, 120 days	900.00
Daily expenses of the party, including stage fare, hack hire, public amusements, &c., 40 days, 27 men, at $4 per day	4,320.00
Expenses returning to Fort Gibson	3,456.00
Presents, a suit of clothes each, guns, flags, medals, cloths, stroods, ornaments, &c	2,500.00
Contingencies, expenses, keeping of Indian horses, medical attendance, &c	1,000.00
Total	$15,632.00

663

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, June 23, 1896.

I, D. M. Browning, Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true and literal copy of so much of the map of Indian Territory on file in this office as map No. 497, as shows the area of Indian Territory between 33° 30′ and 36° north latitude and between 97° and 100° west longitude, as the same appears on file in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, on the day and year first above written.

[SEAL.] D. M. BROWNING, *Commissioner.*

(Here follows diagram marked p. 664.)

665

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, June 23, 1896.

I, D. M. Browning, Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true copy of the original as the same appears on file in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, on the day and year first above written.

[SEAL.] D. M. BROWNING, *Commissioner.*

666 *A report of the names and probable number of the tribes of Indians in the Missouri Territory, the amount of annuities paid them, the amount of expenses of provisions issued to them at the distribution of their annuities and on every other occasion, and the amount of presents other than provisions which ought to be distributed among them. Missouri Territory.* (*St. Louis, November 4th, 1816.*)

Names of Indian tribes.	Probable No. of each tribe of Indians.		Places where the tribes reside or rove.	Amount of annuities paid per annum.	The annual am't of expenses of provisions issued and delivered to the tribes on every occasion.	The am't of presents other than provisions which ought to be delivered among the tribes.	Total amount of provisions, presents, and annuities.
	No. of men.	No. of so'ls.					
Quapaws	340	1,060	In 4 small villages on the south side of Arkansaw River	Dollars.	$125	$1,000	$1,125
Cherokees	1,000	3,600	In a settlement of 18 miles on both sides of the Arkansaw River, 200 miles up	"	320	1,000	1,320
Piankashaws	50	200	About 60 miles west of the mouth of Ohio, near the Mississippi swamps	800	65	50	915
Shawonees	350	1,300	Three towns near Cape Girardeau & 1 about 50 miles west of St. Louis and 2 on St. Francis.	"	131	500	631
Dellaways	285	840	One town near Cape Girardeau and 3 on the waters of White River and scattering parties near St. Louis.	"	133	500	633
Peorias	15	50	In a village on St. Francis about 100 miles from St. Louis, SW	"	36	200	236
Great Osage, 1st	400	1,600	On the Osage River, 3 miles west of the line laterly run			400	"
Great Osage, 2d	650	2,600	On the Verdigreese fork of Arkansaw	1,000	736	400	3,436
Little Osage	450	1,800	On a fork of the Arkansaw called Neeozho	500		400	
Ioways	300	1,000	On Grand River near the settlement, and a village on Lemoin	"	256	500	756
Kansaw	400	1,500	Their village on Kansaw River; rove as low as Fort Osage	"	195	800	995
Ottoes	300	1,200	One village on River Platte a few miles up that river	"	98	400	498
3 tribes Panis	1,400	5,000	2 villages on River Platte & 1 village on the Wolf fork	"	60	1,000	1,060
Marhars	450	1,800	1 village on the SW. side of the Missouri above River Platt	"	100	400	500
Ricaras	100	400	1 village on the SW. side of the Missouri above the Mahas	"	50	100	150
Chyannes	500	2,000	Roven in the plains on the SW. side of the Missouri and on Cheyenne River	"	"	100	100
Ricaras	750	3,000	3 villages on the bank of the Missouri, W. side above the Cheyenne	"	"	500	500
Mandans	350	1,600	2 villages on do do about 1,600 miles up by water	"	"	500	500
Minetaries	650	2,800	3 villages on do do near the Mandans	"	"	500	500
7 tribes of Sioux	2,000	7,000	Roving on both sides of the Missouri from River Platt, 700 miles up	"	500	3,000	3,500
Tribes in plains	4,000	15,400	Roye on both sides of the Missouri above the Sioux & on River Platt, White River, Eau qui Conre, Cheyenne and Roche Jaune	"	"	300	300
Total	14,740	55,750	Total on the Missouri waters	2,300	2,805	12,550	17,655
Sacks	800	3,000	1 village at Rock River. 1 village at Grand River, & scattered on the W. side of Mississippi.	800	725	2,000	3,925
Foxes	400	1,500	1 small village at Rock River, 1 do do 1 large village at Turkey River. W. side Mississippi.	400			

6 tribes of Sioux	1,800	7,000	Roving from Prairie du Chien to the head of River St. Peters & above St. Antony's Falls	..	3,886	6,000	9,886
Chipaways	2,990	6,593	On the Mississippi above the Sioux & west of Lake Superior	..	..	2,990	2,990
	5,000	18,000	Total No. of Indians on the west side of the Mississippi and near its head waters	1,200	4,611	10,000	15,811
Total	19,740	73,750	Total number of Indians in Missouri territory and east of the mountains				
Cadean & Paneas	..	5,600	On Red River near the southern boundary line of the Missouri territory				
Piqué Creeks			On the western mountains between the parallel of latitude 33° and 49° N	..		450	450
Roving bands		20,000	Called by different names, but speak generally the same language				
Different tribes		82,000	On the west side of the Rocky Mountains between the parallel of Lat'd 40 and 49° N	3,500	7,416	23,000	33,916
Grand total		180,750					

[1] Copy mutilated.

WM. CLARK.

It is important to send presents to the chiefs of distant tribes in flags, medals, coats, tobacco, cloth, and sometimes guns and ammunition.

(Indorsed:) 18932. Reply of Interior Dept. Filed, Jun. 27, 1896, Court of Claims.

11307
245

667 In the Court of Claims.

THE CHOCTAW NATION AND THE CHICKASAW Nation
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians. } No. 18932.

Motion for rule on the Secretary of War to furnish certified copies certain records.

Come now the defendant Indians, by their attorneys, and move t court for a rule upon the Secretary of War to furnish to the court ce fied copies of the following records of the War Department, to be us as evidence in the above-entitled cause:

1st. Marcy's map of the Red River, to be found in map room of t Office of the Chief of Engineers, numbered Q 74, bearing date 1856.

2nd. Letter from Major Emery, dated Fort Arbuckle, to Ma McDowell, asst. adj. general, October 18, 1858, with accompanying m Files number 143 E (A. G. O.), 1858.

J. M. VALE,
A. A. LIPSCOMB,
Attorneys for Defendant Indians

PHILIP WALKER,
W. C. SHELLEY,
Counsel.

668 (Indorsed:) In the Court of Claims, No. 18932. The Choc Nation and the Chickasaw Nation vs. The United States and Wichita and affiliated bands of Indians. Motion for rule upon the S retary of War to furnish certified copies of certain records, &c. J. Vale, A. A. Lipscomb, attys. Filed Jun. 11, 1896, Court of Claims.

669 In the Court of Claims.

THE CHOCTAW NATION AND THE CHICKASAW Nation
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians. } No. 18932.

Motion for rule on the Secretary of War to furnish certified copies certain records.

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1st. Marcy's map of the Red River, to be found in map room o office of the Chief of Engineers, numbered Q 74, bearing date 185

2nd. Letter from Major Emery, dated Fort Arbuckle, to Major McDowell, asst. adj. general, October 18, 1858, with accompanying map. Files number 143 E (A. G. O.), 1858.

J. M. VALE,
A. A. LIPSCOMB,
Attorneys for Defendant Indians.

PHILIP WALKER,
W. C. SHELLEY,
Counsel.

670 (Indorsed:) In the Court of Claims, No. 18932. The Choctaw Nation and the Chickasaw Nation vs. The United States and the Wichita and affiliated bands of Indians. 143 E (A. G. O.), '58. Motion for rule upon the Secretary of War to furnish certified copies of certain records, &c. 1 Enc. A. G. O. A. G. C. of E. Memo. in A. G. O. J. M. Vale, A. A. Lipscomb, attys. Filed Jun. 27, 1896, Court of Claims.

[1st indorsement.]

WAR DEPARTMENT,
ADJUTANT-GENERAL'S OFFICE,
Washington, June 16, 1896.

Respectfully returned, by authority of the Secretary of War, through the Chief of Engineers, U. S. Army, to the Court of Claims, with a certified copy of the letter (and of the map referred to therein) of Major W. H. Emory, 1st Cavalry, commanding Fort Arbuckle, C. N., October 18, 1858, addressed to Major McDowell, assistant adjutant-general, Headquarters of the Army, called for herein.

J. C. GILMORE,
Assistant Adjutant-General.

(1 enclosure.)

18932.

[2d indorsement.]

OFFICE CHIEF OF ENGINEERS, U. S. ARMY,
June 25, 1896.

Respectfully forwarded, by authority of the Secretary of War, to the Court of Claims, with a certified copy of Captain Marcy's map of Red River, referred to within.

A. MACKENZIE,
Acting Chief of Engineers.

15672. Inclo. 1 & two addl. incos. accompg.

671 UNITED STATES OF AMERICA,
WAR DEPARTMENT,
Washington City, June 25, 1896.

I hereby certify that the tracing hereto attached is a true copy of Capt. Marcy's map of Red River with corrections of the main branch lying between 94° and 104° west longitude and 32° and 36° north latitude, on file in the Office of the Chief of Engineers, U. S. Army.

A. MACKENZIE,
Acting Chief of Engineers.

Be it known that A. Mackenzie, who signed the foregoing certificate, is the Acting Chief of Engineers, United States Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof I have hereunto set my hand, and caused the seal of the War Department to be affixed, on this 25th day of June, one thousand eight hundred and ninety-six.

[SEAL.]

JOSEPH B. DOE,
Acting Secretary of War.

(Here follows diagram marked p. 672.)

673 [Printed in defts' ev., p. 30.]

38783, A. G. O., 1896.

UNITED STATES OF AMERICA,
WAR DEPARTMENT,
Washington City, June 16, 1896.

Pursuant to section 882 of the Revised Statutes, I hereby certify that it appears from the records of the Adjutant-General's Office that the annexed document is a true copy of the letter (and of the map referred to therein) of Major W. H. Emory, 1st Cavalry, commanding Fort Arbuckle, C. N., October 18, 1858, addressed to Major McDowell, assistant adjutant-general, Headquarters of the Army.

GEO. D. RUGGLES,
Adjutant-General.

Be it known that George D. Ruggles, who signed the foregoing certificate, is the Adjutant-General U. S. Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof I have hereunto set my hand, and caused the seal of the War Department to be affixed, on this 16th day of June, one thousand eight hundred and ninety-six.

[SEAL.]

JOSEPH B. DOE,
Assistant Secretary of War.

674 HEADQUARTERS, FORT ARBUCKLE, C. N.,
October 18, 1858.

Major MCDOWELL,
Asst. Adjutant-General, Headqrs. of the Army.

SIR: I arrived here October 12th, and the same day had the honor to receive your letter containing the instructions of the general in chief. I have given the subject since I received the letter my unremitting attention, and happily the materials and persons are in this vicinity to enable me to give all the facts required with some degree of confidence, but as I am required to report as speedily as possible, I may venture some opinions which I may ask the liberty to modify hereafter to a certain extent, but which will not in any degree materially affect the general conclusion.

As a preliminary fact necessary to be understood, which is probably known at headquarters, it is assumed that the 98th meridian of longitude which defines the eastern boundary assigned to the Wichitas, does not run through Arbuckle, as laid down on Captain Marcy's map, but run

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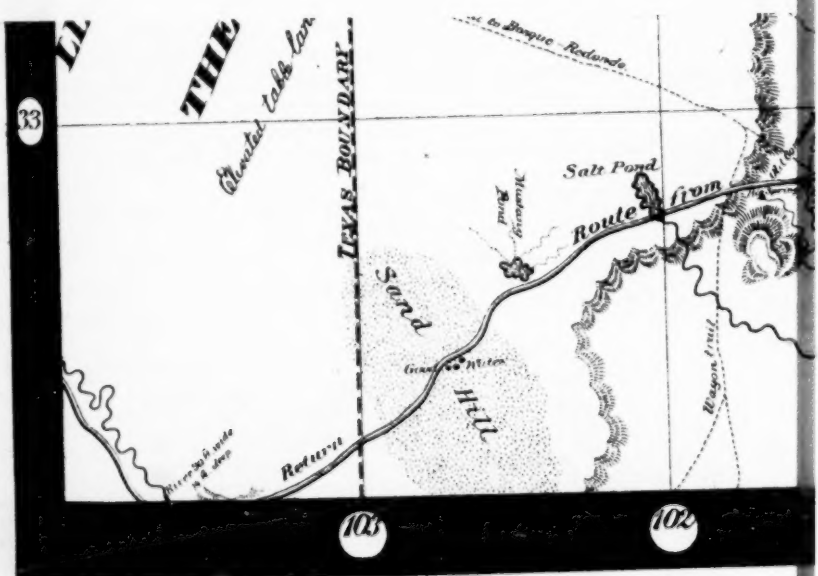

forty-two miles west of Fort Arbuckle; consequently the 100 meridian, which defines the western boundary of the same tract, may be assumed to fall thirty miles west of Otter Creek, or the western base of the Wichita Mountains. For this I have the authority of a general map published by the Department of the Interior in my name, and also the higher authority based upon the actual observations of the U. S. astronomer, Mr. Majors, now present at this post, in whose results I have entire confidence. This result at once excludes the Wichitas from the country in which they were recently settled, and had planted corn for the last five or six years, and which was supposed, until Mr. Major's determination, to be between the 98th and 100 meridian of longitude, but which, in fact, is now proved to be 5 miles east of the meridian of 98.

Another preliminary question in part connected with the above is that of military jurisdiction between the Department of the West and the Department of Texas.

The Wichita Mountains, the strategetic point of operations against the northern Comanches, lies so near the line of these respective departments as to produce cross purposes in the action of both civil and military authorities, which has really occurred to some extent, as exemplified by recent occurrences. In considering the question it is therefore necessary to look at it in two points of view. First, that it belongs to the Department of the West, and second that it belongs to the Department of Texas. The whole district of country should, in fact, be one military department. When the two posts indicated by the commander in chief are established, there will, I think, be no use for more than one company of horse, and that for a short time at Belknap, if these posts are assigned to Texas, for after they are established there will be no movement of Comanches in that vicinity except a few straggling horse thieves. In the same way, if these posts which will fall in the limits of the Department of the West, are retained in that department, there will be no necessity for keeping more than a company of horse at Arbuckle, whose duty
676 it will be to chase straggling parties of marauders and keep the outposts advised of any occurrences.

Of "the propriety of establishing one or more posts in the Wichita country."

That such would be advantageous to the service I think there can be no doubt. Neither Indians or agents will attempt to occupy that country till protected by U. S. troops. The whole Wichita and Keechi nation are now assembled about this post, having deserted their village 40 miles west of this place and came into this post two days after my arrival, in apprehension of the Comanches.

Several eligible positions present themselves for a post on the southern slope of the Wichita Mountains, combining healthy climate, fertile soil, good permanent water, timber, and stone suitable for building. Among these stands preeminently the site of the old Keechi and Wichita village, on the eastern branch of Cache Creek, about fifteen or twenty miles SE. from Mount Scott, the most prominent peak of the Wichita Mountains. There is also a point to the north of the Wichita Mountains on Clear Creek, which runs into the Canadian River 60 miles east of the Antelope hills, and several on the Washita River, but none combining the advantages of the first named in agricultural capabilities. Where

troops are to be sustained, especially cavalry, the corn-growing capacity of the country must be considered. The winters on the elevated plains, near the base of the Wichita Mountains, are cold, and grain is absolutely necessary to sustain animals in condition for efficient service, and the distance from the settlements is too far to haul it.

677 To give protection to the Wichitas in the peaceful occupation of their country and to enable them to cultivate the soil, for which they have shown a strong predisposition, I consider the point as indicated on Cache Creek as beyond all doubt the most eligible. Whether this post or any other single point can be selected, which, at the same time, will effect this object and will enable the command to keep a lookout on the northern Comanches and effectually check their depredations, is a matter of extreme doubt in my mind, and can only be determined by experiment.

The Comanches, like the Kiowas and Cheyennes, live at no particular place. They occupy ranges of country and move their camp whenever the grass is eaten up or burnt out. They are at present supposed to be ranging in the vicinity of the Antelope hills, and the regions about the head of Red River. They come down upon the settlements by trails leading both to the east and west of the Wichita Mountains. The post on Cache Creek, if furnished with cavalry, would watch the trails on the eastern side of the Wichita Mountains, including the unsettled country from thence to Arbuckle. It could not so effectually watch the trails on the western slope. To do that effectually a post on the west slope of the Wichita Mountains is necessary, and there are but two points which can furnish the necessary good permanent water, timber and stone. The first is Otter Creek, or, as the Indians call it, Pecan Creek, which unites with the north fork of Red River at the western base of the Wichita

678 Mountains, and the other is Elk Creek, which unites with the same river 30 miles to the north.

Neither presents the advantages for cultivation of the point on Cache Creek south of Mount Scott, but they afford sufficient good water and wood and are healthy localities. West of these creeks for some distance all accounts concur in representing the water as bad and highly charged with salt of different kinds, and the country as generally destitute of timber.

I therefore do not hesitate to recommend that two posts be established, one at Cache Creek and the other at Elk or Otter Creek, and that for the present neither Belknap or Arbuckle be entirely abandoned.

It is stated, and I believe truly, that a very large number of Indians, composed of Kiowas, Cheyennes, and Arapahoes, have joined the Comanches, and that the Comanches, among whom there was a peace party, are now united and act together, whether for peace or war is yet to be determined, but whatever may be their professions, the establishing of these posts will, for the moment, excite the combined opposition of all those Indians, and should not, in my opinion, be undertaken with less than four or six companies to each post.

In the meantime the number of Indians collected about this post (Fort Arbuckle), under various pretexts, and the unsettled condition of the Chickasaws on this frontier, many of whom have left their farms from apprehension of danger, would render inexpedient at this time the withdrawal of any considerable portion of the force from this post except for temporary purposes.

The whole country within a circuit of two hundred miles of the
) Wichita Mountains comes clearly within the same military relation,
and to be governed efficiently must be governed by one head.
present it is divided between two departments, and the limits of these
partments meet at the precise point where difficulties are most apt here-
er to arise. To which department the district should be assigned, the
neral-in-chief will be able to decide without any views of mine.
I may be pardoned, however, for the suggestion that it will not do to
eak up at this time the military communication through the half civi-
ed nations lying between this and the Missouri frontier. From what
learned along the road an occasional show of troops along the line is
ry necessary.

Supplying troops by the line of either the Red or Arkansas rivers has
ways been attended with vexatious delays and great expense, and in the
d the new posts contemplated must, I think, look for supplies to some
ost on the Gulf of Mexico, to Helena, or Gaines Landing, the nearest
oint on the Mississippi, or to Jefferson City, the present terminus of the
Pacific Railroad. All are about equidistant from the Wichita Mountains,
ut the last has the advantage in the excellence of the road and the healthi-
ess of the climate through which it passes, and the fact that most of it
will traverse Indian Territory, which requires from time to time a show
f military force, though perhaps no permanent establishment.

In view of the great expense which will at first attend the subsisting
f these new posts, it may not be out of place for me to suggest the pro-
priety of establishing, first, the post for the protection of the
680 Wichitas, who will, probably, raise corn enough the first season
to supply that post, and who will, if judiciously directed, be enabled
to supply the other post the following season.

Mr. Majors has been kind enough to furnish me a map of the country,
showing how the meridians run according to his determinations, defining
the country within the two degrees leased for the use of the Wichitas,
&c., which I herewith submit.

I have the honor to be, your obedient servant,

W. H. EMORY,
Major 1st Cavalry, Comdg.

HD. QRS. OF THE ARMY,
New York, Nov. 5, 1858.

The general-in-chief approves the views of Major Emory, and he recommends the establishment of two posts in the district of country assigned to the Witchitas and Keechies Indians, one on Cache, the other on Otter Creek, for garrisons of two companies of cavalry and 1 of infantry, the post on Cache Creek to be established at once, the other as early as may be practicable. Fort Smith, Arkansas, will be the proper depot for supplying the new posts.

The commander of the Department of Texas should have the direction
of affairs in the Wichita country, and the general-in-chief pur-
681 poses to assign this portion of the Department of the West to the
Department of Texas.

Respectfully referred to the Adjutant-General for the information of the Secretary of War, by direction of the general-in-chief.

L. THOMAS,
Asst. Adjt. Gen.

Respectfully submitted to the Secretary of War.

S. COOPER,
Adjt. Gen.

A. G. O., Nov. 8, '58.

(Here follows diagram marked p. 682.)

683 *Evidence for the United States.*

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WASHINGTON, *Jan. 19th, 1846.*

Hon. W. MEDILL,
Commissioner of Indian Affairs.

SIR: I have received your letter of the 17th inst., in which you say "The Department is anxious to ascertain the number of Indians residing within the boundaries of Texas, as well as their names and locations, and all other information relative to them."

I would premise by stating that the habits of the Indians within the Texan border are so uncivilized and they are so predatory and wandering that correctness as to their number can not be relied upon. From the best information that I possess concerning them they may be divided as follows, viz: The Camanches numbering about 20,000 and separated into four great bands—Schecole's band, Tabaquena's band, Schecone's band, and another's, whose name I forget. Schecole is the principal chief. During the warm season they wander about from the Santa Fe Trace to Santa Fe and the Mexican settlements south and west for purposes of plundering and marauding.

They have no fixed habitations, no agriculture, no civilization, and are merely robbers and plunderers. They are rich in horses and mules and are the lords of the prairies.

They winter upon the north branch of the Rio Colorado of the East, at or about the Round Hills.

684 *Kioways.*—They range along the Rocky Mountains, are west of the Camanches, and unite with them in all their wars. They speak a different language and are (as I am informed) equally numerous.

The Toweash, Waco, Towagany, and Wachita Indians are on the Red River above the Cross Timbers, with their villages on both sides and near each other. Language

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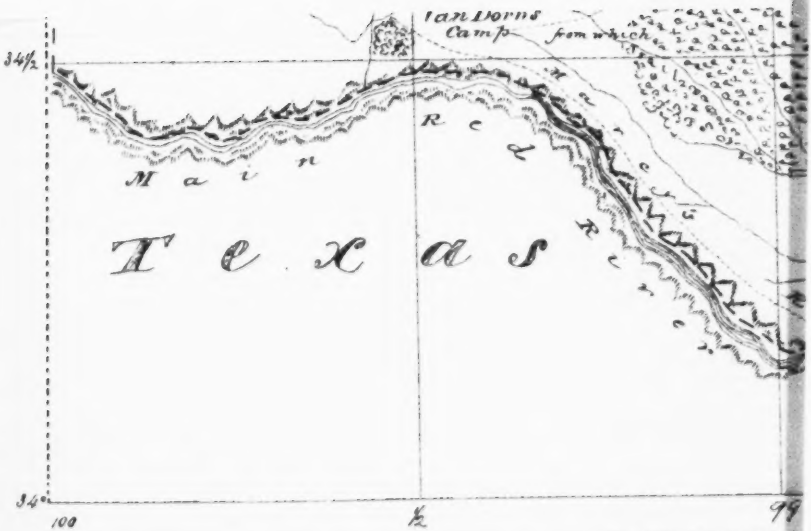

Nos. 337, 338, & 339
October Term, 1899

They have amicable relations with the Camanches, though dreading them—are but fragments of tribes and weak, but partially agricultural, raising maize and the various kinds of vegetables.

Caddoes.—A part of the Caddoes are in Texas on the waters of the Colorado and are small in number.

Biloxis and Coushattas.—These are in the neighborhood of the Caddoes, and are small tribes and agricultural (semi).

Lipans.—These are in Texas; small and friendly.

Attakapas.—A few of these Indians are still in existence in the They are cannibals, and are nearly exterminated. Formerly they lived in Louisiana, in what is now called the Attakapas country, until they were driven away by the Choctaws. They left their name to the country, which signifies in the Choctaw language cannibal.

The whole country west of the Cross Timber is claimed by the Comanches, and is a high rolling prairie region or plateau.

The Comanches and Kioways roam over the country west of 100° west longitude, and when out of buffalo meat live on their horses and mules. They are very superstitious, but submissive to their chiefs, and have a general idea of the Supreme Being. They are not as brave as the emigrant Indians, somewhat thriving, and are never overreached in a bargain.

If proper measures were adopted by the General Government, in the appointment of an agent of the right character—shrewd, sagacious, and true-hearted, who would never deceive them, but make himself known to them as their firm and unchanging friend—they might be reclaimed, improved, greatly civilized, and, I think, would not only not violate a treaty with this country, but could be relied upon as allies and friends.

The short notice I have had of your wishes and my departure from this city for a few days is my apology for the inadequacy of the manner in which I have answered your request.

Very respectfully, yr. obt. servt.,

P. P. PITCHLYNN.

COUNCIL GROUND,
Comanche Peak, 20 March, 1846.

SIR: In my communication of the 10th inst. I informed you that the Comanches had all set out for their hunting grounds and that the other smaller bands were still here in council.

I have now the honor to inform you that all have broken up, seemingly much pleased, with the exception of one Waco chief, who wanted more presents and more beef, and in consequence of a refusal expressed dissatisfaction and a disinclination to bring in stolen horses in possession of that tribe.

685 As far as professions of friendship and pledges to abstain in future from further depredations upon the frontier will go, they were made by all these chiefs, and I am satisfied in good faith, but still of the opinion that the pledges will be observed only as long as the same stimulant is in view—hopes of presents, or fear of identity and punishment of their race.

The talk of each chief is herewith enclosed, as expressive of their views in their own language. These five little bands are much less

numerous in numbers than had been previously stated. They do not exceed in average above 150 souls—making about 750—or above 10 warriors in all.

It is said the smallpox destroyed in one season 800 warriors. They are an extreme destitute and depraved people.

* * * * * * *

I have the honor to be, very respectfully, your obt. servt.,

P. M. BUTLER, *Ind. Com.*

Hon'l W. MEDILL,
Com. of Ind. Affairs.

[Enclosure No. 2.]

Talk of the Tiwaconee chief, delivered on the 11th March, 1846, at the Commanche Peak, in answer to my talk of the day before.

My brother, we have heard your talk sent by our Great Father. It is a good talk. We have thought deep on it, and swallowed it.

I am the oldest man present, and it is agreed that I shall talk first. We are glad that our Great Father has sent you here to talk to his red children. We are glad to hear that there is to be a general peace; that our women and children can sleep in peace, and that there is to be no more war. We are glad that our Great Father has sent us some blankets, for our blankets for our women and some presents for ourselves, and that we want to be put upon the same footing with our red brothers the other side of Red River—Muscogees, Cherokees, Chicasaws, and Choctaws. We have no captive children amongst us, but our young men have stolen many horses. We will bring them in at the next council. We will keep our word in good earnest, and hope you will do the same.

The Wako chief repeated in substance the same that the Tiwaconee did.

The Ketchi chief also repeated very much the same, with the exception that his people had no stolen horses.

[Enclosure No. 5.]

Talk of Caveeoka, chief of the Wichataws and Towash tribes.

My brother, we got the word that our Great Father had sent commissioners here to see us, and that our red brothers, the Muscogees, Cherokees, Chicasaws, and Choctaws, were with them to make a big peace.

When we first heard it we were scared to death. Some of our
686 young men had been out on a war party and had stolen some of the commissioners' horses. We did not stop to get up our horses, but catched the first we could come to, and hurried here to meet you. We have heard your talk. It is a good one. Our hearts are glad of it.

Several years ago we made a treaty with Gen'l Dodge, which we have kept in faith ever since. It is the first council we have ever attended in Texas. We would not listen to the talk of their messengers. We did not want to make peace with Texas. Our young men were opposed to it. Texas began the war upon us first; and, besides, we want to hunt the mustang and the buffalo down on the Colorado. But now that our Great Father has sent us word to make peace, and our red brothers have told

to do it, we are determined to do it. From this day forward there
ill be no more killing and stealing from Texas by our people, and
ere shall be peace as long as the sun rises and sets. We chiefs have
ought upon it and come to this conclusion. Our captains here have
d the talk and they will carry it to all our people, and from that time
rward there shall cease all troubles between the red and the white man.
ur young men have brought in all the horses that they stole from you
d delivered them up to you to-day. All the rest that we have will be
ought down and delivered at the next council when we meet you.
e are glad that our Great Father has thought of his red children here
the woods and has sent us some presents for our women and children.
e want our Great Father to build a house and live here close by us.
he question before we part: You have told us to quit warring and
tealing from Texas, which we agree to, but does our Great Father mean
hat we shall quit stealing from the Spaniards? Our young men must
ave horses from somewhere.

The Tiwacome chief spoke a second time, and said: "It is my duty to
ell the big captain, in the presence of this council, that my red brother,
he Keetchie chief, has told him a lie. He has said his people have no
orses stolen from Texas. I saw seven head myself about a week ago."

AUSTIN, TEXAS, *May 16th, 1847.*

SIR: I have the honour to submit the following report of my proceed-
ings under your instructions of 20th March:

On the 9th May, by previous appointments, I met the Comanche chiefs
Santa Anna and Pochuna Shanico, with a large party, about 90 miles west
of this place and held a friendly talk with them, at which time the ratifi-
cation of the treaty by the Senate and all matters appertaining to their
affairs, in accordance with your instructions, was fully explained to them.
They expressed much satisfaction at the action and renewed promises of
the Government, and were also contented with the alterations made to
the treaty by the Senate of the U. S., and wished me to inform the Gov-
ernment of their determination to carry into effect its several stipulations.

At the same time and place the Comanches were met by Baron John
O. Meusebach, gen'l agent of the German emigrations, and friendly
relations, in the form of a private treaty of peace, was concluded with
them. By the provisions of said contract they allow the colonists to
survey these grant and introduce settlements between the Llano
687 and San Saba rivers, promising to refrain from any act of hostility
towards them, and notify them of the approach of any hostile
bands that might approach their settlements, &c., for which they have
received presents and provisions to the amount of 2,000 dollars. The
contract further stipulates that all friendly intercourse, trade, &c., shall
be carried on under the supervision of the U. S. agents. There has been
great apprehension of hostilities on the part of the Indians whenever an
attempt was made to survey that section. A great part of the land has
been located by Americans for several years past, but the surveys could
not be completed, the Comanches heretofore objecting to every movement
of the kind.

I have great confidence in the beneficial effects of said arrangement,
as there will be no inducement for anyone to intrude into that section of
country for the purpose of surveying, &c., and it is greatly to the interest

of the German comp'y as well as the emigrants to preserve friendly relations with the Comanches.

I have also seen several of the small bands of friendly Indians (Shawnees, Delawares, and Lapans) that for some months past has resided a the line of our frontier settlements. They have all agreed to remove (some has already done so) above the line of settlements.

I have not as yet been able to see the chiefs of all the different tribs, but, so far as my information extends, we have no serious difficulties to apprehend.

The Comanches, Lapans, Tonkahuas, Caddoes, Ionies, Anandaco, Keechies, and the small bands of Shawnees, Delawares, and Cherokees are all perfectly peaceable, and I can hear nothing of a hostile character charged against them.

The Wacoes, Tewaconos, and Wichitas has committed numerous depredations on our citizens in the last few months. The latter part of February last they attacked a party of our citizens and killed two men. They are continually down on our borders, and have stolen several hundred head of horses.

In the immediate vicinity of this place, about 10 nights since, they stole 20 horses and made their escape with them.

I would again earnestly call the attention of the Department to the absolute necessity of taking prompt measures to chastise those Indians. It is a loss of time to think of inducing them to remain quiet by peaceful measures. They have been in treaty with the Texas and U. S. Governments for 4 or 5 years, and broken their treaty engagements almost as soon as made, and are now doing more damage to our citizens than at any previous time, and as their chief, Aquaquash, says, "they were born thieves, and nothing but force will prevent them from stealing." They not only depredate on the whites, but steal from the friendly Indians, and must, in a short time, unless taken in hand, cause much difficulty, as neither our citizens nor the friendly Indians will put up with them much longer. The ranging companies on our frontier, as at present stationed, can effect nothing. They are in the immediate vicinity of the settlements while those thieving bands are concocting their plans for campaigns, and when they come down and steal they move with such speed that they can not be overtaken before they reach their own country, and although they have been known to be hostile they have never been followed to their homes. Capt. Howe, U. S. dragoons, who is in command of
688 the frontier, says, when applied to on the subject, that he has "no orders to send troops into the country occupied by the Indians." They steal our horses and kill our citizens with perfect impunity. The Comanches and all the Indians that are here are extremely anxious that the Government should send troops into the Indian country, and particularly that those bands should be broken up. They offer their services as guides whenever the Government will order a force sufficient for the purpose.

The number of warriors directly engaged in the matter can not, from the best information that I can get, exceed 200. They are badly armed. One company of rangers with a few friendly Indians could soon put a stop to these proceedings without in the least interfering with our friendly relations; in fact, it would do more than any one thing to preserve peace

In order more effectually to inform the Department, I have made an arrangement with a party of the Comanche, Caddoe, and Delaware chiefs to accompany me and hold a treaty with those bands, and, if possible, ascertain their numbers, location, intention, disposition, etc. I leave this place to-morrow for that purpose, and shall visit all the bands on our borders previous to my return, when I shall report the particulars of my several interviews.

I would again recommend to the consideration of the Department the propriety of furnishing the presents for the Indians at as early a day as practicable. I find it difficult to explain the necessity of delay to the wild Indians; and much good would result from assembling the several tribes that are friendly and fully explaining to the assembled nations the treaty as it exists, and the determination of the Government to carry its several stipulations into full effect. It is but imperfectly understood at present, and I am certain that after said meeting I shall be able to exercise much more influence than at present.

I would also suggest that an order be procured from the Hon. Secretary of War to the commander of this frontier to station a sufficient guard at the treaty grounds during the council. The friendly Indians recommend it. Also to give such instructions that said command may assist the agent, if necessary, in enforcing the measures adopted by the Department for the regulating of our Indian affairs generally. From present appearances there will be a large number of Indians who are not in treaty—the Kioways, Muskeleros, Essequators, etc. Please furnish me with full instructions relative to the reception to be given them or other bands not in treaty should they come into council.

Having nothing more to report, I have the honor to be,

Very respectfully, your obt. servt.,

R. S. NEIGHBORS,
Spl. Agent, U. S.

Col. W. MEDILL,
Commissioner of Indian Affairs, Washington, D. C.

U. STATES SPECIAL IND'N AGENCY,
March 16th, 1848.

SIR: I have the honor to submit for your consideration a communication addressed to me by the agent of the "Texas Emigration and Land Company," with a copy of my answer thereto.

689 For the information of the Department I deem it proper to say that the lines proposed to be run for the purpose of establishing the boundaries of "Peters" Colony will pass directly through the country now occupied by the Keechies, Wichitas, Waccoes, Tah wac caros, Caddo's, Ionies, and Ten a wish Indians. It would cross the Brazos River a short distance above the "Comanche Peak" and recross not far from the mouth of the "Clear Fork" and strike Red River at or near the Wichita Mountains. Being fully convinced if the movement proposed be carried into effect that it will create hostilities on the part of those tribes, I submit the matter for the consideration of the Department without any suggestions.

I also deem it proper to state that since my arrival in the settlements I have had an opportunity of conversing freely with Lieut. Col. Bell, in

command of this frontier, in regard to the movements of the military force under his command, during which I was pleased to learn that there is no intention on his part or orders from the War Department to send a body of troops against the Indians, as alluded to in my report of the 2d inst. The Comanches, since my visit to their country, have been perfectly quiet, as well as all other bands on our frontier.

The various existing rumours published in the several newspapers by designing persons is well calculated to create confusion on this frontier, and not only render our citizens hostile towards the Indians, but disposed to oppose the efforts of those charged by the Government with sustaining friendly relations with them. Some of the officers commanding stations, for (as I suppose) the purpose of making themselves somewhat conspicuous, have been forward in those publications, particularly Captain H. McCullough, who has even gone so far as to address a communication to the legislature of this State on the subject of our Indian relations, and the probability of immediate hostilities with them—instead of which, should there have been sufficient cause, he ought to have reported it to his commanding officer (Col. Bell). The address alluded to was the subject of considerable discussion in the house of representatives, and your attention to which is particularly called in consequence of the excitement created amongst settlers on the frontier, and what is liable to continue so long as subordinate officers of the ranging service are permitted to interfere with those matters. I would therefore respectfully suggest that the attention of the commander of this frontier be called thereto in order that better discipline may be maintained. From the energetic measures heretofore carried on by Lieutenant Col. Bell for the preservation of peace with our several Indian tribes, it is presumed he will, after receiving instructions from the Department, use every exertion to check the evil.

Very respectfully, your obt. servant,

ROBT. S. NEIGHBORS,
U. States Special Ind. Agt.

To Col. W. MEDILL,
Com'r of Indian Affairs, Washington City, D. C.

690

U. S. SPECIAL IND. AGENCY,
Torrey's Trading House, July 9, 1849.

SIR: I have the honor to report that on the 7th inst. the Caddo chief Hadebah, the Ionie chief Tow i ash, and Kio we ah (the father of the Caddo boy that was killed by the volunteer troops), with a considerable party arrived at this place.

Finding that they were perfectly satisfied with the contract made with them in regard to that matter, and they having renewed their pledges to abide strictly by said agreement, the sum of five hundred dollars was paid over to the father of the boy killed.

In accordance with your suggestions, I endeavored to impress upon them the disposition of the Government to do them and all other tribes justice in every respect, which proved highly satisfactory, and they gave many assurances in return of a determination to remain at peace and abide by the suggestions of the Government and use all their influence to induce other tribes to do the same. These Indians and their associates

have conducted themselves with great propriety for the past year, and no act of theft or misdemeanor has been traced to them. They are settled temporarily on the Brassos River, and are making considerable crops of corn, and their condition generally is far superior to most of the tribes in Texas.

On the 2nd inst. the Camanche chief Ma pe che co pe, with a considerable party, arrived here and remained three days. He represents the Camanches to be friendly and quiet as usual, there being no disposition on the part of any band to commence hostilities or to depredate on our settlements. He reports that Santa Anna, Camanche chief, is still in Mexico on a foray with a large number of warriors, and is doing much damage to the Mexicans. Small detachments of his party are returning constantly, bringing in horses and captives in considerable numbers.

While the Camanches were here I made inquiry respecting the depredation committed at Brownsville, on the Rio Grande. The chief assures me that the Camanches had no hand in it, and from the best information I have been able to get it was done principally by a band of Lipans, that reside on the Rio Grande, assisted by Mexicans and probably some few white men, as Col. Kinney informed me that two white men acted as spies for the party that stole his mules and horses at the same time.

I deem it proper to call your attention to the fact that the authorities of Mexico are much to blame for the Indian depredations committed on her citizens, and those Indians that attacked Brownsville came in through Mexico, and crossed the Rio Grande to our side not far from the place of attack. Whilst at the settlements on the Rio Grande and El Passo I conversed freely with the Mexicans in regard to Indian matters, and found that at some of the small frontier towns, Frecidio del Norte, Carlos Haciendo, and some other places, they had made temporary treaties with the Apaches, Lipans, Camanches, &c. These Indians resort to those places in large numbers for the purpose of trade, where they procure powder, lead, arms, and provisions, and in fact everything necessary to enable them to carry on hostile operations against the settlements farther in the interior, and they find ready sale at these places for the horses and mules stolen from the interior settlements.

691 On my arrival at San Antonio I met a Mr. De Lacy, who is well known. He was in the employ of a mining co. and spent the past winter at Precidio del Norte, Carlos Rancho, &c. He informed me that the latter was a general rende'vous for all tribes on their forays. Early in the last spring there was assembled at one time 5 or 600 Indians from the various prairie tribes, Apaches, &c., and that it was well known that those Indians went from that point into the different Mexican settlements and stole horses and mules and brought them there where they found traders ready to purchase.

There is also a trading post on this side of the Rio Grande (Fort Leaton), a few miles from Precidio, where the Indians resort in great numbers.

Should the Government be disposed to prevent the Indians from going to Mexico, it will be absolutely necessary to regulate the trade in that section of country, for at present every inducement is held out to the different tribes by those traders to encourage forays into the Mexican settlements. I am informed by the Camanches that a large party of their

people, with the chiefs Buffalo Hump, Yellow Wolf, and Sabiata, visited the German settlements at Fredericksburg some time since for trade, and on their return a disease similar to the cholera broke out among them and killed many of the party; the balance of the band fled with precipitancy from the disease, and have gone high up in the prairies.

The Wacoes, Tah-woccaros, Keechies, and Wichitas have been perfectly quiet for some time past. They are making corn on the Brassos. The Lipans of Texas are also quiet, and raising corn on the Clear Fork of Brassos.

The Ton-que-was, after stealing a large number of horses from our frontier, made their escape from the upper prairies and have kept themselves out of reach.

The only depredation committed on this frontier for a long time past has been the stealing of horses, which is carried on by small renegade parties from the tribes generally, and is confined to no particular tribe. Whenever a demand for restitution has been properly made the principal chiefs and the tribes generally have shown every disposition to carry out the stipulations of the treaty.

On my return from El Paso I was much astonished to find every newspaper in this State filled with reports of Indian depredations and speaking strongly of the probability of a general Indian war, as I had detected no disposition of the kind in my intercourse with the Camanches during the trip to El Passo.

Finding on my arrival that large numbers of the several bands had visited Fort Graham during my absence, I deemed it proper to address a note to Lieut. Hamilton, com'd'g, requesting copies of the talks had with the Indians, &c., so that the Department might be correctly informed on that subject, and I have the honor herewith to enclose for your information the papers received from him, marked A, which will throw much light as to the disposition of our prairie tribes.

I have also the honor to call your attention to copy of Order No. 8, marked B, accompanying.

At the same time that every person at all acquainted with our Indian relations will acknowledge the great necessity of establishing a line
692 between the whites and Indians. There are few under present circumstances that could be found to acknowledge the justice or policy of carrying said order into effect. It is well known to the Department that there is no law or regulation to keep white men from going above the line of posts, and those posts are situated in a country that has always been occupied by the Indians, and the order can only affect those Indians that are most civilized and have for years past held continual intercourse with our settlers for the purpose of trade, &c.

If this order is acted upon previous to any treaty stipulations with the Indians it establishes nonintercourse, and the Indians, feeling oppressed, will not permit even the agent of the Government to visit their country in a friendly manner, and in retaliation will attack any of our citizens that may be found in the Indian country. I would respectfully recommend this subject for your early consideration.

During the time the Indians were at this post I deemed it proper at their earnest request to furnish them with a small quantity of provision.

I have also to notify you that I have discharged my interpreter, Jim Shaw, from the 25th June, he having become dissipated and faithless,

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ıd have employed temporarily Col. L. H. Williams as interpreter from ıe 7th July inst., all of which I hope you will approve.

I have the honor to be, very respectfully, your obt. servant,

ROBT. S. NEIGHBORS,
Special Ind. Agt. U. S.

Hon. W. MEDILL,
Com'r of Ind. Affairs, Washington, D. C.

TORREY'S TRADING HOUSE,
October 18th, 1849.

SIR: J. H. Rollins, esq., U. S. special agent, not having arrived, I deem it proper to inform you that on the 7th inst. I discharged from service my interpreter, L. H. Williams, and gave him a certified account for the pay due him for three months' service, amounting to $137.50 dolls. I have required him to make a written report of his proceedings, &c., during my absence, which I enclose for your information.

On my arrival I found that a large body of Indians, composed of several bands of Comanches, Caddoes, Ionies, Keechies, Wacos, and Tonkahuas, were assembled near the Clear Fork of the Brazos awaiting my return under the expectation that all of their matters would be fully discussed while I was in Washington, they being anxious to learn the wishes and intentions of the Department in relation to their affairs.

The agent not having arrived, I deemed it most proper not to see the Indians, and have consequently remained at this place awaiting his arrival for the purpose of turning over to him the public property in my possession. So far as I can learn the Indians are still disposed to be at peace, but are anxious to see the agent, as there are many matters to be discussed between them which will have a direct bearing on the further maintenance of peaceful relations with our wild Indians.

I regret much to learn on my arrival here of the death of two of the head chiefs of the Comanches, as they were true and devoted
693 friends to the whites, and the selection of some younger chiefs to succeed them may embarrass our friendly intercourse.

Should anything important transpire before the arrival of Mr. Rollins I will communicate particulars to you on receipt of proper information.

Very respectfully, your obdt. servt.,

ROBT. S. NEIGHBORS.

To Hon. ORLANDO BROWN,
Com'r of Indian Affairs, Washington, D. C.

[Enclosure.]

BARNARD'S TRADING HOUSE,
Octr. 9th, 1849.

SIR: Since your departure for Washington I have been in communication with the Comanches and other wild Indians in the limits of this agency, and so far have been unable to detect anything of an unfriendly nature among them. The Comanches have been visited with the cholera, which has been very fatal. The chiefs Santa Anna and Mopochocopie were both victims, with about three hundred of their people. They have been camped on the Brazos, near the Caddo village, all summer,

and consequently have committed no depredations on the frontier. The disease has been confined almost entirely to the Comanches; a few of the Caddos are the only exceptions. From what I can learn, they contracted the disease both in Mexico and at Fredericksburgh at about the same time in the bands of Santa Anna and Mopochocopie. Shan-ees has been appointed successor to Mopochocopie and promises peace. He wishes to hold a council with the agent soon, as he is anxious to have a talk about matters between the Genl. Government and his people.

The Caddoes have been at their village all summer and fall tending their corn, and have made a very large crop. Jose Maria complains that the citizens have surveyed and located his new village, and is anxious to hold a council with the agent about this matter. They have been very quiet and have committed no depredations thus far, and will continue peaceable with very little encouragement.

The Keechies, Wacos, Wichitas, and Tonkahuas are all quiet and awaiting your arrival to hear what the President has to say to them. The Tonkahuas wish to hold a council, and are willing to make a restitution of the stolen property they have in possession, which they will do if they receive the promise of friendly treatment.

The only difficulty with our Indians is occasioned by the imperfect understanding that exists between the authorities and themselves. The Comanches state that they are willing to enter into any arrangement with the agent that will be satisfactory, so far as regards their forays in Mexico. They say that they have not regarded their depredations in that country as any act contrary to the stipulations of their treaty with Messrs. Butler & Lewis, and consider any interference on our part, previous to some arrangement, as an act of aggression, although they have not retaliated for the attacks made upon them by our troops in
694 Mexico. They expect, on your arrival at this place, to receive the talk of the President in relation to this matter, and are very anxious to have some understanding with the agent.

So far as I can learn, the depredations committed on our western frontier have been confined to the Apaches and other Indians in the vicinity of the Rio Grande. Our friendly bands disclaim any participation in any of the attacks made on our citizens, and from the situation occupied by them since your absence I am satisfied that such is the case.

I have the honor to be, very resp'y, yours, &c.,

L. H. WILLIAMS, *Interpreter.*

To ROBT. S. NEIGHBORS, Esq.,
Special Indn. Agent.

BRAZOS AGENCY, TEXAS,
April 30, 1857.

SIR: Since my return to Texas I have lost no opportunity of informing myself in regard to the actual condition of Indians on our immediate borders outside of the Indian reserves, and have conversed freely with the commanding officer of this military department, the resident agents, and the Indians in relation to them. It appears that the Wichitas are very destitute, having lost or eat nearly all their horses. Some of them has this spring visited this agency and have procured seed corn for planting, and by the advice of Spl. Agent Ross are now planting corn at their

cillage, near the mouth of Big Wichita. I learn also that the Ten a wish and No co me bands of Comanches have had intercourse with the chiefs at Comanche Agency, and are anxious and willing to settle down at once on the reserve lately obtained from the Choctaws. The present condition of those Indians fully justify me in calling your attention to this subject, and to urge this as a favorable opportunity to take the preliminary steps towards opening the new reserve and colonizing the Wichitas and other Indians thereon, as both the time and the Indians concerned appear to be favorable for that purpose. If measures has not already been taken, I would respectfully suggest that a competent person or U. S. engineer officer be selected to define the boundaries of the new reserve.

I would also respectfully suggest that immediate measures be taken to have a permanent military post located within the limits of the reserve to assist the agents in the execution of their duties, and that the territory embraced within that reserve be attached to the Texas military department.

Maj. Genl. Twiggs has been assigned to the command of this department. He is an officer of great experience in Indian matters, and his command already extends to the south and west boundary of the reserve. Of all the officers in the service, I know of none more competent or suitable to take charge of a post of so much importance as Col. A. S. Johnson, of 2nd Cavalry, whose regiment is now on duty on this frontier, and who has cooperated with the Indian agents for the past year. I would request that he be assigned to that post.

By the adoption of these suggestions, I feel confident that success will attend the efforts proposed to be made of at once colonizing the
695 Wichitas and other Indians, and that our frontier will be soon relieved of the serious depredations that has heretofore interrupted its quiet.

Hoping that you will at once bring this subject to the notice of the Hon. Sec'y of Interior, and that instructions may be given accordingly,

I am, very respectfully, your obt. servt.,

ROBT. S. NEIGHBORS,
Superrising Agent Texas Indians.

CHAS. E. MIX, Esq.,
Actg. Comr. Indian Affairs, Washington, D. C.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, September 28, 1897.

The honorable the SECRETARY OF THE INTERIOR.

SIR: I have the honor to be in receipt, by reference of the Department for report, on the 17th day of June last, of a letter addressed to you by the Assistant Attorney-General of the United States, requesting an official statement of all payments to the Choctaw Nation or the Chickasaw Nation, or to persons of African descent formerly held in slavery among said nations, or their descendants, either as a part of the principal of the sum of $300,000 agreed to be paid under article 3 of the treaty of April 28, 1866 (14 Stats., 769), or as interest on the said sum.

In reply to the call of the Assistant Attorney-General, the following

statement is respectfully submitted of payments made to the said nations, viz:

PAYMENTS TO THE CHOCTAW NATION.

Appropriation of July 26, 1866 (14 Stats., 259), under 46th article of the treaty		$150,000.00
Appropriation of July 26, 1866, for interest (14 Stats., 259), under same article		11,250.00
Appropriation of April 10, 1869, for interest (16 Stats., 39), under same article		11,250.00
Appropriation of May 17, 1882, for education of freedmen (22 Stats., 72)		7,500.00
Appropriation of March 3, 1885 (23 Stats., 366), to be placed to the credit of the Choctaws on the books of the Treasury, computed as follows:		
Balance of principal due Choctaws	$67,500	
Deduct overpayment of interest, 1867, amounting to	87,500	
Deduct for same in 1868	7,875	
	15,375	
		52,125.00
		232,125.00

PAYMENTS TO THE CHICKASAW NATION.

Appropriation of July 26, 1866 (14 Stats., 259), under 46th article of the treaty	$50,000.00
Appropriation of July 26, 1866, for interest (14 Stats., 259), under same article	3,750.00
Appropriation of April 10, 1869, for interest (16 Stats., 39), under same article	3,750.00
Appropriation of May 17, 1882, for education of freedmen (22 Stats., 72)	2,500.00
	60,000.00

696 In 1888 and subsequent years the Choctaw Nation paid to the Choctaw freedmen, out of the general trust fund of the nation, the sum of $7,300, at the rate of $100 per capita, to those who desired to remove from the Choctaw Reservation.

The letter of the Assistant Attorney-General is herewith returned.

Very respectfully,

W. A. JONES, *Commissioner.*

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[Choctaw Nation, etc., v. U. S., etc., No. 18932.]

DEPARTMENT OF JUSTICE,
Washington, D. C., April 17, 1897.

The SECRETARY OF WAR.

SIR: I have the honor to request, for use in the above case, certified copies of all communications between Maj. S. H. Long, of the topographical engineers, and the Secretary of War, from September 10, 1820, to January 8, 1821, inclusive, with a statement of what the records show as to the date of receipt of the respective communications from Maj. Long, and with a statement of the date when Maj. Long reported his arrival in Washington on his return from his expedition.

Very respectfully,

J. E. DODGE,
Assistant Attorney-General.

[First indorsement.]

OFFICE CHIEF OF ENGINEERS, U. S. ARMY,
April 23, 1897.

Respectfully returned to the Secretary of War.

There is no record in this office of any communication between Maj. S. H. Long, topographical engineers, and the Secretary of War,
698 between September 10, 1820, and January 8, 1821, nor of the time of the arrival of Major Long in Washington from his expedition.

JOHN M. WILSON,
Brig. Gen., Chief of Engineers, U. S. Army.

[Second indorsement.]

A. G. OFFICE, *April 27, '97.*

Respectfully returned to the Secretary of War.

No record has been found in this office from September 10, 1820, to Jan. 8, 1821, of any communications between Major S. H. Long, of the topographical engineers, and the Secretary of War, nor of the date of the arrival of Major Long in Washington from his expedition.

SAML. BRECK,
Actg. Adjutant-General.

[Third indorsement.]

RECORD AND PENSION OFFICE,
War Department, April 30, 1897.

Respectfully returned to the honorable the Secretary of War.

Copies, prepared for the seal of the Department, of such communications between Major S. H. Long, United States Topographical Engineers, and the Secretary of War, from September 10, 1820, to January 8, 1821, inclusive, as have been found on file or of record in this office are herewith inclosed, viz, letters from Maj. Long, dated September 14, 1820, and December 12, 1820, respectively, and record entry of a letter from the Secretary of War, dated November 24, 1820.

The records show that the letter from Major Long, dated September 14, 1820, was received some time in November, 1820, exact date not shown, and that the letter from Major Long, dated December 12, 1820, was received some time in January, 1821, exact date not shown.

Neither the date when Major Long reported his arrival in Washington on his return from his expedition nor the date and place of his official report has been found of record in this office.

F. C. AINSWORTH,
Colonel, U. S. Army, Chief of Office.

[Fourth indorsement.]

WAR DEPARTMENT, *May 4, 1897.*

Respectfully returned to the honorable the Attorney-General, inviting attention to the preceding indorsements and the accompanying copies of records on file in the Record and Pension Office, War Department, duly authenticated under the seal of the Department.

R. A. ALGER,
Secretary of War.

First report referred to in third indorsement above.

BELLE POINT, *September 14, 1820.*

SIR: I have the honor to inform you that the exploring expedition have arrived in safety at this place, having performed the duties assigned
699 them as far as it was practicable, in their condition. Having traversed the country from the Council Bluff to the Rocky Mountain, the expedition proceeded northwardly along their base to the Arkansaw River, more than 150 miles. A party was detached under command of Capt. Bell to proceed down the Arkansaw—the remainder of our forces accompanied myself in quest of the source of Red River. Capt. Bell's report, herewith inclosed, will apprise you of the progress of his party. I regret that, for want of a guide and a proper knowledge of the country, that the detachment accompanying me were led into a mistake and explored the Canadian of the Arkansaw instead of the Red River. On parting with Capt. B.'s detachment, we proceeded southwardly about 150 miles further, in view of the mountains, and came to a brook running in a southeastwardly direction, which, according to Pike's map and description of the country, our only guide, we took to be a branch of Red River. After pursuing it downward more than 100 miles we fell in with a party of Indians of the nation of Bad Hearts, who confirmed us in this

pinion by repeatedly assuring us that the stream on which we were aveling was Red River. Having traversed it by our courses about 800 iles, by its meanderings more than 1,000, we arrived at its confluence ith the Arkansaw, and discovered our error when it was too late to trieve it. I am happy to inform you that no other accident or mis-ortune worthy of notice has happened to the expedition, except those casioned by the desertion of the men noticed in Capt. Bell's report, nd the loss of a few horses.

Maj. Bradford has advertised the deserters, offering a reward of $200 or their apprehension and the delivery of the manuscripts they took rom the gentlemen of the party.

The expedition will proceed hence to Cape Girardeau in the course of few days, when we propose to embark on board the Western Engineer nd sail for Louisville.

I beg leave to defer a more particular account of our proceedings to ome future opportunity.

I have the honor to be, sir, most respectfully, your obdt. and humble ervant,

S. H. LONG,
Maj., U. S. T. Engrs.

Hon. J. C. CALHOUN,
Sec. of War.

NOTE.—The second report referred to in the third indorsement above relates wholly to accounts, and has therefore not been printed.

Orders referred to in third indorsement above.

DEPARTMENT OF WAR,
November 24, 1820.

Maj. S. H. LONG, *Washington.*

SIR: You will repair to Philadelphia, when you will, as soon as practicable, furnish to this Department a report embracing the general character of the country traversed by the exploring expedition under your command, together with proceedings of the expedition, after
700 which you will report more particularly the character of the country, embracing its zoology, botany, and mineralogy. You will also furnish a map of the country, extending from the city of Washington westwardly to the Rocky Mountains.

I have, etc.,

J. C. C. [J. C. CALHOUN.]

[Choctaw Nation, etc., *v.* U. S., &c., No. 18932.]

DEPARTMENT OF JUSTICE,
Washington, D. C., May 1st, 1897.

The SECRETARY OF WAR.

SIR: I have the honor to request, for use in the above case, an official statement of the date when the letter of Generals Jackson and Hinds of October 19–21, 1820, transmitting the Choctaw treaty of October 18, 1820, was received by the Secretary of War, and certified copies of the letter of the Secretary of War to the President, transmitting the said treaty, and of all communications between the Secretary of War and the

President, from the date of such transmittal to January 8, 1821, in regard to the said treaty, or in regard to Major S. H. Long's explorations in the West.

Very respectfully,

J. E. DODGE,
Assistant Attorney-General.

[First indorsement.]

RECORD AND PENSION OFFICE,
War Department, May 5, 1897.

Respectfully returned to the honorable the Secretary of War.

As shown by the records on file in this office, a letter from Generals Andrew Jackson and Thomas Hinds dated at the "Choctaw Treaty Grounds," Oct. 19, 1820, containing papers relative to the Choctaw treaty, was received at this Department some time in December, 1820, exact date not shown.

A copy prepared for the seal of the Department of a letter dated December 12, 1820, from the Secretary of War to the President, transmitting the treaties between the Choctaws and other tribes or nations of Indians, is herewith inclosed. No record has been found of any other communications between the Secretary of War and the President subsequent to December 12, 1820, and prior to January 9, 1821, in regard to said treaty or in regard to Major S. H. Long's explorations in the West.

F. C. AINSWORTH,
Colonel, U. S. Army, Chief of Office.

[Second indorsement.]

WAR DEPARTMENT,
ADJUTANT-GENERAL'S OFFICE,
Washington, May 14, '97

Respectfully returned to the Secretary of War.

No record has been found in this office covering the years 1820-21 of the letters of Generals Jackson and Hinds of October 19-21, 1820,
701 transmitting the Choctaw treaty of October 18, 1820, or of any communications between the Secretary of War and the President in regard to said treaty or in regard to Major S. H. Long's explorations in the West.

SAML. BRECK,
Acting Adjutant-General.

[Third indorsement.]

WAR DEPARTMENT, *May 15, 1897.*

Respectfully returned to the honorable the Attorney-General, inviting attention to the preceding indorsements hereon, and to the accompanying duly authenticated paper, referred to by Col. Ainsworth in the first indorsement.

G. D. MEIKLEJOHN,
Acting Secretary of War.

Letter referred to in first indorsement above.

DEPARTMENT OF WAR, *December 12, 1820.*

SIR: I have the honor to lay before you the treaties which have been concluded with Wea, Kickapoo, Chippewa, Ottawa, and Choctaw tribes or nations of Indians since the last session of Congress. I also lay before you the treaty with the Kickapoos, which was laid before the Senate at the last session, and returned with a resolution proposing certain amendments, amended as required by that resolution.

I have, etc.,

J. C. C. [CALHOUN].

The PRESIDENT OF THE UNITED STATES.

[Choctaw Nation, etc., r. U. S., No. 18932.]

DEPARTMENT OF JUSTICE,
Washington, D. C., May 24, 1897.

The SECRETARY OF WAR,
Washington, D. C.

SIR: I have the honor to request, for use in the above case, an official statement as to whether any communication appears to have been sent by the Secretary of War to the President, or to the Senate, or to any committee or member of the Senate, between November 1st, 1820, and January 8th, 1821, in regard to Major S. H. Long's explorations in the West.

If any such communications exist, I have the honor to request certified copies of them, and, in any event, a certified copy of Major Long's official report of February 20th, 1821, which is in the office of the Chief of Engineers.

Very respectfully,

J. E. DODGE,
Assistant Attorney-General.

702 [First indorsement.]

RECORDS AND PENSION OFFICE,
War Department, May 27, 1897.

Respectfully returned to the honorable the Secretary of War.

No record has been found in this office of any communications from the Secretary of War to the President, to the Senate, or to any committee or member of the Senate, between November 1, 1820, and January 8, 1821, in regard to Major S. H. Long's explorations in the West.

F. C. AINSWORTH,
Colonel, U. S. Army, Chief of Office.

[Second indorsement.]

OFFICE CHIEF OF ENGINEERS, U. S. ARMY,
June 15, 1897.

Respectfully returned to the Secretary of War, with a certified copy of report of Major Long, of Feb. 20, 1821, prepared for the seal of the War Department.

No record is found in this office of any communication from the Secretary of War to the President, or to either House of Congress, as mentioned within.

JOHN M. WILSON,
Brig. Gen., Chief of Engineers, U. S. Army.

[Third indorsement.]

WAR DEPARTMENT, *June 16, 1897.*

Respectfully returned to the honorable the Attorney-General, inviting his attention to the preceding indorsements hereon and the certified copy of report referred to by the Chief of Engineers.

G. D. MEIKLEJOHN,
Assistant Secretary of War.

703 In the Court of Claims. December term, 1896.

THE CHOCTAW NATION AND THE CHICKASAW Nation
vs.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians. } No. 18932.

Stipulation.

It is hereby stipulated and agreed, by and between the counsel representing the parties to this cause, that the following photographs
704 of maps, being among those referred to in the case of United States v. Texas (Record, pp. 253–4), may be filed by counsel for defendant as evidence and be treated as prima facie accurate copies of the originals of the maps or portions of maps of which they purport to be copies, the said originals being accessible in the library of the United States Geological Survey:

Humboldt's Carte Générale du Royaume de la Nouvelle-Espagne, Paris, 1811.

Pike's Chart of the Internal Part of Louisiana, Plates I and II.

Pike's Map of the Internal Provinces of New Spain.

Darby's Map of the United States, including Louisiana, in Darby's Emigrant's Guide, 1818.

Melish's Map of the United States, 1818.

Disturnell's Map of Mexico, 1847.

De Cordova's Map of Texas, 1849.

Marcy's Map of the Country upon Upper Red River, in Marcy's Report, 1852.

J. M. WILSON,
Counsel for Choctaw Nation.
H. E. PAINE,
Counsel for Chickasaw Nation.
L. A. PRADT,
Assistant Attorney-General.
J. M. VALE,
Counsel for Wichitas, &c.

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DEPARTMENT OF JUSTICE,
Washington, D. C., May 24, 1897.

The SECRETARY OF WAR,
Washington, D. C.

SIR: I have the honor to request, for use in the above case, an official statement as to whether any communication appears to have been sent by the Secretary of War to the President, or to the Senate, or to any committee or member of the Senate, between November 1st, 1820, and January 8th, 1821, in regard to Major S. H. Long's explorations in the West.

If any such communications exist I have the honor to request certified copies of them, and, in any event, a certified copy of Major Long's official report of February 20th, 1821, which is in the office of the Chief of Engineers.

Very respectfully,

J. E. DODGE,
Assistant Attorney-General.

(Indorsed:) Court of Claims. No. 18932. Choctaw Nation vs. The United States. War Dept. transmits certain information in reply to within request. Filed Aug. 13, 1897. Court of Claims.

[Indorsed.]

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MAY 24, 1897.

Department of Justice. For certified copies of certain communications between War Department and the Senate in 1820 and 1821, regarding explorations of Maj. S. H. Long, U. S. Engineers (480698 R. and P. Office), Record and Pension, for report. W. D. records, with 477558.

[Indorsed.]

RECORD AND PENSION OFFICE,
WAR DEPARTMENT,
May 27, 1897.

Respectfully returned to the honorable the Secretary of War.

No record has been found in this office of any communications from the Secretary of War to the President, to the Senate, or to any committee or member of the Senate, between November 1, 1820, and January 8, 1821, in regard to Major S. H. Long's explorations in the West.

F. C. AINSWORTH,
Colonel, U. S. Army, Chief of Office.

[4th indorsement.]

OFFICE CHIEF OF ENGINEERS, U. S. ARMY,
June 15, 1897.

Respectfully returned to the Secretary of War, with a certified copy of report of Major Long of Feb. 20, 1821, prepared for the seal of the War Department.

No record is found in this office of any communication from the Secretary of War to the President, or to either House of Congress, as mentioned within.

JOHN M. WILSON,
Brig. Gen., Chief of Engineers, U. S. Army.

[5th indorsement.]

WAR DEPARTMENT,
June 16, 1897.

Respectfully returned to the honorable the Attorney-General, inviting attention to the preceding indorsements hereon, and the certified copy of report referred to by the Chief of Engineers.

G. D. MEIKLEJOHN,
Assistant Secretary of War.

707 UNITED STATES OF AMERICA,
WAR DEPARTMENT,
Washington City, June 15, 1897.

I hereby certify that the sixty-eight pages hereto attached are a true copy of a report of Maj. S. H. Long, Topographical Engineers, to honorable J. C. Calhoun, Secretary of War, dated February 20, 1821, in the office of the Chief of Engineers, United States Army.

JOHN M. WILSON,
Brig. Gen., Chief of Engineers, U. S. Army.

Be it known that John M. Wilson, who signed the foregoing certificate, is the Chief of Engineers of the United States Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof I have hereunto set my hand, and caused the seal of the War Department to be affixed, on this sixteenth day of June, one thousand eight hundred and ninety-seven.

[SEAL.] G. D. MEIKLEJOHN,
Asst. Secretary of War.

708 PHILAD'A., *February 20th, 1821.*

No. 1.]

SIR: In obedience to your order of the 28th November, I have the honour to submit the following report embracing a concise account of the movements of the exploring expedition under my command, and a general description of the country explored by them. Altho' there are no very striking incidents to embellish the narration, yet the diversity of scenery presented to the view, the changes in the character and aspect of the country, and the variety of other interesting matter in the several departments of natural science, which have been subjects of particular attention, cannot fail to awaken a lively interest in the minds of an enlightened community, inasmuch as a discussion of them must lead to a knowledge of the condition and natural resources of a large portion of the U. States territory.

But as the principal object contemplated in making this report is a general view of the topography of the country, the subjects of description will be such only as are thought to be illustrative of such a view.

MOVEMENTS OF THE EXPEDITION.

The expedition embarked on board of the U. States steamboat "Western Engineer," at Pittsburg on the 4th of May, 1819. Their outfit consisted of such books, instruments, stationary, &c. (a return of which is on file in the Engineer Department), together with such provisions, &c., as

were deemed requisite at the commencement of their voyage. They proceeded down the Ohio River, making such observations and surveys along its banks as are calculated to augment the stock of intelligence already acquired in relation to that part of the country. This part of their route having been previously traversed by gentlemen of science, who have judiciously arranged and generously promulgated the intelligence they have collected, but little matter of a novel or interesting character could be expected. Yet an investigation of the numerous organic remains
709 and mineral productions discoverable on the Ohio throughout its whole extent, together with such an examination of the country as is requisite to a general description of its aspect, soil, and vegetable productions, were considered as objects meriting their attention in the discharge of their several duties.

On arriving at the confluence of the Ohio and Mississippi they proceeded up the latter to the Missouri, and then up the river last mentioned to the Council Bluffs, improving every opportunity of extending their researches in the various branches of natural science.

At the time of their arrival at the Council Bluffs the season was so far spent that it was deemed inexpedient to proceed further till the ensuing season, and the boat was accordingly dismantled and moored in a safe harbour, and quarters constructed for the accommodation of the party during the then approaching winter. Being located in a situation central to a variety of Indian tribes and nations inhabiting the neighbouring country, they were enabled to acquire a pretty extensive acquaintance with the manners, customs, and character of the nations in that quarter.

Surveys of the surrounding country were made, observations for determining the latitude, longitude, magnetic variation, dip, &c., were taken, the changes of the weather and other meteorologic phenomena were recorded, and such other duties performed as pertained to the pursuits of the expedition.

On the voyage up the Missouri a party was detached from the steamboat at Fort Osage, with instructions to proceed across the *the* country by land to the Kanzes village, and thence to the villages of the Pawneys, on the river Platte, and to return on board again at the Council Bluffs. This excursion was undertaken with a view of prosecuting the business of the expedition. The party had accomplished part of the duties assigned them when they were met, near the Kanzes village, by a war party of the Republican Pawneys and robbed of their horses, baggage, &c.,
710 which compelled them to give up the further prosecution of the enterprise. This misfortune rendered it necessary for them to change their route and shape their course for the Missouri, which they reached at Cow Island, having obtained much useful information concerning the country thro' which they passed and the natives inhabiting it.

On my way to the wintering post of the expedition, to which we had given the name of Engineer Cantonment, I pursued a course north of the Missouri from near its mouth to that place, taking sketches of the country preparatory to a topographical delineation. The observance of courses, distances, magnetic variations, &c., were objects of our particular care and attention in all the movements of the expedition.

On my arrival at the cantonment, which I reached on the 27th of May last, preparations were made with all convenient dispatch for reconnoitr-

ing the country westward to the Rocky Mountains, in conformity to your order of the 28th Feb'y, 1820.

The steamboat was ordered on topographical duties under the command of L't Graham, who proceeded with her down the Missouri to St. Louis, thence up the Mississippi to the De Moyen Rapids, and thence down the river to Cape Girardeau, taking such observations
No. 2 and sketches on the voyage as are requisite in constructing a chart of that part of the river and the adjacent country.

Having made the necessary arrangements and rendered our outfit for the western tour as complete as circumstances would permit, we commenced our march on the 6th June, all in good health, except Mr. Say, the zoologist and antiquary for the expedition. It may not be improper here to give a list exhibiting the names of the persons composing the party and the several capacities in which they served.

S. H. Long, maj. T. eng'rs, commanding expedition.
J. R. Bell, capt. l't artillery, journalist.
W. H. Swift, l't art'y, asst. topograph'r & comd'g guard.
Thos. Say, zoologist & antiquary.
E. P. James, botanist, mineralogist, & physician.
711 T. R. Peale, assistant naturalist.
Sam'l Seymour, lands*kip* painter, &c.
Joseph Bijou, guide and interpreter.
Abraham Ledoux, farrier and hunter.
Stephen Julien, interpreter.
H. Dougherty, hunter.
Zachariah Wilson, baggage master.
J. Duncan, D. Adams, & J. Oakley, engagees.
John Sweney, private of corps of artillery.
Joseph Verplank, Wm. Parrish, Robt. Foster, Mordecai Nowland, Peter Bernard, and Charles Myers, privates of the rifle regt., pack-horse men and hunters.

The number of horses and mules procured for the use of the party was 34, including several that were the property of individuals; so that we were able to have all the party mounted and had a sufficient number of horses for the transportation of baggage. In addition to arms, ammunition, a small quantity of provisions, and other necessaries for the tour, our outfit embraced a small supply of Indian goods for presents, not exceeding $150 in value.

The instruments for astronomical and other observations comprehended in our outfit were very limited both in number and variety. The mode of transporting them that we were compelled to adopt was by no means suited to the conveyance of delicate instruments or such as required much space in packing. We, however, took all belonging to the expedition that were in good repair and of a portable construction. The principal were the following: One sea sextant of 5-inch radius, one snuff-box sextant, one mercurial horizon with a glass frame, one patent-lever watch of an excellent quality, three travelling compasses, one measuring tape, two thermometers, and some few articles of apparatus for the use of the naturalists.

Every man being accoutred with a gun, bullet pouch, and powder-horn, and most of them with pistols, the exploring party pro-
712 ceeded westwardly to the Pawney villages situated on a branch of

Platte called the Loup Fork, thence southwardly to the Platte, thence westwardly along the valley of the Platte to the place where ssues from the Rocky Mountains. Having examined the mountains hat place and finding the country too hilly and broken to penetrate h horses within their range, we shaped our course southwardly along ir base, taking occasion to ascend the peaks and spurs of the moun-s, whenever a favorable opportunity presented, for the purpose of ertaining their geological character and that of the vegetables growing n them.

On arriving at the Arkansaw Capt'n Bell was detached with a small ty to ascend along the river, as far as it was practicable to travel with ses, and was able to ascend nearly thirty miles, when his further gress was interrupted by the proximity of the hills to the river.

Having descended the Arkansaw about one hundred miles to the nt whence it was judged expedient to strike upon a southwardly rse in quest of the source of Red River, the party was formed into o detachments, the one to proceed down the Arkansaw under the rection of Capt'n Bell, and the other to accompany me, with the view exploring the country southwardly to Red River and thence down its lley to the upper settlements thereon.

Capt'n Bell's party, with the exception of three soldiers last named in e foregoing list, who deserted on the march, arrived in safety at Belle oint, their place of destination, having performed the duties assigned em.

On separating from Capt. Bell, the detachment under my direction oceeded southwardly in view of the mountains about one hundred and fty miles and arrived at a creek having a southwardly course, which we ok to be tributary to Red River. Having travelled down its valley bout 200 miles, we fell in with a party of Indians of the nation of Kas-
kayas or Bad-hearts, who gave us to understand that the stream
13 along which we were travelling was Red River. We accordingly
continued our march down the river several hundred miles far-
ner, when, to our no small disappointment, we discovered that it was the anadian of the Arkansaw, instead of Red River, that we had been xploring. Our horses being nearly worn out with the fatigue of our ng journey, which they had to perform barefooted, and the season being o far advanced to admit of retracing our steps and going again in quest f the source of Red River, with the possibility of exploring it before he commencement of winter, it was deemed adviseable to give over the nterprise for the present and make our way to the settlements on the
Arkansaw. We were led to the commission of this mistake in
No. 3 consequence of our not having been able to procure a guide
acquainted with this part of the country. Our only depend-
nce in this respect was upon Pike's map, which assigns to the head waters of Red River the apparent locality of those of the Canadian. We continued our march, therefore, and arrived at Belle Point on the Arkansaw on the 13th of September, four days after the arrival of Capt'n Bell and his party.

Both parties suffered occasion'ly for want of food and water, but in general the game of the country yielded us an ample supply of the former, and the water courses, along which we for the most part travelled,

satisfied our demands for the latter. In regard to health, we were all highly favoured except Mr. Say, who was more or less indisposed throughout the tour. Some of the rest were occasionally affected with slight indisposition.

It is a source of much regret that we had the misfortune to loose some of our most valuable manuscripts by the desertion of three soldiers of Capt'n Bell's party, before mentioned. They deserted on the head waters of the Verdigris River, within about 200 miles of the upper settlements of the Arkansaw, taking with them three horses—the best belonging to the party—four saddlebags containing wearing apparel, and other things belonging to the gentlemen of the party, besides the following
714 manuscripts, viz: Journal of the tour, 1 number; Manners and customs of the Indians, 1 No.; Zoological descriptions and remarks, 1 No.; Vocabularies of the Indian languages, two numbers, all by Mr. Say, and one number, containing topographical notes and sketches, by Lt. Swift. In addition to the above the loss of a few horses that failed on the march was the only accident or misfortune worthy of notice that befel the expedition.

From Belle Point the exploring party proceeded across the country to Cape Giradeau, where they arrived on the 10th of October, having been occupied a little more than four months in the performance of the tour from the Council Bluffs.

Throughout the whole excursion the attention of the gentlemen of the expedition was constantly occupied upon the several subjects of investigation which were deemed essential to a topographical and scientific description of the country. In the discharge of our duties, however, we laboured under many disadvantages for want of a sufficient variety of instruments to furnish all the data proper and desirable in giving an account of the geology and meteorology of the *of the* country. A barometer would have been particularly useful, but out of three belonging to the expedition two were rendered completely unfit for use, partly by accident and partly by defects in their construction, and the third was in such a condition that it was not deemed advisable to take it with us, as it was not likely to remain fit for use but for a short time only. In ascertaining the humidity of the atmosphere a hygrometer would have been particularly useful, but it has never been in my power to procure one that had any claim to being accurate. In taking the various observations, however, that could be effected by means of the few instruments we had with us no pains were spared and no opportunities lost. Those in particular for the calculation of latitude and longitude were taken as often as it was thought necessary and with the utmost care and precision that circumstances would permit.

On our arrival at Cape Girardeau we had contemplated to
715 embark on board of "The Western Engineer," which was at that port, ready for our accommodation, and sail for Louisville, but, learning that the water of the Ohio was at that time too low to admit even the passage of a boat drawing no more than fifteen or sixteen inches of water, we were compelled to seek another mode of conveyance. Those of the expedition who had been on duty during the two last seasons, being very anxious to visit their homes, arrangements were accordingly made for their return to Philadelphia, where they would be enabled to

mpile and report the intelligence they had collected. Messrs. Say, le, Seymour, & Lt. Graham, being desirous to return by water, waited opportunity of taking a passage to New Orleans and thence to iladelphia.

Most of the curiosities collected by the expedition were placed in the rge of Mr. Say to be shipped for this place.

Lt. Swift was left in command of the steamboat and crew, with instrucns to proceed with them to Louisville as soon as the water would pert. He was instructed to leave the boat in the care of the pilot employed board of her, order her crew of U. S. soldiers to Newport, Kentucky, for nter quarters and subsistence, and report in person at Philadelphia r topographical duty.

NERAL DESCRIPTION OF THE COUNTRY TRAVERSED BY THE EXPLORING EXPEDITION.

Having given the foregoing brief account of the movements of the expedition, we next proceed to a consideration of the region o. 4 explored by them, which embraces a very considerable portion of the immense valley situated between the Alleghenny and Rocky ountains. The portion of this valley to which their attention has been ore particularly directed, and relative to which intelligence has been ollected, is situated between thirty-five and forty-two degrees of north atitude and eighty and one hundred and six degrees of west longitude, mbracing an extent of about 500 miles in width from north to south, and 1,300 miles in length from east to west.

716 As might be expected in a region of this extent, a great diversity of surface is presented to view, exhibiting all the varieties from the most level and unbroken to the most rugged and mountainous aspect. The most broken parts of this region are those situated along the Ohio, from its source to its confluence with the Mississippi, and on the west of the Missis-sippi between Red River and the Arkansaw and between the latter and the Missouri, extending westward about 400 miles from the Mississippi. The whole region in a geological point of *of* view is constituted of three varieties of formations which characterize the surface throughout, viz, transition, secondary, and alluvial. A tract, however, of considerable extent, including the Hot Springs of the Washitaw and extending northwardly to the lead mines back of St. Genevieve, has by some been considered as possessing a primitive character, but it is believed that the rocks discoverable therein are not sufficiently uniform to warrant such a decision. Moreover, an insulated tract of primitive country, surrounded by others exhibiting the most unequivocal marks of their being secondary, and at the same time presenting a similar conformation in their general aspect, is such an anomaly in natural science as requires more than ordinary proof to be admitted. The particular tract under consideration is probably analogous to other tracts within the region above specified, exhibiting a surface characterized by primitive formations, superincumbent upon others of a secondary character.

In order to give a more distinct conception of the country or region under consideration, it may be regarded as divisible into the following sections, viz: 1st. The country situated between the Ohio River and the

Alleghenny Mountains; 2nd, the country situated between the Ohio, Mississippi, and the Lakes; 3rd, the country situated between the Mississippi and Missouri rivers; 4th, the country situated between the Red and Missouri rivers west of the Mississippi and east of the meri-
717 dian of the Council Bluff, and 5th, the country between the proposed meridian and the Rocky Mountains, to be considered in the order here given.

OF THE COUNTRY SITUATED BETWEEN THE OHIO RIVER AND THE ALLEGHENNY MOUNTAINS.

The country on the south side of the Ohio, including the northerly parts of Pennsylvania, Virginia, and Tennessee, together with the whole of Kentucky, abounds in hills elevated in the vicinity of the Ohio from 4 to 8 hundred or a thousand feet above the water table of the river, and rising many hundred feet higher in the neighborhood of the Alleghenny Mountains. This section is watered by many streams of considerable magnitude tributary to the Ohio, the most important of which are the Monongahela, Kenhawa, Great Sandy, Licking, Kentucky, Salt, Greene, Cumberland, and Tennessee. These rivers are all navigable for keel boats, and many of them for steamboats, to very considerable distances during the boating season, which generally commences about the 20th of February and terminates early in June.

Occasional freshets contribute to render them navigable during short portions of the other months of the year, but no reliance can be placed in periodical returns of freshets excepting those of the spring season. Upon these rivers are extensive and valuable tracts of bottom land covered with deep and heavy forests, and possessed of a soil adapted to the cultivation of all the variety of vegetable products common to the various climates in which they are situated. The highlands back of the bottoms, altho' variegated with hills and valleys alternating with each other in quick succession, are generally possessed of a surface susceptible of being tilled, and in many instances of a soil equally as rich and prolific as that of the bottoms. In many parts of the country, however, the hills are abrupt and stony to such a degree as renders them unfit for tillage. The average produce per acre upon the farming lands of this section may be estimated at the following rates, viz: Indian corn
718 or maize, 40 bushels; wheat, 22; rye, 26; oats, 35; barley, 30; tobacco, from 12 to 15 cwt., and cotton, from 5 to 7 cwt. In regard to the products last mentioned, viz, cotton and tobacco, it should be observed that they are cultivated only in the southwesterly parts of this section, and that oats and barley are seldom cultivated except in the upper or northeasterly parts.

Of the population of this section, if we except the towns and
No. 5 villages and their immediate vicinities, as also a large portion of country surrounding Lexington, Ky., and another of considerable extent, including Nashville, Ten., it is yet but thinly inhabited, affording room for a population far more numerous and more widely diffused.

There are extensive tracts of country between the Alleghenny Mountains and the Ohio as yet almost entirely destitute of inhabitants, the most

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considerable of which are situated in the vicinity of the mountains; also the country generally between Tennessee River and the Mississippi.

As this section of country is pretty generally well known, the foregoing outline of its topography will suffice.

OF THE COUNTRY SITUATED BETWEEN THE OHIO, MISSISSIPPI, AND THE LAKES.

The section of country next in the order proposed is situated north of the Ohio River, and comprehends the States of Ohio, Indiana, and Illinois.

This section may be subdivided into three orders or varieties of country, which merit a separate consideration, viz, the hilly, the plain or rolling, and the valley country.

The hilly country, like that south of the Ohio, exhibits a very uneven surface, variegated with hills and dales confusedly distributed, and occupying about one-third part of the section under consideration. This portion of the country is of a triangular shape, limited on the south by the Ohio River, and on the N. west by an imaginary line commencing on the Mississippi near the Grand Tower and running in a direc-
719 tion nearly E. N. east till it approaches the easterly part of Lake Erie. On the east it mingles with the hilly country comprehended in the back parts of Pennsylvania and N. York. In short, the whole region situated between the Alleghenny Mountains and the imaginary line above specified, or, in other words, the country thro' which the Ohio and its tributaries, except the Wabash, have their courses, may be arranged under this head. The hills throughout the whole are very similar in respect to their altitudes, multiplicity, and confirmation.

Altho' the hilly country north of the Ohio, is in many places rugged and broken, yet a large proportion of it is susceptible of cultivation. No high mountains are to be seen; the hills usually rise from six to eight hundred feet above the common level, or about 1,000 feet above the water tables of the principal rivers and invariably present rounded summits. Interspersed amongst the hills are numerous fine tracts of arable land, which may in general be alleged of the valleys of the numerous rivers and creeks by which the country is watered. The soil upon the hills is generally productive, except where the surface is rocky, and the declivities abrupt, which is more particularly the case in the vicinity of the rivers, where the highlands are divided into numerous knobs, being cut by deep ravines with abrupt and precipitous banks.

The hilly country having been generally esteemed more healthy than either of the other varieties above mentioned, has acquired a more numerous population than the latter. As yet, however, no part of this section has its full compliment of inhabitants, if we accept as before the numerous towns and villages, and their immediate neighborhoods. In regard to the products of agriculture, the same remarks that have been made concerning the section south of the Ohio are equally applicable to the country under consideration, with the exception that cotton is cultivated only in the southwesterly extreme of this section, and tobacco is raised for domestic use only.

The most considerable rivers intersecting this section of countr
720 are the Muskingum, Scioto, Big Miami, and Wabash, all of whic
in the spring season are navigable considerable distances fro
their mouths. The valleys of these rivers give place to many extensi
and fertile bottoms, well adapted to cultivation, and producing the nece
saries of life in great abundance and variety.

The plain or rolling country is separated from that last under consi
eration by the imaginary line above mentioned. It is not to be inferre
however, that the junction of these two regions is distinctly marked b
any characters whatever by which the line can be traced with precisi
but that a gradual change of aspect is observable in travelling from o
variety of country to the other, and that the general direction of the li
indicated by this change is that specified above.

The other boundaries of this variety are the Mississippi on the we
and the Lakes Erie and Michigan, and the Fox and Wisconsin rivers
the north and east. The variety of country, altho' not entire
No. 6. destitute of hills, is almost throughout its whole extent possessed
an undulating or rolling surface, rising into broad and gen
swells in some parts, and subsiding into extensive flats or plains in othe

The valleys of numberless watercourses, bounded by abrupt bluffs
banks, afford some diversity to its aspect; and the bluffs in particular,
the principal streams, being cut by numerous ravines, contribute in ma
places to give the surface a hilly and broken appearance.

Altho' no part of this region can with propriety be denominated hil
especially when compared with the portion of country above considere
yet upon the Wisconsan, Fox, the head waters of Rock and Milwa'k
rivers, the country is considerably diversified with hills, or rather swe
and valleys. The only hills worthy of particular notice, not only
this variety, but in the whole section under consideration, are the Ocoo
and Smokey Mountains, which are broad and elevated ridges rather th
mountains. The former is situated about twelve miles north
721 the Wisconsan, 100 miles above its mouth, and the latter abo
forty miles southwest of the portage between the river just me
tioned and Fox River of Green Bay. The rivers of most note with
this region are the Wabash above the hilly country, before describ
the Kaskaskias, Illinois, Rock, and Wisconsan, tributary to the Miss
sippi, the Fox of Green Bay, the St. Joseph of Lake Michigan, and t
Maumee and Sandusky tributary to Lake Erie. These rivers are
navigable for boats of 10 or 15 tons burden when swollen by spri
freshets, but during the greater part of the summer and fall they have no
sufficient depth of water to be navigable for boats of burden, and
winter their navigation is entirely obstructed by ice. The spring fre
ets, consequent to the melting of the snow and ice, usually take place
the month of March, the southerly streams being open for navigati
much earlier than those in the north.

The prairies or champaigns east of the Mississippi are mostly situat
in this particular region, occupying at least three-fourths of it. Th
are waving or flat tracts of country of greater or less extent, separat
from each other by narrow skirts of woodland situated upon the marg
of rivers and creeks. They are generally possessed of a rich soil, yie
ing a spontaneous growth of grass and other herbage of a luxuri

appearance. They are well adapted to the cultivation of corn, wheat, rye, barley, oats, &c., of which they yield plentiful crops.

The prevailing opinion in regard to this portion of the country, viz, that it is unhealthy, appears too well founded to admit of refutation. The causes that contribute to render it so are very obvious. A large proportion of the prairies are so flat that much of the water deposited upon them by showers remains stagnant upon the surface till it is carried off gradually by evaporation, which renders the atmosphere humid and unhealthy. The vegetable mould, of which the immediate surface is composed, and the abundance of vegetables that spring and decay upon the ground, contribute largely to render these exhalations more deleterious. Altho' there are but few swamps and marshes and very
722 rarely pools of stagnant water to be met with in this region, still the general water table of this country is so little inclined that the streams having but a moderate descent are uniformly sluggish, often exhibiting the appearance of a succession of stagnant pools. The consequence is that the vegetable matter they contain, instead of being carried away by the strength of the current, is deposited upon the bottoms and sides of the channels, and while in its putrescent state serves to augment the quantity of noxious effluvia with which the atmosphere is charged.

The population of this region, compared with its extent, is very inconsiderable, and with the exception of a few villages the settlements are very scattering. Large portions of it, embracing the northerly parts of Indiana and Illinois, are almost entirely destitute of inhabitants. Many parts of the country must remain uninhabited for many years to come, on account of the scarcity of timber and other deficiencies, such as the want of mill seats, springs of water, &c., which are serious blemishes in the character of a large proportion of the country. There are, however, numerous and extensive tracts within this region possessed of a rich soil and in other respects well adapted for settlements, and presenting the strongest inducements for emigrants to occupy them.

The country of the third order agreeably to the subdivision above given, viz, the valley country, is situated upon the rivers, and is included within the hilly and plain countries above described. The tracts
No. 7 belonging to this order, usually denominated bottoms, are altogether alluvial, being composed of alternate layers of sand and soil deposited from the water of the rivers upon which they are respectively situated. The alluvion thus deposited, having once constituted a part of the surface of the countries drained by the water courses tributary to the rivers along which the deposits have been made, it will readily be inferred that the fecundity of the valleys will in some measure correspond with that of the countries whence their alluvion was derived.
723 Accordingly, we find the bottoms more or less productive in proportion to the fertility of the region in which the rivers take their rise and thro' which they flow.

In the valley of the Ohio the quality of the soil appears to improve from its source downward. The alluvion of which it is composed is supplied by the Allegheny and Monongahela rivers, which have their origin and courses in a hilly and mountainous country possessed in general of a saady surface. The alluvion supplied by other tributaries entering the Ohio at various points between its source and its mouth is of a better

quality, being composed principally of argillaceous and calcareous earth which are prevailing ingredients in the soil of the country drained by those tributaries.

It should be remarked, however, in relation to all the varieties of alluvia, that they are partially composed of the fine particles of decayed vegetable matter with which the water drained from the surface of the ground is invariably charged. This property in alluvial deposites often prevails to such a degree as to render soils apparently sandy and sterile remarkably productive. The alluvial bottoms thro'out the U. States afford innumerable examples of this fact, evidenced in the slimy deposites left upon the surface of the ground after an inundation, essentially contributing to the fecundity of the soil.

The most extensive tract of valley country east of the Mississippi is that situated within the bluffs of this river, usually denominated the American Bottom, extending from the mouth of the Ocoa or Kaskaskias River northwardly to that of the Missouri. This spacious bottom, altho' at present elevated much above the range of the highest freshets, is nevertheless alluvial. Its length along the Mississippi is about eighty and its average breadth about four miles. It is generally destitute of a timber growth except along the margin of the river, upon which there is a skirt of woodland extending almost from one end of the tract to the other. The alluvion of the American Bottom is composed of the rich mud brought down by the turbid Missouri, united with an abundance
724 of vegetable matter yielded by the waters of the Upper Mississippi, which also characterizes the bottoms of this extensive river from the Missouri downward to its mouth. Upon this bottom are situated the town of Kaskaskia, the villages of Prairie de Rocher, Harrison, Prairie du Pont, Cahokia, and Illinois, together with many other settlements.

On the same side of the river another large tract of valley land, called the Mississippi Bottom, commences a few miles below the mouth of the river Kaskaskias, and extends downward along the Mississippi between 50 and 60 miles, having an average width of about 3 miles.

This tract, in regard to soil and aspect, is of a character similar to that of the American Bottom, except that the former is more plentifully stocked with timber.

Besides these there are numerous other bottoms on the Mississippi, within the limits prescribed for this report, all of which are composed of a rich alluvion. Those in particular situated below the confluence of the Mississippi and Missouri are possessed of a soil exceedingly luxuriant, being composed, as before observed, of the rich and fertilizing mud deposited from the water of the Missouri. Most of them are covered with deep and heavy forests of timber, accompanied with a luxuriant undergrowth of vines, shrubs, grass, and other herbage.

The bottoms of the Wabash, Kaskaskias, Illinois, and Rock rivers are also made up of a rich alluvion of sand and loam containing a large proportion of vegetable mould. Their surfaces, like those of the Mississippi bottoms, are generally flat, exhibiting tabular elevations or benches, formed by the washing of the rivers at different periods. Large tracts of prairie land are to be met with upon them, but for the most part the proportion of woodland is amply sufficient to sup'ly the adjacent country with timber and fuel.

The valleys of these rivers differ from that of the Ohio not only in having a greater width but also in being limited on both sides
No. 8 by bluffs stretching along their whole length and maintaining
725 nearly a parallel direction; whereas the valley of the Ohio is bounded by abrupt hills irregularly disposed, in some instances protending far into the valley like promontories, and in others retiring from the river and affording room for bottoms of considerable extent.

The Ohio bottoms are uniformly clad in deep forests, except where they have been removed by settlers, no prairies worthy of notice making their appearance.

The valley country, from circumstances already detailed in allusion to the country constituting the second variety, is almost without exception unhealthy. But at the same time it appears evident that this evil gradually decreases in proportion to the increase of population and the consequent advancement of agriculture; for the products of the soil, which the bottoms yield in the greatest profusion, instead of being left to wither and decay upon the surface, are necessarily consumed in the subsistence of man and beast, in consequence of which one of the most fruitful causes of pestilential effluvia, viz., putrifying vegetables, is in a very considerable degree removed.

The prevailing timber growth of the region comprehending the two sections of country already described, is exhibited in the following list of trees, viz: Cottonwood, willow, sycamore, black walnut, pecan, coffee-tree, sweet and sour or black gum, red and water elm, hackberry, blue and white ash, linden, yellow and white poplar, catalpa, black and honey locust, buckeye, burr oak, white and black oak, mulberry, box elder, white dogwood, sugar-tree, white maple, wild cherry, red oak, hickory, ironwood, and hop hornbeam.

The foregoing constitute the principal timber growth of the valley country, and are to be met with more or less frequently thro'out the whole of it. Red beech is abundant in some parts of the valley of the Ohio and in those of many of its tributaries. It abounds also in the northerly parts of the States of Ohio and Indiana. Post oak, black-jack, and several other varieties of the oak, also chesnut, white and shell-
726 bark hickory, persimmon, &c., are sometimes found in the bottoms, but are more prevalent upon the hills and highlands. Pitch pine abounds in many parts of Ohio and Indiana, and generally in the neighbourhood of the Alleghenny Mountains. White pine occasionally makes its appearance in the northerly parts of Ohio. Red cedar is found in a great variety of places thro'out the country, but nowhere in great abundance.

The undergrowth of the several tracts of country above considered includes a great variety of shrubs, vines, brambles, grass, and other herbage, to be enumerated in a botanical catalogue daily expected from Dr. James. The most valuable timber trees are the white, post, and burr oak, the white and blue ash, the shellbark hickory, the black walnut, the cherry, the locust, chestnut, poplar, mulberry, beech, cottonwood, and linden. The two last mentioned are seldom used when other kinds of timber are to be had. The cottonwood is not only the most abundant timber growth upon the bottoms but is more widely diffused than any other, and in many places is the only variety of forest trees that make

their appearance, which, however, is more particularly the case westward of the Mississippi.

OF THE COUNTRY SITUATED BETWEEN THE MISSISSIPPI AND MISSOURI RIVERS.

We next proceed to a consideration of the country west of the Mississippi, and shall begin with that situated between this river and the Missouri. This section contains no mountains, or, indeed, hills of any considerable magnitude. The term rolling appears to be peculiarly applicable in conveying an idea of the surface of this region, altho' it is not entirely destitute of abrupt hills and precipices. The aspect of the whole is variegated with the broad valleys of rivers and creeks and intervening tracts of undulating upland united to the valleys by gentle slopes. Its surface is checkered with strips of woodland situated upon the margins of the water courses and dividing the whole into extensive pastures.

727 If we except those parts of the section that are contiguous to the Mississippi and Missouri, at least nineteen-twentieths of the country are completely destitute of a timber growth.

Within the valleys of these two rivers are extensive tracts of alluvial bottom, possessed of a rich soil.

The bottoms of the Missouri, in particular, are probably inferior to none within the limits of the U. States in point of fertility. Those of the Mississippi are very rich, but do not exhibit sym'toms of so great a fecundity as the former. The bottoms of both, in ascending the rivers become more sandy and apparently less productive.

The bottoms of the Missouri are, for the most part, clad in a deep and heavy growth of timber and underbrush to the distance of
No. 9. about 350 miles above its mouth. There are, however, prairies of considerable extent occasionally to be met with on this part of the river. Higher up, the prairies within the river valley become more numerous and extensive, till at length no woodlands appear, except tracts of small size, situated at the points formed by the meanders of the river.

The bottoms on the Upper Mississippi (that part of Mississippi situated above its confluence with the Missouri being distinguished by this appellation) contain less woodland in proportion to their extent than those of the Missouri. The prairies upon this river also become more numerous and extensive as we proceed upward.

The interiour of the country situated between the valleys of these rivers presents, as before remarked, a rolling aspect, inclining to hilly and broken in some parts, but generally variegated with gentle swells and broad valleys. Within this section are numerous small rivers and creeks, with valleys of a character similar to that of the Mississippi or Missouri, but not so fertile. Their valleys expand to a great width compared with the magnitude of the streams upon which they are situated, but are not bounded by abrupt bluffs, like those of the two rivers just mentioned. They are generally covered with a luxuriant
728 growth of grass and other herbage, and occasionally present copses of woodland of moderate extent. The timber growth of the bottoms is similar to that of the Mississippi bottoms—cottonwood,

blue and white ash, hackberry, black walnut, cherry, mulberry, hickory, and several varieties of the oak being the prevalent timber trees. The hills or highlands are in some instances covered with a scrubby growth of timber and furze, consisting of post oak, black jack, hazle, green brier, &c.

The soil of this section is probably equal, if not superior, to that of any other tract of upland of equal extent within our territory. But the scarcity of timber, mill seats, and springs of water, defects that are almost uniformly prevalent, must for a long time prove serious impediments in the way of settling the country.

The population of this section of country is located almost exclusively within the valleys of the Mississippi & Missouri, and in their immediate neighbourhood, extending upward along the former about one hundred and sixty, and along the latter about three hundred and twenty, miles above their confluence.

The most populous parts of the country are the county of St. Charles, situated near the junction of these two rivers—Cote Sans Desein and its vicinity; that part usually denominated the Booms Lick country, extending from the mouth of the Osage River upward along the Missouri to the river Charaton, and the country on the Mississippi, including the Salt River settlements, which have become numerous and pretty widely diffused.

Along the valleys, both of the Mississippi and Missouri, there are still innumerable vacancies for settlements, holding forth inducement for emigrants to occupy them, equally as strong as any of the positions already selected. The inhabited portions of this section have in many instances proved unhealthy, owing, in all probability, to the same causes that have been herein assigned in relation to the country east of the Mississippi, which operate with equal force and effect upon the inhabitants of this section.

OF THE COUNTRY SITUATED BETWEEN THE MISSOURI AND RED RIVERS.

729 WEST OF THE MISSISSIPPI AND EAST OF THE MERIDIAN OF THE COUNCIL BLUFF.

Altho' no precise limits can be assigned at the western boundary of this section, yet the meridian above proposed may be regarded as a line of division between the two regions, differing in their general character and aspect. It is not pretended that the immediate course of the line is marked by any distinct features of the country, but that a gradual change is observable in the general aspect of the two regions, which takes place in the vicinity of the proposed line. The assumed meridian is in longitude 96 degrees west, nearly, and crosses the Platte a few miles above its mouth; the Kanzes near the junction of its principal forks; the Arkansaw about 100 miles above the Verdigris, or 700 miles from its mouth; the Canadian about 150 miles from its mouth, and the Red River about 150 miles above the Kiamishy River.

The section of country under consideration exhibits a great variety of aspect, the surface being diversified by mountains, hills, and valleys, and occasional tracts of rolling country. Within the section is an extensive tract of bottom land deserving of particular consideration. It is

situated on the Mississippi, commencing a few miles below the
No. 10. Ohio and extending downward to Red River, uninterrupted by hills or highlands, and subject in many places to inundation from the freshets of the Mississippi. The bottom contains many large swamps, rendered almost impenetrable by a dense growth of cypress and cypress knees (the latter of which are conical excrescences springing from the roots of the cypress, and shooting up in profusion to the height of from 1 to 8 or 10 feet).

The most extensive of these swamps commences near the head of the bottom and passes southwestwardly, back of New Madrid, the Little Prairie, St. Francisville, &c., and terminates near the village of the Post of Arkansaw. The Great Swamp, the name by which this extensive morass is designated, is about two hundred miles in length and is of variable widths from 5 to 20 or 30 miles. The timber growth of this and of the other swamps, which are of a similar character but
730 inferior in magnitude, consists principally of cypress of a superior quality, but the difficulty of removing it renders it of little value to the country. Within the bottom are also numerous lakes, lagoons, and marshes, once, no doubt, parts of the bed of the Mississippi or of some of its tributaries that have their courses through the bottom.

Notwithstanding the general depression of this bottom, it contains many insulated tracts of considerable extent elevated above the range of the highest floods. The bottom, almost thro'out its whole extent, supports a dense and heavy growth of timber of an excellent quality, together with a luxuriant undergrowth of canebrake, vines, &c.

It may not be improper to remark in this place that great havoc is annually made amongst the timber of this tract by lumber and fuel mongers, who furnish the New Orleans market with large supplies of these articles, particularly of the former.

The bottom is bounded on the west by a chain of heights corresponding to the river bluffs on other parts of the Mississippi, but not arranged in so regular a manner. These are the commencement of a part of the hilly country hereafter to be considered.

The most considerable rivers that flow through the bottom and pour their tribute into the Mississippi are the St. Francis, the Big Black and White rivers, which are confluent; the Black and Washitaw, and Red river.

There are also a few other bottoms on the west side of the Mississippi of moderate size. The largest of them are Tywapata and Bois Brulé, situated a little above the mouth of the Ohio.

The hilly and mountainous country commences immediately west of the Mississippi bottoms, and extends westwardly about four hundred miles. Altho' the terms hilly and mountainous are expressive of the general character of the country, yet the following portions of this section may be enumerated as exceptions, viz: A tract of country comprehending St. Louis, Belle Fontaine, Florrissant, and extending southwestwardly so as to include the lead-mines tract, Belle View, &c.
731 This tract (which embraces the most populous part of the Missouri Territory) may be denominated rolling or moderately hilly. Considerable portions of the country situated between the Arkansaw and Red river', particularly in the vicinity of the latter, are also of this char-

acter. On the Arkansaw above Belle Point is an extensive tract of a similar description, as also many tracts of inferior size on the north side of the Arkansaw between the village of the Post and the Cadron settlements. On the south side of the Missouri is also an extensive tract of rolling country commencing at the river Le Mine, 6 miles a[illegible] Franklin, and extending upward along the Missouri, with occasional interruptions, to the Council Bluff. Such is the extent of this tract that it comprises almost the whole of the country situated between the assumed meridian line and the Missouri from Fort Osage upward. On the head waters of the Osage River and on those of its principal tributaries the country is said to be of a similar character also. To these may be added large portions of country situated on the Verdigris River, upon the Arkansaw above Grand River, and upon the Canadian from its mouth upward to the distance of about two hundred miles. The tracts here designated exhibit broad and elevated swells of land, separated from each other by deep and spacious valleys.

These portions of country are checkered with woodlands and prairies in many instances, alternating with each other in due proportion, for the accommodation of settlers, with farming and woodlands. On the Missouri above Fort Osage and on the Osage River, however, the proportion of woodland is very inconsiderable and the timber it affords of a scrubby character. The prairies here, as on the north of the Missouri, occupy at least nineteen-twentieths of the whole surface.

Some portions of the Red River country are also deficient in
No. 11. the quantum of woodlands allotted to them, but in general it may be observed that the more southerly regions are better supplied with timber than those farther north. The growth of the
732 woodlands interspersed amongst the prairies is mostly post oak, hickory, black jack, and white oak upon the highlands, and cotton-wood, sycamore, black and white walnut, maple, bur' oak, and several other trees common to the Western bottoms, in the valleys.

The bow wood, or, as it is sometimes called, the Osage orange, is found upon the southerly tributaries of the Arkansaw and upon the Red River and its tributaries. This tree is deserving of particular notice, inasmuch as it affords a timber extremely compact and elastic; its trunk and roots may prove very useful in dy'ing yellow and its fruit of importance in medicine.

The residue of this section, with the exception of the river bottoms and tracts of valley land scattered in various directions, thro'out the whole, is extremely hilly, broken, and mountainous, the hills and mountains rising from five to fifteen hundred feet above the water table of the country in which they are situated. They are exceedingly numerous, and are divided into a multiplicity of knobs and peaks having rounded summits and presenting perpendicular cliffs and abrupt precipices of transition sandstone. Their surfaces generally are covered with rocks of this description or flinty fragments strewed in profusion upon them. The growth upon them is almost exclusively pitch pine, cedar, scrubby oaks, hickory, haw, and bramble; the poverty of the soil in some instances and the scarcity of it in others excluding the more luxuriant vegetable productions common to the more level country in their vicinity.

The range of mountains situated between the Arkansaw and Red rivers gives rise to the following streams, all of which are sufficiently copious

for mill seats and abound in cascades and falls well adapted to such purposes, viz: The Blue Water, Kiamishy, and Little rivers, all of which are tributary to Red River; the Mountain, Rolling Cossetot, and Saline Forks of Little River; the Little Missouri, Cadeau, Washitaw, and the Saline, all confluent; the Maumelle Le Fevre, Petit Joan, and Poteau, tributary to the Arkansaw, besides numerous creeks of less note.

733 The hills and mountains between the Arkansaw and Missouri are equally prolific in water courses. The most considerable of these are the Verdigris, Neosho or Grand River, Illinois, together with the Troy, Mulberry White Oak, Spadra, Pine, Illinois, Point Remove, and Cadron creeks, tributary to the Arkansaw. The Little Red & White rivers, confluent streams; The Strawberry, Spring, Eleven Point, Current, Little and Big Black, all confluent and tributary to White River, which enters the Mississippi about thirty miles above the mouth of the Arkansaw.

The St. Francis and the Merameg have their sources in this broken region also, and discharge themselves into the Mississippi. Of the valleys of the rivers last enumerated, viz, those north of the Arkansaw and tributary to the Mississippi, it is observable that they are uniformly possessed of a rich soil, but owing to the excessive floods, occasionally brought down thro' them from the hills and mountains, their cultivation is very precarious. The valley of White River, and those of some few others, are in many places elevated above the reach of the highest freshets, and are not altogether subject to this inconvenience. But for the most part they are annually subject to be swept by overwhelming freshets, which prostrate fences, buildings, and every artificial structure that opposes their march. Even a fall freshet has been known to inundate plantations situated within the valleys to the depth of eight or ten feet. These floods are generally very sudden as well as excessive, to such a degree that on some occasions the water has risen in the course of one night more than twenty feet. By these sudden rises of the water the planter that in the evening thought his family and possessions secure from harm has been compelled the next morning to embark with his family in a canoe to save themselves from impending destruction, while his habitation, fields, cattle, and all his effects are abandoned to the fury of the torrent.

The streams rising in the same hilly country and tributary to the Missouri are the following, viz: The Bon Homme Creek, the
734 Gasconade, the Osage & its tributaries, the Le Mine, the Blue Water, and several streams tributary to the Kanzes River. Upon some of these, as the Bon Homme, Gasconade, and upon some few creeks beside, mills have been constructed, at which much of the lumber of the St. Louis market is sawed.

This section as yet is but very partially populated, altho' the
No. 12 inhabitants in some portions of it are considerably numerous. The most populous part of the section is the country situated immediately below the mouth of the Missouri, including the town of St. Louis and the villages of Florrissant and Carondelet, Herculaneum, St. Genevieve, Bainbridge, Cape Girardeau, Jackson, St. Michael, and the country in their vicinity; the Lead Mine tract, including Mine a Burton, Potosi, and Belle View, are considerably populous. The settlements in these places, however, if we except the sites occupied by the towns and

llages just enumerated, are still very scattering, and but a small pro-
ortion of the land susceptible of agriculture is yet under cultivation.
esides these there are numerous other settlements and several small
llages within this part of the Missouri Territory, distributed in various
irections and constituting a very scanty population. They are scattered
long the Missouri from its mouth to Fort Osage, a distance of more than
hree hundred miles, on the Gasconade, Merameg, St. Francis, Big
Black and several of its tributaries.

Within the Arkansaw Territory there are but few villages, and the
ettlements are as yet very scattering. The principal villages are the
Post of Arkansaw, situated about 60 miles above the mouth of the river;
Davidsonville on Strawberry River, a small village at the commencement
of the highlands on the Arkansaw, at a place called the Little Rock,
about 200 miles from the mouth of the river, selected as the seat of gov-
ernment for the Territory. Besides these there are a few other inconsid-
erable villages on the Arkansaw River, as also several of small size
situated in the country between the river just mentioned and Red
735 River, the most considerable of which are at Pecan Point, Mount
Prairie, Prairie D'Inde, &c. These villages contain but very
few houses, and those generally of a rude structure, a circumstance attrib-
utable only to the infancy of the Territory. The settlements of the
Territory are scattered along the Arkansaw from the White River Cut-off
(a channel uniting these two rivers at the distance of 30 miles above the
mouth of the former and 3 miles above that of the latter) to Belle Point,
a distance of about four hundred miles. On Little Red, White, and
Strawberry rivers are many scattering settlements, as also on the Wash-
itaw, Cadeau, Little Missouri, and the several forks of Little River.
The settlements upon Red River extend upward to the Kiamishy, a dis-
tance of about nine hundred miles from its mouth, following the meanders
of the river.

The settlements of the section under consideration are most numerous
in those parts represented in the foregoing description, as being variegated
with prairies and woodlands alternating with each other. In the valley
of the Arkansaw, however, which is generally clad in rich forests and
luxuriant cane brakes, prairies are seldom to be met with, and settlers
have had recourse to clearing the land necessary for their plantations.

In addition to the white settlements above pointed out, there are num-
erous villages and settlements of the Cherokee Indians, extending along
the Arkansaw, from the mouth of Point Remove Creek, upward to
Mulberry River, a distance of about one hundred miles. These settle-
ments in respect to the comforts and conveniences of life they afford
appear to vie with, and in many instances even surpass, those of the
Americans in that part of the country.

There are a few villages of the Quawpaws, or Arkansaws, and Choc-
taws, situated on the south side of the Arkansaw River, below the high-
lands. They are not numerous, subsist principally upon game and indian
corn of their own raising, and have even been friendly to the whites.

Upon the river St. Francis are a few settlements of the Delaware
736 & Shawneys, dispersed remnants of those unfortunate nations.

The several bands of the Osage nation resident upon the Verdi-
gris and upon the headwaters of the Osage River, also the Kanzes

Indians living upon the river bearing their name, are included within this section of the country.

In regard to climate, this region, as it expands thro' more than eight degrees of latitude, may be expected to afford a considerable variety; and the position is sufficiently verified by the commencement and progress of annual vegetation. The change of climate is also indicated by certain peculiarities observable in the vegetable products of different parts of the country. For example, vegetation begins at least a month earlier in the southern than in the northern extreme of the region. The Spanish moss disappears northwardly of the 33d degree of N. latitude. Cotton and indigo can not be cultivated to advantage in a latitude higher than thirty-six degrees, and the cane brake or reed cane is seldom found north of 37½ degrees.

In regard to the salubrity of the climate there is also a diversity, depending upon local circumstances rather than upon the
No. 13. temperature of the weather. A luxuriant soil yielding its products to decay and putrify upon the ground, also stagnant waters, flat lands, and marshes, in which the river valleys of this region abound, can not fail to load the atmosphere with pestilential miasmata, and render the country unhealthy wherever these occurrences are to be met with. But it is presumed that the causes of disease will gradually be exterminated as the population of the country increases.

Of the rivers of this region, there are many that are navigable for keel boats of several tons burthen, but all of them have more or less obstructions from shoals and frosts at different periods. The Arkansaw, which in point of magnitude and extent, deservedly ranks second amongst the tributaries of the Mississippi (the Missouri being the first), is navigable to the mouth of the Neosho, or Grand River, a distance of about 600 miles. In this part of the river, however, the navi-
737 gation is liable to obstructions, for want of sufficient depth of water, during a period of 2½ or 3 months, commencing in July. Occasional obstructions are also imposed by ice forming in the river during the winter season, but these are seldom of long continuance, the winters being usually short and mild. As the freshets of the river seldom prevail more than a few days at a time, and are usually attended by sudden rises and falls of the water, boats of moderate draft and burden only are suited to its navigation. The Arkansaw is navigable at all seasons for boats of this description about two hundred miles, which comprehends the distance by the meanders of the river from the Mississippi to the commencement of the high lands. Above the mouth of the Neosho, it spreads to a much greater width than below, and the water is more extensively diffused over its bed, which renders the shoals more numerous and the navigation more precarious.

This part of the Arkansaw can not indeed be considered navigable, even for perogues of a large size, except during the short period of a freshet, which is seldom long enough to complete a voyage of 100 miles.

The Red River is navigable during most of the year to the Great Raft, about 500 miles from its mouth. At this place it' navigation is effectually obstructed, except in a high stage of water when keel boats of 10 or 15 tons burden may pass through it and ascend several hundred miles above.

That part of the river situated above the raft, however, like the upper rt of the Arkansaw, is rendered impassable for boats of burden, by oals and sand bars.

The Washtaw tributary to Red River is navigable many miles. That rt of it particularly situated within the valley of the Mississippi and enominated Black River admits of constant navigation for boats of conderable burden. The Little River, which is also tributary to Red iver, together with its forks heretofore enumerated, is navigable in high ater. White River is navigable, in a moderate stage of water, between three and four hundred miles; also the Big Black, its principal 38 tributary and several branches of the river last mentioned, viz, the Strawberry, Current, Eleven Point, and Spring rivers.

The navigation of the St. Francis is blocked up near its mouth and endered impassable for boats of every description by rafts of logs and driftwood completely chocking the channel of the river, and in many places occupying the whole of its bed for the distance of several miles ogether. The Merameg is also navigable in a moderate stage of water o a very considerable distance.

The Gasconade, Osage, and Kanzes rivers are navigable in the spring season, but their navigation seldom extends far inland from their mouths, being obstructed by shoals or rapids.

Of the rivers tributary to the Missouri, it is remarkable that their mouths are generally blocked up with mud, consequent to the subsidence of the summer freshets of that river, which usually takes place in July. The reason is obvious: the freshets of the more southerly tributaries are discharged early in the season and wash from their mouths the sand and mud previously deposited therein, leaving them free from obstructions. These freshets having subsided, the more northerly branches discharge their floods formed by the melting of the snow at a later period. The Missouri being swollen thereby, backs its waters charged with mud considerable distances up the mouths of the tributaries before alluded to.

The water here becoming stagnant deposits its mud, and the tributaries having no more freshets to expel it, remain with their mouths thus obstructed till the ensuing spring. The lower part of the Canadian River, altho' it is included within the section under consideration, will be described in the sequel of this report in connexion with the rest of that river.

Of the animals found in the several sections of country above described, there are a great variety in almost every department of zoology. But as most of them are common in other parts of the U. States, they need not be enumerated here.

OF THE COUNTRY SITUATED BETWEEN THE MERIDIAN OF THE COUNCIL BLUFF AND THE ROCKY MOUNTAINS.

739

No. 14.

We next proceed to a description of the country westward of the assumed meridian and extending to the Rocky Mountains, which are its western boundary. This section embraces an extent of about four hundred miles square lying between 96 & 105 degrees of west longitude and between 35 and 42 degrees of north latitude.

Proceeding westwardly across the meridian above specified, the hilly country gradually subsides, giving place to a region of vast extent, spreading towards the north and south, and presenting an undulating surface,

with nothing to limit the view or variegate the prospect, but here and there a hill, knob, or insulated tract of table-land. At length the Rocky Mountains break upon the view, towering abruptly from the plains and mingling their snow-capped summits with the clouds.

On approaching the mountains no other change is observeable in the general aspect of the country except that the insulated knobs and table-lands above alluded to become more frequent and more distinctly marked. The bluffs by which the valleys of water courses are bounded present a greater abundance of rocks, stones lie in great profusion upon the surface, and the soil becomes more sandy and sterile. If to the characteristics above intimated we add that of an almost complete destitution of woodland (for not more than one-thousandth part of the section can be said to possess a timber growth), we shall have a pretty correct idea of the general aspect of the country.

The insulated tracts herein alluded to as table-lands are scattered thro'out the section and give to the country a very grotesque appearance. They rise from six to eight hundred feet above the common level, and are surrounded in many instances by rugged slopes and perpendicular precipices, rendering their summits almost inaccessible. Many of them are in this manner completely insulated, while others are connected with the plains below by gentle acclivities leading from their bases to
740 their summits, upon one side or other of each eminence. These tracts, as before intimated, are more numerous but less extensive in the vicinity of the Rocky Mountains than they are further eastward; and in the former situation they are more strikingly characterized by the marks above specified than in the latter.

The geological formations that present themselves along the declivities of these heights are principally horizontal strata of secondary sandstone and brec'ia or pudding stone alternating with each other. Blink stone prevails upon the surface of them in many places, but in general the superior strata are rocks of the description just before mentioned. These tracts are denominated tabular, not from any flatness of surface by which they are characterized, but from their appearance at a distant view and from the horizontal description of the stratifications imbedded in them. Their surfaces are usually waving, and in some instances rise into knobs and ridges of considerable height. Many of them are clad in scrubby timber growth of pitch pine, red cedar, scrubby oaks, etc., while others exhibit a bald or prairie surface.

By far the greater proportion of this section of country is characterized by a rolling and plain surface, which may be alleged not only of the space included within the limits above assigned, but of extensive portions of country north and south of it. Altho' the elevated table-lands, a description of which has just been given, are situated within this region, they occupy but a small proportion of it. In addition to these inequalities in the surface of the country, there are numerous mounds or knobs of different magnitudes and occasional swells of greater or less extent, which contribute to give a pleasing variety to the prospect. The country is also divided into extensive parterres by the valleys of rivers and creeks, which are usually sunk 150 or 200 feet below the common level and bounded in some places by perpendicular precipices and in others by bluffs or banks of gentle slopes.

Immediately at the base of the mountains and also at those of some
741 of the insular table-lands are situated many remarkable ridges, rising in the form of parapets to the height of between fifty and one hundred & fifty feet. These appear to have been attached to the neighbouring heights, of which they once constituted a part, but have at some remote period been cleft asunder from them by some extraordinary convulsion of nature, which has prostrated them in their present condition.

The rocky stratification of which these ridges are principally composed, and which are exactly similar to those of the insulated table-lands, are variously inclined, having various dips or inclinations from 45 to 80 degrees.

Throughout this section of country the surface is occasionally characterized by water-worn pebbles and gravel of granite, gneiss, and quartz, but the predominant characteristic is sand, which in many instances prevails almost to the entire exclusion of vegetable mould. Large tracts are often to be met with exhibiting scarcely a trace of vegetation.

The whole region, as before hinted, is almost entirely destitute
No. 15. of a timber growth of any description. In some few instances, however, sandy knobs and ridges make their appearance, thickly covered with red cedars of a dwarfish growth.

There are also some few tracts clad in a growth of pitch pine and scrubby oaks, but in general nothing of vegetation appears upon the uplands but withered grass of a stinted growth, no more than 2 or 3 inches high, prickly pears profusely covering extensive tracts, and weeds of a few varieties, which, like the prickly pear, seem to thrive best in the most arid and sterile soils.

In the vicinity of the Rocky Mountains, southwardly of the Arkansaw River, the surface of the country in many places is profusely covered with loose fragments of volcanic rocks. On some occasions stones of this description are so numerous as almost to exclude vegetation. A multiplicity of ridges and knobs of various sizes, containing rocks of this character, also make their appearance. All these formations seem to be superincumbent upon horizontal strata of secondary sandstone;
742 but the volcanoes whence they originated have left no vestiges by which their exact locality can be determined. In all probability they were extinguished previously to the recession of the waters that once inundated the vast region between the Alleghenny and Rocky Mountains.

Of the rivers that have their courses through this section those of most note are the Platte, the Kanzes and its forks, the Arkansaw, and the Canadian tributary to the Arkansaw. The Platte rises in the Rocky Mountains, and after an easterly course of about eight hundred miles falls into the Missouri at the distance of about seven hundred miles from the Mississippi. It derives its name from the circumstance of its being broad and shoal, its average width being about twelve hundred yards, exclusive of the islands it embosoms, and its depth in a moderate stage of water so inconsiderable that the river is fordable in almost every place. The main Platte is formed of two confluent tributaries of nearly equal size, called the North & South forks, both of which have their sources considerably within the range of the Rocky Mountains. They unite about 400 miles westward from the mouth of the Platte, having meandered about the same distance eastwardly from the mountains. Besides

these, the Platte has two considerable tributaries, the one, called the Ell
Horn, entering a few miles above its mouth, and the other, the Lon
Fork, entering about 90 miles above the same place. The valleys of th
Platte and its several tributaries are extremely broad and in many place
considerably fertile. They gradually become less fertile on ascendin
from the mouths of the rivers on which they are situated, till at lengt
they exhibit an arid and sterile appearance. The alluvion of which th
bottoms are composed contains a large proportion of sand, which, adde
to the nitrous and saline matter blended with it, occasions freque
appearances of complete barrenness.

Magnesia also appears to be a component part of the alluvion—a qualit
invariably derogatory to the fertility of any soil. The valley of th
Platte, from its mouth to its constituent forks, spreads to the widt
743 of ten or twelve miles and forms a most beautiful expanse of lev
country.

It is bounded on both sides by highlands elevated 25 or 30 feet abo
the valley, and connected therewith by gentle slopes.

The river in several places expands to the width of many mile
embosoming numerous islands, some of which are broad and considerabl
extensive, and all of them covered with a growth of cottonwood & willow
These are the only woodlands that make their appearance along the rive
and in travelling westward these become less numerous and extensive t
at length they entirely disappear. Copses and skirts of woodland aga
present themselves in the neighbourhood of the mountains, but they are
small magnitude, and the trees they furnish are of a dwarfish growt
For a distance of nearly two hundred miles, commencing at the confluen
of the North and South forks, and extending westwardly towards the mou
tains, the country is almost entirely destitute of woodland, scarcely a tr
bush, or even a shrub making its appearance.

The Platte is seldom navigable except for skin canoes requiring but
moderate depth of water, and for these only when a freshet prevails
the river. No attempts have been made to ascend the river in can
for any considerable distance, the prevalence of shoals and the rapidity
the current discouraging such an undertaking. The bed of the Platte
seldom depressed more than six or eight feet below the surface of t
bottoms, and in many places even less, and spreads to such a width th
the highest freshets pass off without inundating the bottoms, except
their lowest parts, the rise of the water on such occasions being no mo
than five or six feet.

In order to account in some measure for the diversity of soil observa
in the valleys of most of our Western rivers, it may not be i
No. 16. proper in this place to assign one of the principal causes th
operate in producing this effect. The alluvial deposits
which the river bottoms are formed consist of particles of mud and sa
more or less minute. The coarser and more ponderous particles are,
course, soonest deposited, while the finer are transferred by t
744 current to a greater distance and deposited nearer the mouths
the rivers. Thus it happens that the bottoms situated near
to the sources of the Western rivers are sandy and contain but a sm
proportion of *of* vegetable mould, while those nearer their mouths
generally furnished with a rich and fertile loam.

The Kanzes—or Konzay, as it is pronounced by the Indians—is made up of two considerable streams, heading in the plains between the Platte and Arkansaw rivers, called the Republican and Smoky Hill forks. Tributary to the former of these are the Solomon's and Saline forks, of less magnitude, rising also in the same plains. The Kanzes is navigable only in high freshets for boats of burden, and on such occasions not more than 150 or 200 miles, the navigation being obstructed by shoals. The character of this river and its several branches is similar to that of the Platte and its tributaries. Woodlands are seldom to be met with except in narrow skirts and small copses along the water courses. Much of the country situated upon its forks is said to be possessed of a good soil, but is rendered uninhabitable for want of timber and water. The bottoms are possessed of a light, sandy soil, and the uplands are in many places characterized by aridity and barrenness. The surface for the most part is rolling, but in some instances inclines to hilly.

That portion of the Arkansaw included within the section under consideration has a bed or channel varying in width from 400 yards to more than a mile, exclusive of islands. In the neighbourhood of the mountains its width does not exceed fifty or sixty yards, gradually growing wider in its progress downward. Its valley, for a distance of more than one hundred miles from the place where it issues from the mountains, contains a considerable timber growth, principally of cottonwood, in skirts bordering upon the river, which occasionally embosoms islands clad in the same kind of growth. Every appearance of timber, however, is lost on a farther progress eastward, and nothing is presented to variegate or adorn the prospect in land but a broad expanse of waving prairies.

745 Proceeding eastward along the river, its valley gradually widens and the bluffs or banks by which it is bounded become less elevated and abrupt. The bottoms rise but a few feet above the water level of the river, but the freshets, having a broad bed like that of the Platte to expand upon, seldom rise so high as to inundate the bottoms. This part of the Arkansaw, as before hinted in a former part of this report, can not be considered as navigable except for boats of light burden during the prevalence of a freshet. In a very low stage the river is said to disappear in many places, the whole of its water passing off thro' the immense body of sand of which its bed is composed.

The Arkansaw, having a direction nearly east and west, has no great variety of climate to traverse in its course from the mountains to the Mississippi; consequently there is no succession of thaws taking place upon the river calculated to maintain a freshet for any considerable length of time. The freshets are occasioned by a simultaneous melting of the snow throughout the whole extent of the river and by showers of rain, which, falling upon a rolling surface, is quickly drained off and causes sudden but seldom excessive rises in the river. I have witnessed in the Arkansaw no less than three considerable rises and falls of the water in the course of two weeks.

The most considerable streams tributary to this part of the Arkansaw are the Negracka, or Red Fork, and the Newsewketonga, or Grand Saline, on the south, and the Little Arkansaw and Stinking Fork on the north side. The Negracka rises within 50 or 60 miles of the mountains, and, after meandering eastwardly between four and five hundred miles, unites

with the Arkansaw at the distance of about 900 miles from the mouth of the latter.

The Newsewketonga has its source in the plains between the Arkansaw and Canadian rivers, and unites with the former about 150 miles below the Negracka.

The head waters of the Little Arkansaw interlock with those of the Smoky Hill Fork of the Kanzes and are discharged into the
746 Arkansaw about 1,500 miles above its mouth. The Stinking Fork runs amongst the head waters of the Neosho and enters the Arkansaw about 800 miles from its mouth.

Besides these there are many other streams of smaller size entering on both sides of the river.

The Canadian rises at the base of the Rocky Mountains, and, after a meandering course of about one thousand miles, enters the Arkansaw at the distance of about 550 miles from the mouth of the latter.

No. 17. This river has generally been represented upon the maps of the country as having a N. easterly course, whereas its source is nearly in the same latitude as its confluence with the Arkansaw; consequently its general course is nearly east. In its course it forms an extensive curve to the southward, leaving a broad space between it and the Arkansaw, in which several streams many hundred miles in length, tributary to both these rivers, have their origin and courses. This river has a broad valley bounded by bluffs from two to five hundred feet high, faced with rocky precipices near its source and by abrupt declivities intersected by numerous ravines lower down. It has a spacious bed, depressed but a few feet below the bottoms, and exhibiting one continued stratum of sand thro' the greater part of its length. It is the channel thro' which the water of a vast extent of country is carried off, yet during most of the summer season it is entirely destitute of running water thro'out a large proportion of its extent—a circumstance in proof of the aridity of the region drained by it. Fifty miles above its mouth it receives at least two-thirds of its water from its principal tributary, denominated the North Fork. This fork rises between the Arkansaw and Canadian and has a meandering course of about 700 miles. Six miles above the fork just mentioned another tributary enters the Canadian, called the South Fork, about half as large as the other. Notwithstanding the supplies afforded by these two tributaries, the Canadian has not a sufficiency of water in summer to render it navigable even to their mouths.

746½ At a distance of 20 miles above its mouth a chain of rocks (slaty sandstone) extends across the bed of the river, but occasions no considerable fall. A little above the entrance of the South Fork is another of the same description, forming rapids of moderate descent not more than 400 yards in length. With these exceptions, the bed of the river presents no rocky formations (in place) for more than four hundred miles from its confluence with the Arkansaw. About three hundred and fifty miles from that point beds of gypsum or plaster of paris begin to make their appearance in the bluffs fronting upon the river, and upon the declivities of the highland knobs a great abundance of this article is to be met with, not only upon the Canadian but also upon the upper part of the Arkansaw. The hills in which it is imbedded are composed of ferrugenous clay and fine sand of a deep-red complexion. Hence the

Arkansaw derives the coloring matter that gives to its waters their reddish hue.

The bottoms of the Canadian, in the neighbourhood of its mouth, are possessed of a soil exceedingly prolific, but, like those of the other rivers of this region, the more remote their situation from the mouth of the river the more sandy and sterile in their appearance.

Its valley is plentifully supplied with timber of an excellent quality for a distance of about two hundred miles on the lower part of the river, and the highlands for nearly the same distance are agreeably diversified with prairies and woodlands. This portion of the river is situated eastward of the assumed meridian, and the country upon it has already been partially described in a former part of this report.

The woodland growth upon the lower part of the Canadian consists of cottonwood, sycamore, white, blue, and black ash, swamp cedar, red elm, coffee tree, yellow wood, sugar tree, box elder, white and black walnut, wild cherry, mulberry, &c., in the river valley, and hickory, white and post oak, black jack, black oak, &c., upon the adjacent uplands. On a progress westward the most valuable of the timber trees above mentioned disappear, till at length occasional groves of cottonwood,
747 mingled with mulberry, red elm, and stinted shrubbery of various kinds constitute the only woodlands of the country. On this occasion it may be observed that the cane or reed, the peavine, pawpaw, spice wood, hop vine, and several other varieties of shrubs and vines common only to rich soils are nowhere to be found within this section or westward of the proposed meridian.

The country of the Canadian above that last considered, or that portion of it west of the assumed meridian, appears to be possessed of a soil somewhat richer than the more northerly parts of the section, but exhibits no indications of extraordinary fecundity in any part of it. Proceeding westward a very gradual change is observable in the apparent fertility of the soil, the surface becoming more sandy and sterile, and vegetation less vigorous and luxuriant. The bottoms appear to be composed in many places almost exclusively of loose sand, exhibiting but few signs of vegetation. Knobs and drifts of sand, driven from the bed of the river by the violence of the wind, are piled in profusion along the margins of the river thro'out the greater part of its length. It is remarkable that these drifts are, in many instances, covered with grapevines of shrubbery appearance, bearing fruit in the greatest abundance and perfection. The vines grow to various heights, from eighteen
No. 18. inches to four feet, unaccompanied in some instances by any other vegetable, and bear a grape of a dark purple or black colour of a delicious flavour, and of the size of a large pea or common gooseberry.

The waters of this section, almost in every part of it, appear to hold in solution a greater or less proportion of common salt and sulphate of magnesia, which, in many instances, render them too brackish or bitter for use. Saline and nitrous efflorescenses frequently occur upon the surface in various parts of the country, and incrustations of salt of considerable thickness are to be found in some few places south of the Arkansaw River. As to the existence of rock salt in a mineral state some doubts are to be entertained if the decision is to rest upon the character of the

specimens exhibited as proofs of the fact. The several examples
748 of this formation that I have witnessed are evidently crystalline salt, deposited by a regular process of evaporation and crystallization, and formed into concrete masses or crusts upon the surface of the ground.

Indications of coal are occasionally to be seen, but this mineral does not probably occur in large quantities. The geological character of this section is not such as to encourage the search for valuable minerals. A deep crust of secondary sandstone occasionally alternating with breccia, with here and there a superstratum of rocks of a primitive type, are the principal formations that present themselves.

Of the animals of this region the buffaloe or bison ranks first in importance, inasmuch as it supplies multitudes of savages not only with the principal part of their necessary food, but also contributes to furnish them with warm clothing. The flesh of this animal is equal, if not superior, to beef, and affords not only a savoury but a wholesome diet. A large proportion of this section, commencing at the assumed meridian and extending westward to within one hundred miles of the Rocky Mountains, constitutes a part only of their pasture ground, over which they roam in numbers to an incredible amount. Their range extends northwardly and southwardly of the section as far as we have any particular account of the country. The animal next in importance is the wild horse, a descendant, no doubt, of the Spanish breed of horses, to which its size, form, and variety of colours show that it is nearly allied. In regard to their contour, symmetry, &c., they afford all the varieties common to that breed of horses. They are considerably numerous in some parts of the country, but not abundant. They are generally collected in gangs, but are sometimes solitary.

Grisley or white bears are frequently to be seen in the vicinity of the mountains. They are much larger than the common bear, endowed with great strength, and are said to be exceedingly ferocious. The black or common bears are numerous in some parts of the country, but none
of these animals are found remote from woodlands, upon the
749 products of which they depend in a great measure for their subsistence.

The common deer are to be met with in every part of this section, but are most numerous in the vicinity of woodlands. The black-tailed or mule deer is found only in the neighbourhood of the mountains. Hilly and broken lands seem to afford them their favorite pasture ground. The elk is also an inhabitant of this section, but is not to be found remote from woodlands. The cabric, wild goat, or, as it is more frequently called, the antelope, is common. They are numerous, and with the buffaloe are the common occupants of the plains, from which they retire only in quest of water.

Wolves are exceedingly numerous, particularly within the immediate range of the buffaloe. Of these there are many varieties, distinguishable by their shape, size, and colour.

The marmot, commonly called the prairie dog, is more abundant thro'out this section than any other quadruped. They live in villages scattered in every direction, and thickly inhabited, a single village in some instances occupying a tract of ground three or four miles in extent.

Their habitations are burrows three or four inches in diameter, situated at a distance of fifteen or twenty paces asunder. The habits and manners in other respects are peculiarly interesting. They subsist on vegetables, their flesh is similar to that of the groundhog, and their hair equally as coarse.

The beaver, otter, mink, and muskrat are numerous upon the rivers, creeks, and rivulets issuing from the mountains, and are generally upon those whose valleys are supplied with woodlands.

Badgers, rac'oons, hairs, polecats, porcupines, many varieties of squirrels, panthers, wild cats, lynxes, and foxes of several species are also inhabitants of this section. Besides these the country affords a great variety and abundance of reptiles and insects, both venomous and harmless.

Of the feathered tribes no very considerable variety is observable.
750 The turtledove, the jay, the barn swallow, the quail (partridge of the Middle States), the owl, whip-poor-will, and lark, which seem more widely distributed over the territory of the U. States than any other birds, are found here. Several varieties of the hawk,
No. 19. containing some new species, the bald and grey eagle, the buzzard, raven, crow, jackdaw, magpie, turkey, two or three varieties of the grouse, pheasant, pigeon, many varieties of the sparrow and fly-catcher, the whooping or sandhill crane, curlew, sandpiper, together with a variety of other land and water fowls, are more or less numerous in this region. It is remarkable that birds of various kinds common to the seacoast, and seldom found far in the interior, pervade the valley of the Mississippi to a great distance from the Gulf of Mexico, and frequent the regions adjacent to the Rocky Mountains.

In regard to this extensive section of country I do not hesitate in giving the opinion that it is almost wholly unfit for cultivation, and, of course, uninhabitable by a people depending upon agriculture for their subsistence. Altho' tracts of fertile land, considerably extensive, are occasionally to be met with, yet the scarcity of wood and water, almost uniformly prevalent, will prove an insuperable obstacle in the way of settling the country.

This objection rests not only against the section immediately under consideration, but applies with equal propriety to a much larger portion of the country. Agreeably to the best intelligence that can be had concerning the country both northward and southward of the section, and especially to the inferences deducible from the account given by Lewis & Clark of the country situated between the Missouri and the Rocky Mountains above the river Platte, the vast region commencing near the sources of the Sabine, Trinity, Brasis, and Colorado, and extending northwardly to the 49th degree of N. latitude, by which the U. States territory is limited in that direction, is throughout of a similar character. The whole of this region seems peculiarly adapted as a range for buffaloe, wild goats, and other wild game, incalculable multitudes of which
751 find ample pasturage and subsistence upon it.

This region, however, viewed as a frontier, may prove of infinite importance to the U. States, inasmuch as it is calculated to serve as a barrier to prevent too great an extension of our population westward and secure us against the machinations or incursions of an enemy that might otherwise be disposed to annoy us in that part of our frontier.

The Indians of the section last described, whose numbers are very limited compared with the extent of country they inhabit, will be considered in the sequel to this report.

OF THE ROCKY MOUNTAINS.

This range of mountains has been distinguished by a variety of appellations, amongst which the following are the most common, viz, Rocky, Shining, Mexican, Chippewyan, Andes, &c. The general course of the range is about N. NW. or S. SE. Its breadth varies from fifty to one hundred miles. They rise abruptly out of the plains which lie extended at their base on the east side, towering into peaks of great height, which renders them visible at the distance of more than one hundred miles eastward from their base. They consist of ridges, knobs, and peaks variously disposed, among which are interspersed many broad and fertile valleys. The more elevated parts of the mountains are covered with perpetual snows, which contribute to give them a luminous and, at a great distance, even a brilliant appearance, whence they have derived the name of Shining Mountains.

Between the Arkansaw and Platte, on a small creek tributary to the former, is situated a high part of the mountains denominated "Highes Peak" on many maps of the country, and said to be more elevated than any other part within the distance of 150 or 200 miles. This peak whose summit has been accounted inaccessible, was ascended by a detachment of the expedition conducted by Dr. James, from which circumstance it has been called James Peak. Its elevation above the
752 common level, ascertained by a trigonometrical measurement, is about eight thousand five hundred feet. But the correctness of the statement that it is higher than any other part of the mountains within the distance above mentioned is questionable. Judging from the position of the snow near the summits of other peaks and ridges at a great distance from it, a much greater elevation is apparent.

The mountains are clad in a scattering growth of scrubby pines, cedar, and furze, and exhibit a very rugged and broken aspect. The rocky formations embodied in them, contrary to the opinion generally received, are uniformly of a primitive character, consisting of granite, gneiss, quartz rocks, &c. It should be remarked, however, that a deep crust of secondary rocks, the same as the stratifications of the plains before mentioned, appears to recline against the east side of the mountains extending upward from their base many hundred feet.

At the base of James Peak, above designated, are two remarkable springs of water, considerably copious and strongly impregnated with fixed air. At the place also where the Arkansaw issues from the mountains are several medicinal springs on the north side of the river, rising in a small area at the base of the mountains. These springs were discovered by Capt'n Bell, and in consequence I have taken the
No. 20 liberty to call them Bell's Springs. They are six in number, one of which is strongly impregnated with fixed air, another with sulphureted hydrogen, and the rest with salt and sulphur, the waters all being more or less chalybiate.

OF THE INDIANS INHABITING THE SECTION OF COUNTRY LAST DESCRIBED.

This country is exclusively inhabited by savages, no other beings of the human family having fixed their abode within it. They consist of the following tribes and nations, whose numbers, places of residence, and mode of life will be subjects of consideration as far as our knowledge of them extends.

The Otoes, or, as they are called in their own language, the Wahtooh-tah-tah, reside in a perman't village of dirt or earthen
753 lodges on the south bank of the river Platte, about fifty miles from its confluence with the Missouri and thirty miles southwestwardly from the Council Bluff. The principal remnant of the old Missouries, who have become extinct as a nation, have their residence with the Otoes. In the course of the last winter, whilst these Indians were absent from their village on their winter hunt, their town was partly burnt by the Sauks, which misfortune induced them to take up a temporary abode upon Salt River, a few miles from their former residence, but it was generally supposed that they would return again and rebuild their town. The name of their principal chief is Shongotongo, or Big Horn; probable number of lodges, 100; of persons, 1,400. The Otoes and Missouris are esteemed a brave people and are friendly towards the Americans.

They are at war with the Sauks, Foxes, Sioux, Osages, Iatans, and other Indians west of the Missouri. A small band of the Ioways resided for some time with these Indians, but not being able to harmonize with them lately, returned to their old village on the river De Moyen of the Mississippi. Their principal chief, usually called Hard Heart, being dissatisfied with the conduct of his tribe, remains with the Otoes.

The Omawhaw, or, as it is commonly written, the Maha, Nation exultantly boasts that they have never *have* killed an American. On the contrary, they have ever been very friendly and still hold the Americans in the highest estimation. Under the influence of their present principal chief, Ongpatunga, or the Big Elk, they never go to war except in the pursuit of a predatory war party, in consequence of which the traders have given them the reputation of being cowardly. But the history of this people shows that they have been as ambitious of martial renown and have acquired as large a share of it as any of their neighbours. They formerly resided in a village of dirt lodges upon Omawhaw Creek, a small stream entering the Missouri about 200 miles above the Council Bluff,
but they have recently abandoned it and are about building a
754 town on Elkhorn River. Their number of souls is about 1,500.

The Poncahs have their residence in a small village of dirt lodges, about 180 miles above Omawhaw Creek. This tribe have a common origin with the Omawhaw and speak the same language. Their principal chief is called Smoke Maker. Their number is about 200 souls.

The tribes above enumerated evidently sprung from the same common stock, the language of all being radically the same. They have a tradition that their fathers came from beyond the lakes.

The Pawneys are a race of Indians distinct from the preceding, their language differing radically from that of the Indians alluded to. The

Pawneys consist of three distinct bands that have their residence at present on a branch of the river Platte, called the Loup Fork, about 60 miles from the mouth of the latter and between 108 and 115 miles westward from the Council Bluffs. The three bands are distinguished by the appellations of the Grand, the Republican, and the Loup Pawneys. The two former acknowledge a common origin, but the latter deny having any natural affinity with them, tho' their habits, language, &c., indicate the same ancestry. They live in three villages, included within an extent of about seven miles on the north bank of the Loup Fork, all compactly built.

The village of the Grand Pawneys is situated immediately on the bank of the river, and contains about 180 earthen lodges, 900 families, or 3,500 souls. The name of the principal chief of this village is Tarrarecawaho, or Long Hair.

The village of the Republican Pawneys is situated about three miles above that of the Grand Pawneys; contains about 50 lodges, 250 families, or 1,000 souls. The name of their principal chief is Fool Robe, who is very much under the influence of Long Hair. This band separated many years since from the Grand Pawneys and established themselves upon the Republican Fork of the Kanzes River, where they were visited by Pike on his tour westward. They seem to be gradually amalgamating with the parent stock, and their village wears a
755 declining aspect.

The village of the Loup Pawneys, or Skeree, as they call themselves, is situated four miles above that last mentioned, immediately on the bank of the river. It contains about 100 dirt lodges, 500 families, or 2,000 souls, making an aggregate of 6,500 souls belonging to the three villages. The name of their principal chief is the Knife Chief. A few years since the Loup Pawneys had a custom of annually sacrifising a human victim to the Great Star (Venus), but this was abolished by their
No. 21 present chief, aided by the noble daring of his gallant son. They appear unwilling to acknowledge their affinity with the other Pawneys, but their language being very nearly the same, proves them to be of the same origin.

Altho' these bands are independent of each other in all their domestic concerns, government, &c., yet in their military operations they generally unite, and warfare becomes a common cause with them. Their arms are principally bows & arrows, lances, war clubs, and shields, with some few firearms. They are expert horsemen, but generally fight on foot. They are more numerous and accounted more formidable in warfare than any other combination of savages on the Missouri, the Sioux excepted. Their confidence in their own strength gives them a disposition to domineer over their weaker neighbours. They are at war with the Osages, Kanzes, Sioux, Iatans, Kaskayas, Kiaways, Shiennes, Crows, &c.

The several tribes above described cultivate maize, or Indian corn, pumpkins, beans, watermelons, & squashes.

They hunt the bison, or buffaloe, elk, deer, beaver, otter, the skins of which they exchange with traders for fusees, powder, and lead, kettles, knives, strouding, blankets, beads, vermillion, silver ornaments, and other trinkets. They prefer the Meckinaw guns, blankets, &c., and will give a higher price for them, knowing that they are greatly superior to those furnished by American traders.

The Konzes and Osages, both of which reside in the vicinity of the meridian assumed as the eastern boundary of this section, may here be admitted to a more particular consideration than that already
756 allowed them in this report. The Kanzes Indians reside in a village of earthen lodges, situated on the north side of the river, near the mouth of the Blue Earth Creek, entering the river about one hundred miles from its mouth. Their village consists of about 130 lodges, and contains about 1,500 souls. This tribe was formerly very troublesome to our traders, frequently robbing them of their goods, but since the establishment of the upper posts on the Missouri they have become very friendly. They are at war with most of the other tribes and nations herein enumerated, except the Osages and Otoes, with the last of whom they have lately made peace thro' the agency of Major O'Fallon, Indian agent for the Missouri. Several Indians of the Missouri tribe reside with them.

The Osages are divided into three bands or tribes, called the Grand Osage, the Little Osage, and Clermo's band. The two former of which reside in permanent villages situated on the headwaters of the Osage River, and the last upon the Verdigris about sixty miles from its confluence with the Arkansaw.

According to Pike, whose estimate of their numbers is probably near the truth, the Grand Osages amount to 1,695, the Little Osages to 824, and Clermo's band to 1,500 souls, making an aggregate of about 4,000. These Indians are not accounted brave by those inhabiting the country to the north and east of them, but are the dread of those west and south of them. Altho' they have occasionally been chargeable with depredations committed against the whites, they have been provoked to the perpetration of them by aggressions or trespasses on the part of the latter, or else the depredations have been committed by malcontents of the nation who will not be governed by the council of their chiefs. These Indians hold the people and Government of the U. States in the highest estimation, and have repeatedly signified their strong desire to be instructed by them in the arts of civilization. The U. States have purchased from them large and valuable tracts of country for mere trifles—which the Osages have been the more willing to relinquish, under the pros-
757 pect and encouragement given them that the Americans would become their neighbors and instructors. They are in a state of warfare with all the surrounding tribes and nations of Indians except the Kanzes. It is said they are about forming an alliance with the Sauk & Fox Indians of the Mississippi, and that the latter are preparing to remove to their country. They have recently driven the Pawneys of Red River from their place of residence, and compelled them to seek an abode upon the head waters either of the Brassis or Colorado.

The Kanzes and Osages are decendants from the same common origin, with the Otoes, Missouris, Omawhaws, and Puncahs, to which may be added the Quawpaws and several other tribes not mentioned in this report. The languages of all of them are radically the same, but are now distinguished by a variety of dialects.

OF THE ARRAPAHOES, KASKAYAS, KIAWAYS, IATANS, AND SHIENNES.

These nations have no permanent residences or villages, but roam sometimes in society and sometimes separately over the tract of country constituting the section last described. They hunt the bison principally

and migrate from place to place in the pursuit of the herds of that animal, upon the flesh of which they chiefly subsist. Being thus accustomed to a roaming life, they neglect the cultivation of the soil, and are compelled to subsist almost exclusively upon animal food. They formerly carried on a limited trade with the Spaniards of Mexico, with whom they exchanged dressed bison skins for blankets, wheat flour, maize, &c., but their supplies of these articles are now cut off by a war which they are at present waging against that people. They also at distant periods held a kind of fair on a tributary of the Platte near the mountains (hence called Grand Camp Creek), at which they obtained Brit-
No. 22 ish merchandize from the Shiennes of Shienne River, who obtained the same at the Mandan village from the British traders that frequent that part of our territory. Last winter they traded a great number of horses and mules with a party of white men who had ascended Red River, but whence the party came could
758 not be ascertained; it however appeared probable that they were citizens of the U. States or possibly freebooters from Barataria.

The Shiennes associated with these wandering tribes are a small band of seceders from the nation of the same name residing upon Shienne River. They are said to be daring and ferocious. They are, however, kept under restraint by the energy and firmness of their chief.

The Bears Tooth, who is the principal chief of the Arapahoes and the head chief of all these bands, possesses great influence over the whole. His mandates, which are uniformly characterized by discretion and propriety, are regarded by his subjects as inviolable laws.

The Kaskaya and Kiaway languages are very difficult to acquire a knowledge of. Our interpreter, who had lived several years with them, could only make himself understood by the language of signs with the aid of a very few words of the Crow language, which many of them appear to understand. Indeed, many of the individuals of these different nations seemed to be ignorant of each others' language, for when they met they would communicate by means of signs, with now and then an oral interjection, and would thus maintain a conversation apparently without the least difficulty or misapprehension.

These nations are at war with all the Missouri Indians, as far down as the Osages, who are also included amongst their enemies, and it was rumored that hostilities had recently commenced between them and the Shiennes upon the river of the same name.

Their implements of war consist of the bow and arrow, the lance, war club, and shield. They usually fight on horseback, and as horsemen display great skill and activity.

Their habitations are leather lodges, which serve them as tents on their march and dwellings at the places of their encampment.

Widely diffused as these Indians are, and never embodied, it is impracticable even to conjecture their numbers with any degree of probable accuracy. They roam not only thro'out the section above specified, but extensively within the range of the Rocky Mountains.

759 The foregoing remarks about the Indians of this part of the country have been made, for the most part, agreeably to the suggestions of Mr. Say, whose attention was particularly directed to researches of this nature. But, having been robbed of his notes upon the customs,

manners, languages, &c., of the Western Indians by the men who deserted from Capt'n. Bell's party, he could give no further account of them than what his recollection could supply. Of the Kanzes, Otoes, Pawneys, and other Indians near the Council Bluffs his notes are considerably extensive, but the vessel on board of which they, with other articles, were shipped from N. Orleans, having been obstructed in her passage up the Delaware by ice, we have not yet received them.

OBSERVATIONS EMBRACING SEVERAL TRAITS OF CHARACTER COMMON TO THE INDIANS OF THE WESTERN COUNTRY.

An accurate and extensive knowledge of the numerous tribes and nations of Indians living within the U. States territory can only be obtained by a long residence with them. They are seldom communicative except upon the subjects intimately connected with their personal experience or present interest and welfare. In regard to matters of an abstract or metaphysical nature their ideas appear to be very limited; at any rate very little is known of their sentiments upon subjects of this kind, owing, in a great measure, to the inability of the persons usually employed as interpreters to converse intelligently concerning them. The delicate trains of thought and reflection attributed to them by writers who have attempted to enlarge our acquaintance with the Indian character usually have their origin in the ingenuity of the writers themselves. The exploits of their war parties, and particularly those of individuals, are often recounted, but are seldom transmitted to succeeding generations, unless they are characterized by some signal advantage to the tribe or nation to which the party or individual belongs. Hence their history is very defective, affording but few incidents and characterized by no regular series of events. In regard to the numbers of persons and
760 strength of the several tribes and nations, also the ages of individuals, no precise statements can be made; all the information given under these heads is, almost without exception, conjectural. In relation to subjects of this kind, the Indians are either ignorant or wilfully silent, and deem it an impertinent curiosity that prompts a stranger to the investigation of them.

Notwithstanding these obstacles in the way of acquiring authentic and credible information concerning the savages, yet there are certain traits in their general character that are observable in a partial acquaintance with a variety of tribes and nations, and upon these the following remarks are grounded:

They are, almost without exception, addicted to habits of extreme indolence; self-preservation, self-defence, and recreation being their usual incentives to action. The laborious occupations of the men consist almost exclusively in hunting, warfare, and tending their horses. Their amusements are principally horse racing, gambling, and sports of various kinds. The cultivation of corn and other vegetables, the gathering of fuel, cooking, and all other kinds of domestic drudgery is the business of the women, the men deeming it degrading to their dignity to be occupied in
No. 23 employment of this kind. Their religion consists in the observance of a variety of rites and ceremonies, which they practise

with much zeal and ardour. Their devotional exercises consist in sin
ing, dancing, and the performance of various mystical ceremonies, whi
they believe efficacious in healing the sick, frustrating the designs
their enemies, and in giving success to any enterprise in which they m
be embarked.

Amongst all these tribes and nations secret associations or councils a
common, the proceedings of which are held sacred and not to be divulg
except when the interests of the people are thought to require a disclosu
To these councils, which they denominate medicine, or rather mag
feasts, none are admitted but the principal men of the nation, or such
have signalized themselves by their exploits in battle, huntin
761 stealing horses, or in any of the pursuits accounted laudable
the Indians. In these assemblies the policy of making war
peace, and the manner in which it is to be effected, also all matters invol
ing the interests of the nation are first discussed.

Having thus been the subject of deliberation in solemn council (
the proceedings at these feasts are conducted with the greatest solemnit
the decision, of whatever nature it may be, is published to the people
large by certain members of the council performing the office of crie
On such occasions the criers not only proclaim the measures that ha
been recommended, but explain the reasons for them, and urge the peo
zealously to embrace them. It is also the business of the criers, who a
generally men of known valour and approved habits, and are able to enfo
their precepts by the examples they have set, to harangue the people of t
village daily and exhort them to such a course of life as is deemed prai
worthy. On such occasions, which are usually selected in the stillness
the morning or evening, the crier marches thro' the village uttering
exhortation in a loud voice and endeavouring to inculcate correct pri
ciples and sentiments. The young men and children of the village
directed how to demean themselves in order to become useful and enj
the esteem of good men and the favour of the good spirit. In this w
they are incited to wage war or sue for peace and to practise accordi
to their ideas of morality and virtue, and may be swayed to almost a
purpose that their elders (for such are their men of medicine, or as t
term imports, magic wisdom) think proper to execute. They appear
have no laws except such as grow out of habitual usages, or such as
sanctioned by common consent. The executive of their government see
to be vested in the chiefs and warriors, while the judiciary is composed
the medicine council above-mentioned, which, by the bye, takes no c
nizance of criminal acts, at which the principal chief presides. In
their acts of devotion as also on all occasions where their c
762 fidence is to be won or their friendship to be plighted, the smoki
of tobacco seems to be invariably regarded as an inviolable tok
of sincerity. They believe in the existence of a supreme being, wh
they denominate "master of life" or "good spirit," but of his attribu
their ideas are vague and confused. They are generally in the habit
offering in sacrifice a portion of the game first taken on a hunting expe
tion, a part of the first products of the field, and often a small porti
of the food provided for their refreshment. In smoking they genera
direct the first puff upward and the second downward to the earth, or t
first to the rising and the second to the setting sun, after which th

inhale the smoke into their lungs and puff it out thro' the nostrils for their own refreshment. They have some indistinct notion of the immortality of the soul, but appear to know no distinction of heaven or hell, Elysium or Tartar as the abodes of departed spirits.

The arts of civilized life, instead of exciting their emulation, are generally viewed by the Indians as objects unworthy of their attention. This results as a natural consequence from their habits of indolence. They are aware that much labour is requisite in the prosecution of them, and being inured from their infancy to look upon manual labour of every description as a drudgery that pertains exclusively to the female part of their community, they think it degrading to the character of men to be employed in them. Hunting, horsemanship, and warfare are the only avocations in which their ambition or sense of honour prompts them to engage.

Their reluctance to forgive an injury is proverbial. "Injuries are revenged by the injured, and blood for blood is always demanded if the deceased has friends who dare to retaliate upon the destroyer." Instances have occur'ed where their revenge has become hereditary, and quarrels have been settled long after the parties immediately concerned have become extinct.

Much has been published in relation to the high antiquity of Indian traditions, of those particularly which relate to their origin and their religion, but from the examples afforded by the several nations of
763 Indians resident upon the Mississippi and its waters, but little proof is to be had in favour of the position. It is not doubted that the immediate objects of their worship have been held in reverence by their predecessors for a long succession of ages, but in respect to any miraculous dispensations of Providence of which they may have a traditional knowledge, their ideas are at best exceedingly vague and confused, and of occurrences recorded in sacred history they appear to be entirely ignorant. The knowledge they have of their ancestry is also very limited, so much so that they can seldom trace back their pedigree more than a few generations, and then know so little of the place whence their fathers came that they can only express their ideas upon the
No. 24 subject in general terms, stating that they came "from beyond the lakes," from the rising or sitting sun, from the North or South, &c. In some instances, where their term of residence in a place has evidently been of limited duration, they have either lost or conceal their knowledge of the country whence their ancestors came, and assert that the Master of Life created and planted their fathers on the spot where they, their posterity, now live. They have no division of time except by years, seasons, moons, and days.

Particular periods are distinguished by the growth and changes of vegitables, the migrations, incubations, &c., of birds and other animals.

Their language is of two kinds, viz, verbal and signal, or the language of signs. The former presents a few varieties, marked by radical differences, and a multiplicity of dialects peculiar to individual tribes or nations descended from the same original. The latter is a language common to most if not all of the Western Indians, the motions or signs used to express ideas being, with some slight variations, the same amongst all of them. Nearly allied to the language of signs is a species of written language which

which they make use of, consisting of a few symbolical represent
and of course very limited and defective. The figures they make
have but a faint resemblance to the objects described, and are
imprinted upon trees, cliffs, &c., by means of paints, cha
764 and sometimes by carving with a knife or other edged to
are significant of some movement, achievement, or design
Indians.

A variety of figures of this description are to be seen upon the
rocks, and trees in places held sacred, and frequently resorted to
Indians, but of their import little is known. Many of these symb
made by the magicians or men of medicine, and are probably of
or devotional import.

Much intrigue, cunning, and artifice, are blended with the po
the Indians, and judging from their usual practice, it is a favour
well-approved maxim with them that "the end sanctifies the m
In an interview with strangers, it appears to be their first ob
ascertain their motives and the objects of their visit; and after reg
them for some time without a show of curiosity a variety of int
tories are proposed, in order to satisfy themselves upon these
This they appear to do with the view also of scrutinizing into th
acter and disposition of their guests. In the course of the conve
they become more and more familiar and impertinent, till at lengt
familiarity is succeeded by contempt and insult. Thus from the
reserve, they are, in a short time impelled by curiosity and a pro
to abuse where they are not in some measure compelled to respect
commission of outrages, even without the slightest provocation.
kind of treatment, however, is easily obviated at the commencem
an interview by resisting every advance made by the Indians t
famil'arity, & by uniformly opposing firmness and reserve to th
ties they are disposed to take.

These attributes of the Indian character manifest themselves n
in the well-known stratagems they adopt in warfare, but in the m
ment of their domestic concerns in which rivalships of one
another are created; parties are formed, and pretenders arise c
privileges that have been withheld from them, and placing thems
the head of factions, occasionally withdraw from the mothe
765 Thus new tribes are formed and distributed in various di
over the country, with nothing to mark their genealogy
resemblance of their language to that of the present stock, or
Indians that spring from the same origin.

The chiefs or governors of tribes have their rank and titles by
tance; yet in order to maintain them, and secure themselves
preeminence, they are under the necessity of winning over to thei
ests the principal warriors and most influential men of their tribe
countenance and support are often essential to their continu
authority. In conciliating the friendship of these, the chief i
compelled to admit them to participate in the authority with w
is invested, and to bestow upon them any effects of which he
possessed. Thus it often happens that the chiefs are among the
of the Indians, having parted with their horses, clothes, trinkets,
insure the farther patronage of their adherents, or to purchase the
ship of those that are disaffected.

"The situation of principal chief is very frequently usurped during the minority of the rightful successor, or wrested from an imbecile incumbent by some ambitious chief or warrior. In this case the ascendency obtained over the nation by the usurper is gradual, and depends upon the resources of his own mind, aided by his reputation for generosity and valour."

The condition of the savages is a state of constant alarm and apprehension. Their security from their enemies and their means of subsistence are precarious and uncertain, the former requiring the utmost vigilance to prevent its infraction, and the latter being attended with no regular supplies of the necessaries of life. In times of the most profound peace, whether at their villages or on a hunting expedition, they
No. 25 are continually on the alert lest they should be surprised by their enemies. By day scouts are constantly kept patrol'ing for a considerable distance around them, and by night centinels are posted to give notice of the approach of strangers.

When they engage in a hunt, they generally abandon their villages, old men, women, and children joining in the enterprize thro'
766 fear of being left at home without the strength of their nation to protect them. On their march they endeavour to make as great a display of force as practicable in order to intimidate any of their enemies that may be lurking to spy out their condition. With this view, they are careful to pitch their lodges or tents at the places of their encampment in such a manner and in such numbers as to give the impression at a distance that they are numerous and formidable. We have witnessed a hunting party on their march, co'sisting of not more than one hundred persons, including men, women, and children, yet at their encampment more than thirty lodges were pitched, each of which would accommodate at least twelve adult persons.

It is an opinion generally credited that the Indians are possessed of strong natural appetites for ardent spirits, but there is at least room to doubt of its being well founded. That their appetites for them are often strong and ungovernable is very certain, but they may be considered as fictitious rather than natural, having been created by occasional indulgencies in the use of intoxicating liquors. Instances are not rare in which Indians have refused to accept liquor when offered them. After a long abstinence from food, anything calculated to allay the cravings of the appetite is eagerly swallowed, and on such occasions nothing perhaps produces such an effect more speedily than spirit'ous liquor. Indians while lounging about a trading establishment are often destitute of food for a considerable time and can obtain no other kind of refreshment from the trader but liquor, which is bestowed partly in exchange for commodities they may have to *to* dispose of and partly by way of encouraging them to return to him with the products of their next hunt. A small draught on such occasions produces intoxication, and the sudden transition from a state of gnawing hunger to that of unconcerned inebriety cannot fail to make them passionately fond of a beverage that can thus change their condition so much to their immediate satisfaction. In their use of ardent spirits the Indians appear to be less captivated with their taste
767 than with the exhilirating effects. The quality of liquor is not a subject of discrimination with them. Provided it has sufficient

strength to inebriate, they are satisfied, let its character in other respects be what it may. Having contracted the habit of intoxication they seldom appear thankful for liquor unless it has been bestowed in such quantities as are sufficient to produce that effect.

In the indulgence of their appetites they display but few or no traits of epicurism, choosing those kinds of food that are most nutritive, without regarding their tastes or flavour. In the preservation of their food no pains are taken to render it savoury or palatable; their object is solely to reduce it to a state of security against putrefaction. They make no use of spices or other aromatics either in preserving or cooking their food. Even salt is not considered as an essential, and is seldom used as an appendage in their cookery. This article is only prized by them on account of its usefulness for their horses. In regard to their choice of food, however, and manner of cooking it, the small variety within their reach, and the impracti'bility of obtaining condiments of different kinds, perhaps renders them less particular in these respects than they would be under different circumstances. It cannot be supposed that they are entirely insensible to dainties of every description; on the contrary, they appear remarkably fond of sugar and saccharine fruits.

They appear to have a natural propensity for the fumes of tobacco, which they invariably inhale into the lungs and eject thro' the nostrils. They make no use of this article except in smoking, which is an indulgence of which they are exceedingly reluctant to be deprived. When they cannot obtain tobacco they use as a substitute the dried leaves of the sumac, the inner bark of the red willow dried, and the leaves and bark of a few other shrubs, the fumes of which are less stimulating but equally as palatable as those of tobacco.

The Indians under consideration know not the use or value of
768 the precious metals except as trinkets or ornaments for their dress. They use wampum, and, in some few instances, shells of a small size and of a particular character as a substitute for money. But, in general, furs, peltries, horses, and various articles of dress at standing or fixed rates of barter are the immediate objects both of internal and external trade.

They do not hold their property in common, but each individual enjoys the fruit of his own toil and industry. They are accounted more or less wealthy according to the number of horses they are possessed of and the style in which they are able to dress.

Polygamy is common amongst them, every man being allowed as many wives as he can maintain. Marriages are binding upon the parties only as long as they think proper to live together, and are often contracted for a limited term particularly specified. Females during the period of their catamenea, are excluded from society and compelled even to sleep apart from their families in small tents or lodges constructed for their use.

Dancing is common amongst them, both as a devotional exercise and an amusement. Their gestures on both occasions are similar, except that on the former they are accompanied by solemnity and on the latter by cheerfulness, and are characterized by extraordinary uncouthness
No. 26 rather than by gracefulness. No ribbaldry, however, or tricks of buffoon'ry are practised on these occasions; on the contrary, their deportment is uniformly accordant with their ideas of decorum.

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This exercise is invariably accompanied by singing or a kind of chanting, in which the women, who are excluded from a participation in the former, perform their part. Their music consists in a succession of tones of equal intervals, accompanied by occasional elevations and depressions of the voice. The modulations with which it is variegated are by no means melodious; the voices of all the chanters move in unison and all appear to utter the same aspirations. The same series of sounds appears to be common to the chanting of all the tribes.

769 The foregoing are among the most common features in the general character of the western Indians. Altho' in a region so extensive as that inhabited by them, and amongst so great a variety of tribes and nations, a considerable diversity of character is to be expected and admitted, yet it is believed that the traits above considered are common to the whole as a race of barbarians. And, altho' the shades of barbarianism in which they are enveloped uniformly exclude the light of civilization, yet it is not to be presumed that they are equally dark and malignant in all cases.

OF THE MISSISSIPPI, MISSOURI, AND OHIO RIVERS.

I trust it will not be deemed improper on this occasion to offer a few remarks upon the characters of these rivers, embracing more particularly the condition of their navigation.

The causes heretofore alleged as giving occasion to a diversity of soil within the valleys of the western rivers have an effect also in giving character to their channels or beds. For example, the banks near the mouths of the rivers being composed of a fine unctious and adhesive alluvion, one less liable to crumble and wash away and constitute a more permanent barrier to resist the force of the current than those higher up that are composed of coarser materials, in consequence the beds of the rivers are rendered narrower and deeper towards their mouths than at greater distances from them. This is more particularly the case with the Mississippi, Red, Arkansaw, and some others whose beds or channels gradually dilate and become more shoal on ascending from their mouths. Thus it happens, also, that the navigation of the Mississippi has fewer obstructions between Natchez and its mouth than above, this part of the river having so great a depth of water that snags, bars, &c., are sunk below the reach of any kind of water craft employed in its navigation. From Natchez upward to its confluence with the Missouri the river presents impediments that become more and more numerous and difficult to pass. Still, however, the main channel, tho' intricate in many

770 places, affords a sufficient *of* depth of water in all stages for boats of five or six feet draft to ascend to the mouth of the Ohio. From this point to the Missouri, a distance of more than two hundred and twenty miles, the navigation is partially obstructed during a very low stage of the water by shoals, so that it is navigable only for boats of modern burthen requiring but about three feet of water. At the distance of about thirty miles above the mouth of the Ohio there are two rocky bars extending across the Mississippi, called the Big and Little Chains, which in the deepest channel across them afford no more than five or six feet of water in a low stage, and occasion a great rapidity of current.

The Mississippi is usually at its lowest stage about the middle of August, the summer freshet of the Missouri having subsided previously to that time. It usually continues in this stage till it is swollen by the fall freshet of the Ohio, after which it subsides again and remains low during the winter. The distance from N. Orleans to the mouth of the Missouri is estimated at about twelve hundred miles, and its average descent per mile thro'out that distance at twelve inches, making an aggregate descent of 1,200 feet between these two points, or giving at the mouth of the Missouri an elevation of 1,200 feet above tide water.

Its current in the main channel of the river is supposed to have an average velocity of 3¾ miles per hour in a moderate stage of water, but when the river is high its velocity is considerably accelerated. Its water is turbid, being charged with a fine argillaceous mud of a light colour, derived exclusively from the Missouri.

The Missouri is a very wild and turbulent river, possessing the ruder features of the Mississippi, but destitute of the gentleness characteristic of the latter in many places. The obstructions to the navigation of the Missouri, altho' they are of the same character with those of the Mississippi, are far more numerous and formidable than those of the latter. The channel is rendered exceedingly intricate by means of sand bars and islands, and the navigation in many places is very hazardous on
771 account of the multiplicity of rafts, snags, sand bars, &c., with which the channel is beset. No part of the river is exempt from these obstructions for any considerable distance, particularly where the water is low.

As this river in connexion with some of its principal tributaries traverses a considerable variety of climates, embracing more than 10 degrees of latitude, a succession of spring freshets invariably takes place and maintains an elevated stage of water from the breaking up of winter early in March to the middle and sometimes the last of July, when the summer freshet yielded by the most northerly of its tributaries comes down. During this period there is a sufficient depth of water to admit
No. 27 boats of almost any burthen, but during the residue of the year it can hardly be called navigable, except for boats drawing no more than 25 or 30 inches. The river is usually blocked up with ice during the winter season. The average velocity of its current in a middling stage of water may be estimated at 4½ miles. In times of high freshet it moves with an accelerated velocity equal to 5 or 5½ miles per hour. Its descent per mile is found by careful measurement to be sixteen inches, making the whole descent from the mouth of the river to that of the Platte, a distance of about six hundred and fifty miles, 866 feet, which added to 1,200, feet the descent of the Mississippi, gives an elevation of 2,066 feet above tide water. The object of this calculation is to arrive at the probable height of James Peak above the level of the ocean. The distance along the Platte to the base of the Rocky Mountains is estimated at 700 miles, and its average descent per mile twenty inches, making its whole descent 1,166 feet, which, added to 2,066 feet, the elevation at the mouth of the Platte, gives an altitude of 3,232 feet for that of the base of the mountains above tide water.

If instead of the route above specified from the ocean to the base of the mountains we substitute the distance on the Mississippi from tide water

to the mouth of the Arkansaw, 600 miles, and thence by the
772 meanders of the latter to the base of the Rocky Mountains, 1,980
miles, and allow as before an average descent of twelve inches to
he mile in the former and sixteen inches (which is probably very near
he truth) to the latter, the result will give an elevation of 3,240 feet
bove tide water, differing only eight feet from the estimated elevation
y the route above proposed. To this if we add the altitude of James
Peak, viz, 8,500 feet, as before stated, we have an aggregate elevation of
11,740 feet as the height of the peak above the level of the ocean. Com-
paring this altitude with that of the "inferiour limit of perpetual snow,"
as estimated by M. De Humboldt for the latitude of 40 degrees, viz,
9,846 feet above the ocean, we find the summit of the peak 1,894 feet
higher than that elevation. And judging from appearances this difference
of altitude seemed sufficiently well marked by the distance to which the
snow extended from the summit downward upon the sides of the peak to
authenticate in a good degree the calculation above stated.

But to return from the digression: The Ohio is next to be considered.
This river, as before hinted, differs from those just described, in the
rapidity of its current, the width of its bed, character of its channel, and
in several other respects. But as its general character is well known, a
few remarks in relation to it will here suffice. The obstructions to its
navigation are sand bars, some few rafts, snags, and rapids, to which the
intricacy of its channel in several places may be added. During a middle
and high stage of water these obstructions entirely disappear, and an
accelerated current is the only difficulty to be encountered. The aver-
age velocity of the current in a moderate stage of water may be estimated
at 2½ miles and in a high stage at 3 miles per hour. The season in
which the navigation of the Ohio can be relied on commences between
the middle of February and first of March and continues to the latter
part of June. A fall freshet usually takes place in October or Novem-
ber, and the river is again navigable for a few weeks. During the rest
of the year boats of inconsiderable burden meet with numerous obstructions
in their progress from the lowness of the water, and in many
773 places no channel can be found of sufficient depth to admit their
passage. At the distance of about 17 miles from its mouth is the
first serious obstruction to its navigation, consisting of a limestone bar
extending across the river, denominated the Big Chain. Three miles
above it is another bar of a similar description. The range of rocks of
which these appear to be a portion seems to extend across the point of
land situated between the Ohio and Mississippi, presenting itself again
on the latter at the Big and Little Chains, before mentioned. The falls
of the Ohio at Louisville are impassable for boats of burthen, except in
the higher stages of the water. Le Tarts Falls and numerous other
rapids denominated ripples are also impassable for boats of any consider-
able burthen when the river is at its lowest stages. In this state the
river is fordable in numberless places.

The foregoing report is intended as a civil rather than a military
description of the country. For a partial description of its military fea-
tures I beg leave to refer to my report of the 12th of May, 1818, to
Brig'r Gen. T. A. Smith, on file in the War Department.

In the performance of topographical duties I have been aided by Lts.
Graham and Swift, who have rendered essential service in these and

other operations. The former of these gentlemen is at present occupied in completing the calculations upon the various astronomical and other observations we took in connexion with our duties. The latter is engaged in delineating the surveys made in behalf of the expedition.

The services of Capt'n Bell are to be recognized as highly important and useful to the expedition, in keeping a journal of our proceedings, and conducting detached parties whenever an occasion required. He is now busily engaged in revising his journal, a copy of which will soon be in readiness to be disposed of agreeably to your instructions.

The duties in the various departments of natural science were discharged with zeal and ability by Mr. Say & Dr. James, assisted by Mr. Peale, who was active and industrious in the collection and preservation of such rare specimens of animals, &c., as came under our
774 observation. The vessel on board of which most of these specimens were shipped from N. Orleans has very lately arrived in in this port, and discharged our packages in good order.

I take this opportunity to express my acknowledgement of
No. 28 the politeness of her owners, Messrs. C. Price & Morgan, who have kindly franked the transportation of the collections.

A catalogue, embracing the zoology of the country explored by us, is shortly expected from Mr. Say, and shall be forwarded by the earliest opportunity. Dr. James has been instructed also to furnish a mineralogical and botanical catalogue, which is daily expected. Both of them are intended as accompaniments to this report.

Mr. Seymour has taken numerous lands*kip* views exhibiting the characteristic features of various parts of the country, besides many others of detached scenery.

Suggestions have been made by gentlemen of the Philosophical Society in regard to publishing our scientific discoveries with the philosophical transactions. The subject is to be brought before the society, and as soon as any definite proposals shall have been made I will apprise you thereof without delay.

A map of the country, situated between the meridian of Washington City and the Rocky Mountains, shall be reported as soon as the necessary elements and data can be compiled and the drawings executed.

I have the honor to be, sir, most respectfully, your obedt. and humble servant,

S. H. LONG, *Maj., T. Eng.*

Hon. J. C. CALHOUN,
Sec'y of War.

775 In the Court of Claims of the United States.

THE CHOCTAW NATION AND THE CHICKASAW Nation
vs.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians. } No. 18932.

Deposition of witness produced, sworn, and examined at the hour of ten o'clock a. m., on the 28th day of October, A. D. 1897, at the city of Washington, District of Columbia, before me, the undersigned, a notary

public, in a certain cause now pending in the Court of Claims, wherein the Choctaw Nation and the Chickasaw Nation are claimants and the United States and the Wichita and the affiliated bands of Indians are defendants; when were present Mr. Jeremiah M. Wilson, on behalf of the claimant, the Choctaw Nation, and Mr. Charles C. Binney, on behalf of the defendant, the United States; counsel for the Chickasaw Nation and for the Wichita and affiliated bands having been duly notified.

LEVIN C. HANDY, having been produced as a witness on behalf of the defendant, the United States, was by me sworn, before any question was put to him, to tell the truth, the whole truth, and nothing but the truth, relative to the said cause.

Thereupon witness says that his name is Levin C. Handy; that his occupation is that of photographer; that he is 42 years of age; that his place of residence is Washington, D. C.; that he has no interest, direct or indirect, in the claim which is subject to inquiry in said cause;
776 that he is not related to the claimant.

And thereupon the said Levin C. Handy was examined by the counsel for the United States, and, in answer to interrogatories, testified as follows:

Q. 1. Are you the same Levin C. Handy who testified in the case of United States against Texas in the Supreme Court of the United States, and whose deposition is printed on pages 253 to 256 of the record in that case?

A. Yes, sir.

Q. 2. Are these photographs, which have been put in evidence in this case under stipulation, numbered one to nine, among the photographs which you testified in that case that you made?

A. They are, sir.

Q. 3. Can you identify here the photographs from which you made them?

A. Yes, I can. Identifying No. 1 as made from photograph of Carte Generale du Royaume de la Nouvelle Espagne.

Identifying No. 2 as made from photograph marked "Plate 1, reduced and laid down to the schedule of forty miles to the inch by Anthony Nau."

Identifying No. 3 as made from a photograph marked Plate 2, "A chart of the internal part of Louisiana."

Identifying No. 4 as made from a photograph marked "A map of the internal provinces of New Spain."

Indentifying No. 5 as made from a photograph marked "Extract of map of the United States, including Louisiana, by William Darby."

Identifying No. 6 as made from a portion of photograph marked "Map of the United States, with the contiguous British and Spanish
777 possessions, by John Melish, improved to the 1st of January, 1818."

Identifying No. 7 as made from a portion of a photograph marked "Mapa de los Estados Unidos de Mejico, 1847."

Identifying No. 8 as made from photograph marked "J. de Cordova's map of the State of Texas, 1849."

Identifying No. 9 as made from photograph marked "Map of the country upon Upper Red River, explored in 1852 by Captain R. B. Marcy, 5th United States Infantry."

(Counsel for the United States offers in evidence the above photographs, identified as those from which the photographs already in evidence were made, to be marked "United States Exhibits 1A, 2A, 3A, 4A, 5A, 6A, 7A, 8A, and 9A.")

Q. 4. Did you make that photograph [showing witness photograph]?

A. I did.

Q. 5. Where did you make it?

A. In the library of the State Department.

Q. 6. From what did you make it?

A. I made it from a treaty, the writing of which is well defined on the picture.

(Counsel for the United States offers this photograph in evidence, to be marked "Exhibit 10.")

Q. 7. Did you make this photograph [showing witness photograph]?

A. I did, sir.

Q. 8. Where did you make it?

A. I made that in the Library of Congress at the Capitol.

Q. 9. From what did you make it?

778 A. I made a memorandum at the time I made the picture and I have it here. I made it from the atlas to Thompson's Alcedo, by Aaron Arrowsmith, published in London in 1816.

(Counsel for the United States offers this photograph in evidence, to be marked "Exhibit No. 11.")

Q. 10. Did you make this photograph?

A. I did.

Q. 11. Where did you make it?

A. I made that in the new Congressional Library.

Q. 12. From what did you make it?

A. I made it from the map of Spanish dominions in North America, found in "A Modern Atlas" by John Pinkerton, published in Philadelphia in 1818.

(Counsel for the United States offers this photograph in evidence to be marked "Exhibit No. 12.")

(Counsel for the United States offers in evidence, to be marked "Exhibit No. 13," the printed copy of the agreement between the United States commissioners to negotiate with the Five Civilized Tribes and the commissioners on the part of the Choctaw and Chickasaw Indians, bearing date, Atoka, Indian Territory, April 23d, 1897, counsel for the Choctaw Nation agreeing that it is a correct copy.)

Cross-examination by Judge Wilson waived.

The examination by counsel being concluded, the witness, in compliance with the rule of the court requiring him to state whether he knows of any other matter relative to the claim in question, and if he do to state it, says: I do not.

LEVIN C. HANDY.

779 I, F. Walter Brandenburg, jr., a notary public in and for the District of Columbia, certify that at the time and place aforesaid,

in C. Handy, witness on behalf of the United States in the above-
tled cause, was by me sworn, before any question was put to him, to
the truth, the whole truth, and nothing but the truth relative to said
se, and that the answers were taken down in my presence and the
l deposition as above set forth was read over to and signed by him,
ore me, at the time and place aforesaid.

In witness whereof I have hereunto set my hand and official seal this
d day of November, A. D. 1897.

[SEAL.] F. WALTER BRANDENBURG, Jr.,
Notary Public, D. C.

0 UNITED STATES EXHIBIT No. 13—F. W. B., comr. No. 18932.

Agreement between the United States commissioners to negotiate with the Five Civilized Tribes and the commissioners on the part of the Choctaw and Chickasaw Indians.

81 Agreement between the United States commissioners to negotiate with the Five Civilized Tribes and the commissioners on the part of the Choctaw and Chickasaw Indians.

This agreement, by and between the Government of the United States, f the first part, entered into in its behalf by the Commission to the Five Civilized Tribes, Henry L. Dawes, Frank C. Armstrong, Archi-ald S. McKennon, Thomas B. Cabaniss, and Alexander B. Montgomery, duly appointed and authorized thereunto, and the governments of the Choctaw and Chickasaw tribes or nations of Indians in the Indian Terri-tory, respectively, of the second part, entered into in behalf of such Choc-taw and Chickasaw governments, duly appointed and authorized there-unto, viz, Green McCurtain, J. S. Standley, N. B. Ainsworth, Ben Hampton, Wesley Anderson, Amos Henry, D. C. Garland, and A. S. Williams, in behalf of the Choctaw tribe or nation, and R. M. Harris, I. O. Lewis, Holmes Colbert, P. S. Mosely, M. V. Cheadle, R. L. Murray, William Perry, A. H. Colbert, and R. L. Boyd, in behalf of the Chick-asaw tribe or nation,

Witnesseth, that in consideration of the mutual undertakings herein contained, it is agreed as follows:

That all the lands within the Indian Territory belonging to the Choc-taw and Chickasaw Indians shall be allotted to the members of said tribes so as to give to each member of these tribes (except the Choctaw freedmen), so far as possible, a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the lands.

That all the lands set apart for town sites, and the strip of land lying between the city of Fort Smith, Arkansas, and the Arkansas and Poteau rivers, extending up said river to the mouth of Mill Creek; and six hun-dred and forty acres each to include the buildings now occupied for the Jones Academy, Tushkahoma Female Seminary, Wheelock Orphan Sem-inary, and Armstrong Orphan Academy; and ten acres for the capitol building in the Choctaw Nation; one hundred and sixty acres each imme-diately contiguous to and including the building know as Bloomfield

Academy, Lebannon Orphan Home, Harley Institute, Rock Academy, and Collins Institute; and five acres for the capitol building in the Chickasaw Nation; and the use of one acre of land for each church house now erected outside of the towns; and eighty acres of land each for J. S. Murrow, H. R. Schermerhorn, and the widow of R. S. Bell, who have been laboring as missionaries in the Choctaw and Chickasaw nations since the year 1866, with the same conditions and limitations as apply to lands allotted to the members of the Choctaw and Chickasaw nations, and to be located on lands not occupied by a Choctaw or a Chickasaw; and a reasonable amount of land, to be determined by the townsite commission, to include all court-houses and jails, and other public buildings not hereinbefore provided for, shall be exempted from division. And all
782 coal and asphalt in or under the lands allotted and reserved from allotment, shall be reserved for the sole use of the members of the Choctaw and Chickasaw tribes, exclusive of freemen: Provided, That where any coal or asphalt is hereafter opened on land allotted, sold, or reserved, the value of the use of the necessary surface for prospecting or mining, and the damage done to the other land and improvements, shall be ascertained under the direction of the Secretary of the Interior and paid to the allottee, or owner of the land, by the lessee, or party operating the same, before operations begin.

That in order to such equal division, the lands of the Choctaws and Chickasaws shall be graded and appraised so as to give to each member, so far as possible, an equal value of the land: Provided, That the lands allotted to the Choctaw freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw tribe, so as to reduce the allotments to the Choctaws by the value of the same and not affect the value of the allotments to the Chickasaws.

That the said Choctaw freedmen who may be entitled to allotments of forty acres each shall be entitled each to land equal in value to forty acres of the average land of the two nations.

That in the appraisement of the lands to be allotted the Choctaw and Chickasaw tribes shall each have a representative, to be appointed by their respective executives, to cooperate with the Commission to the Five Civilized Tribes, or any one making appraisements under the direction of the Secretary of the Interior, in grading and appraising the lands preparatory to allotment. And the land shall be valued in the appraisement as if in its original condition, excluding the improvements thereon.

That the appraisement and allotment shall be made under the direction of the Secretary of the Interior, and shall begin as soon as the progress of the surveys now being made by the United States Government will admit.

That each member of the Choctaw and Chickasaw tribes, including Choctaw freedmen, shall, where it is possible, have the right to take his allotment on land the improvements on which belong to him, and such improvements shall not be estimated in the value of his allotment. In the case of minor children, allotments shall be selected for them by their father, mother, guardian, or the administrator having charge of their estate, preference being given in the order named, and shall not be sold during his minority. Allotments shall be selected for prisoners, convicts, and incompetents by some suitable person akin to them, and due care taken that all persons entitled thereto have allotments made to them.

All the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from date of patent; and each allottee shall select from his allotment a homestead of one hundred and sixty acres, for which he shall have a separate patent, and which shall be inalienable for twenty-one years from date of patent. This provision shall also apply to the Choctaw freedmen to the extent of his allotment. Selections for homesteads for minors to be made as provided herein in case of allotments, and the remainder of the lands allotted to said members shall be alienable for a price to be actually paid, and to include no former indebtedness or obligation—one-fourth of said remainder in one year, one-fourth in three years, and the balance of said alienable lands in five years from date of the patent.

That all contracts looking to the sale or incumbrance in any way of the land of an allottee, except the sales hereinbefore provided, shall be
783 null and void. No allottee shall lease his allotment, or any portion thereof, for a longer period than five years, and then without the privilege of renewal. Every lease which is not evidenced by a writing, setting out specifically the terms thereof, or which is not recorded in the clerk's office of the United States court for the district in which the land is located, within three months after the date of its execution, shall be void, and the purchaser or lessee seall acquire no rights whatever by an entry or holding thereunder. And no such lease nor any sale shall be valid as against the allottee unless providing to him a reasonable compensation for the lands sold or leased.

That all controversies arising between the members of said tribes as to their right to have certain lands allotted to them shall be settled by the commission making the allotments.

That the United States shall put each allottee in possession of his allotment and remove all persons therefrom objectionable to the allottee.

That the United States shall survey and definitely mark and locate the ninety-eighth (98th) meridian of west longitude between Red and Canadian rivers before allotment of the lands herein provided for shall begin.

That as soon as practicable after the completion of said allotments, the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation shall jointly execute, under their hands and the seals of their respective nations, and deliver to each of said allottees patents conveying to him all the right, title, and interest of the Choctaws and Chickasaws in and to the land which shall have been allotted to him in conformity with the requirements of this agreement, excepting all coal and asphalt in or under said land. Said patents shall be framed in accordance with the provisions of this agreement, and shall embrace the land allotted to such patentee, and no other land. The Secretary of the Interior of the United States shall annex to such patents his official certificate that it is drawn in accordance with the provisions of this agreement; that it embraces the land allotted to such patentee, and no other land, and that he approves said patent; and said certificate shall be operative as a relinquishment of all right, title, and interest of the United States in and to the land conveyed by said patents, and as a guaranty of the United States of title to and possession of the land so conveyed, and the acceptance of his patents by such allottee shall be operative as an assent on his

part to the allotment and conveyance of all the lands of the Choctaws and Chickasaws in accordance with the provisions of this agreement, and as a relinquishment of all his right, title, and interest in and to any and all parts thereof, except the land embraced in said patents, except also his interest in the proceeds of all lands, coal and asphalt herein excepted from allotment.

That the United States shall provide by law for proper records of land titles in the territory occupied by the Choctaw and Chickasaw tribes.

The rights of way for railroads through the Choctaw and Chickasaw nations to be surveyed and set apart and platted to conform to the respective acts of Congress granting the same in cases where said rights of way are defined by such acts of Congress. but in cases where the acts of Congress do not define the same, then Congress is memorialized to definitely fix the widths of said rights of way for station grounds and between stations, so that railroads now constructed through said nations shall have, as near as possible, uniform rights of way; and Con-
784 gress is also requested to fix uniform rates of fare and freight for all railroads through the Choctaw and Chickasaw nations; branch railroads now constructed and not built according to acts of Congress to pay the same rates for rights of way and station grounds as main lines.

It is further agreed that there shall be appointed a commission for each of the two nations. Each commission shall consist of one member to be appointed by the executive of the tribe for which said commission is to act, who shall not be interested in town property other than his home, and one member of the Commission to the Five Civilized Tribes to be designated by the chairman thereof. Each of said commissions shall lay out town sites, to be restricted as far as possible to their present limits, where towns are now located in the nation for which said commission is appointed. Said commission shall have prepared correct and proper plats of each town, and file one in the clerk's office of the United States district court for the district in which the town is located, and one with the principal chief or governor of the nation in which the town is located, and one with the Secretary of the Interior, to be approved by him before the same shall take effect. When said towns are so laid out each lot on which permanent, substantial, and valuable improvements other than fences, tillage, and temporary houses, have been made, shall be valued by the commission provided for the nation in which the town is located, at the price a fee simple title to the same would bring in the market at the time the valuation is made, but not to include in such value the improvements thereon. The owner of improvements on each lot shall have the right to buy the same at sixty-two and one-half per cent of the said market value within sixty days from date of notice served on him that such lot is for sale, and if he purchases the same, he shall, within ten days from his purchase, pay into the Treasury of the United States one-fourth of the purchase price, and the balance in three equal annual instalments, and when the entire sum is paid shall be entitled to a patent for the same. In case the two members of the commission fail to agree as to the market value of any lot, they shall elect a third person, who is not interested in town lots, who shall act with them to determine said value.

If such owner of the improvements on any lot fails within sixty days to purchase and make the first payment on the same, such lot, with the

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improvements thereon, shall be sold at public auction to the highest bidder, under direction of the aforesaid commission, and the purchaser at such sale shall pay to the owner of the improvements the price for which said lot shall be sold, less sixty-two and one-half per cent of the said appraised value of the lot, and shall pay the sixty-two and one-half per cent of said appraised value into the United States Treasury, under regulations to be established by the Secretary of the Interior, in four installments as hereinbefore provided. The commission shall have the right to reject any bid on such lot which they consider below its value.

All lots not so appraised shall be sold from time to time at public auction (after proper advertisement) by the commission for the nation in which the town is located, as may seem for the best interest of the nations and the proper development of each town, the purchase price to be paid in four instalments as hereinbefore provided for improved lots. The commission shall have the right to reject any bid for such lots which they consider below its value.

All the payments herein provided for shall be made under the direction of the Secretary of the Interior into the United States Treasury.

A failure of sixty days to make any one payment to be a forfeiture
785 of all payments made and all rights under the contract: Provided,

That the purchaser of any lot shall have the option of paying the entire price of the lot before the same is due.

No tax shall be assessed by any town government against any town lot unsold by the commission, and no tax levied against a lot sold, as herein provided, shall constitute a lien on same till the purchase price thereof has been fully paid to the nation.

The money paid into the United States Treasury for the sale of all town lots shall be for the benefit of the members of the Choctaw and Chickasaw tribes (freedmen excepted); and at the end of one year from the ratification of this agreement, and at the end of each year thereafter, the funds so accumulated shall be divided and paid out to the Choctaws and Chickasaws (freedmen excepted), each member of the two tribes to receive an equal portion thereof.

That no law or ordinance shall be passed by any town which interferes with the enforcement of or is in conflict with the Choctaw or Chickasaw constitutions or laws, or those of the United States, and all persons in such towns shall be subject to said laws; and the United States agrees to maintain strict laws in the territory of the Choctaw and Chickasaw tribes against the introduction, sale, barter, or giving away of liquors and intoxicants of any kind or quality.

That said commission shall be authorized to locate, within a suitable distance from each town site, not to exceed five acres to be used as a cemetery; and when any town has paid into the United States Treasury, to be part of the fund arising from the sale of town lots, ten dollars per acre therefor, such town shall be entitled to a patent for the same as herein provided for titles to allottees, and shall dispose of same at reasonable prices in suitable lots for burial purposes, the proceeds derived from such sales to be applied by the town government to the proper improvement and care of said cemetery.

That no charge or claim shall be made against the Choctaw or Chickasaw tribes by the United States for the expenses of surveying and

platting the lands and town sites, or for grading, appraising, and all
ting the lands, or for appraising and disposing of the town lots as her
provided.

That the land adjacent to Fort Smith and lands for court-houses, ja
and other public purposes, excepted from allotment, shall be dispo
of in the same manner and for the same purposes as provided for to
lots herein, but not till the Choctaw and Chickasaw councils shall dir
such disposition to be made thereof; and said land adjacent thereto sh
be placed under the jurisdiction of the city of Fort Smith, Arkansas,
police purposes.

There shall be set apart and exempted from appraisement and sale,
the towns, lots upon which churches and parsonages are now built a
occupied, not to exceed fifty feet front and one hundred feet deep
each church or parsonage; provided, that such lots shall only be u
for churches and parsonages, and when they cease to be so used sh
revert to the members of the tribes to be disposed of as other town l
provided further, that these lots may be sold by the churches for wh
they are set apart if the purchase money therefor is invested in other
or lots in the same town, to be used for the same purpose and with
same conditions and limitations.

It is agreed that all the coal and asphalt within the limits of
Choctaw and Chickasaw nations shall remain and be the common pr
erty of the members of the Choctaw and Chickasaw tribes (freedm
excepted), so that each and every member shall have an equal
786 undivided interest in the whole; and no patent provided for
this agreement shall convey any title thereto. The revenues fr
coal and asphalt, or so much as shall be necessary, shall be used for
education of the children of Indian blood of the members of said tri
Such coal and asphalt mines as are now in operation, and all others wh
may hereafter be leased and operated, shall be under the supervision
control of two trustees, who shall be appointed by the President of
United States, one on the recommendation of the principal chief of
Choctaw Nation, who shall be a Choctaw by blood, whose term shall
for four years, and one on the recommendation of the governor of
Chickasaw Nation, who shall be a Chickasaw by blood, whose term s
be for two years, after which the term of appointees shall be four ye
They shall each give bond for the faithful performance of their du
under such rules as may be prescribed by the Secretary of the Inter
Their salaries shall be fixed and paid by their respective nations.

All coal and asphalt mines in the two nations, whether now develo
or to be hereafter developed, shall be operated, and the royalties th
from paid into the Treasury of the United States, and shall be dra
therefrom under such rules and regulations as shall be prescribed by
Secretary of the Interior.

All contracts made by the national agents of the Choctaw and Chi
asaw nations for operating coal and asphalt, with any person or corp
tion are hereby ratified and confirmed, and the lessee shall have the ri
to renew the same when they expire.

All agreements heretofore made by any person or corporation with
member or members of the Choctaw or Chickasaw Nation, the objec
which was to obtain such member or members' permission to operate

or asphalt, are hereby declared void, but such persons or corporations shall have prior right to lease the coal or asphalt claims described therein by application to the trustees within six months after the ratification of this agreement.

All leases under this agreement shall include nine hundred and sixty acres, which shall be in a square as nearly as possible, and shall be for thirty years. The royalty on coal shall be fifteen cents per ton of two thousand pounds on all coal mined, payable on the 25th day of the month next succeeding that in which it is mined. Royalty on asphalt shall be sixty cents per ton on . . . asphalt, payable same as coal; provided, that the legislatures of the Choctaw and Chickasaw nations may reduce such royalties when they deem it for their best interests to do so. No royalties shall be paid except into the United States Treasury, as herein provided.

Lessees shall pay on each coal or asphalt claim at the rate of one hundred dollars per annum, in advance, for the first and second years, two hundred dollars per annum, in advance, for the third and fourth years, and five hundred dollars for each succeeding year thereafter. All such payments shall be treated as advanced royalty on the mine or claim on which they are made, and shall be a credit as royalty when each said mine is developed and operated and its production is in excess of such guaranteed annual advanced payments; and all persons having coal leases must pay said annual advanced payments on each claim whether developed or undeveloped; provided, however, that should any lessee neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable on any lease, the lease on which default is made shall become null and void, and the royalties paid in advance thereon shall then become and be the money and property of the Choctaw and Chickasaw nations.

787 In surface, the use of which is reserved to present coal operators, shall be included such lots in towns as are occupied by lessees' houses—either occupied by said lessees' employees or as offices or warehouses: Provided, however, That in those town sites designated and laid out under the provision of this agreement, where coal leases are now being operated and coal is being mined, there shall be reserved from appraisement and sale all lots occupied by houses of miners actually engaged in mining, and only while they are so engaged, and in addition thereto a sufficient amount of land, to be determined by the town-site board of appraisers, to furnish homes for the men actually engaged in working for the lessees operating said mines, and a sufficient amount for all buildings and machinery for mining purposes: And provided further, That when the lessees shall cease to operate said mines, then and in that event the lots of land so reserved shall be disposed of by the coal trustees for the benefit of the Choctaw and Chickasaw tribes.

That whenever the members of the Choctaw and Chickasaw tribes shall be required to pay taxes for the support of schools, then the funds arising from such royalties shall be disposed of for the equal benefit of their members (freedmen excepted) in such manner as the tribes may direct.

It is further agreed that the United States courts now existing, or that may hereafter be created, in the Indian Territory, shall have exclusive

jurisdiction of all controversies growing out of the title, ownership, occupation, possession, or use of real estate, coal, and asphalt in the territory occupied by the Choctaw and Chickasaw tribes; and of all persons charged with homicide, embezzlement, bribery, and embracery, hereafter committed in the territory of said tribes, without reference to race or citizenship of the person or persons charged with such crime; and any citizen or officer of the Choctaw or Chickasaw nations charged with such crime shall be tried, and, if convicted, punished as though he were a citizen or officer of the United States.

And sections sixteen hundred and thirty-six to sixteen hundred and forty-four, inclusive, entitled "Embezzlement," and sections seventeen hundred and eleven to seventeen hundred and eighteen, inclusive, entitled "Bribery and embracery," of Mansfield's Digest of the Laws of Arkansas, are hereby extended over and put in force in the Choctaw and Chickasaw nations; and the word "officer," where the same appears in said laws, shall include all officers of the Choctaw and Chickasaw governments; and the fifteenth section of the act of Congress, entitled "An act to establish United States courts in the Indian Territory, and for other purposes, approved March 1, 1889, limiting jurors to citizens of the United States, shall be held not to apply to United States courts in the Indian Territory held within the limits of the Choctaw and Chickasaw nations; and all members of the Choctaw and Chickasaw tribes, otherwise qualified, shall be competent jurors in said courts: Provided, That whenever a member of the Choctaw or Chickasaw nation is indicted for homicide, he may, within thirty days after such indictment and his arrest thereon, and before the same is reached for trial, file with the clerk of the court in which he is indicted his affidavit that he can not get a fair trial in said court, and it thereupon shall be the duty of the judge of said court to order a change of venue in such case to the United States district court for the western district of Arkansas, at Fort Smith, Arkansas, or to the United States district court for the eastern district of Texas, at Paris, Texas, always selecting the court that, in his judgment, is nearest or most convenient to the place where the crime charged in the indictment is supposed to have been committed, which courts shall have
788 jurisdiction to try the case; and in all said civil suits said courts shall have full equity powers; and whenever it shall appear to said court, at any stage in the hearing of any case, that the tribe is in any way interested in the subject-matter in the controversy, it shall have power to summon in said tribe and make the same a party to the suit, and proceed therein in all respects as if such tribe were an original party thereto; but in no case shall suit be instituted against the tribal government without its consent.

It is further agreed that no act, ordinance, or resolution of the council of either the Choctaw or Chickasaw tribes, in any manner affecting the land of the tribe, or of the individuals after allotment, or the moneys or other property of the tribe or citizens thereof (except appropriations for the regular and necessary expenses of the government of the respective tribes), or the rights of any person to employ any kind of labor, or the rights of any persons who have taken or may take the oath of allegiance to the United States, shall be of any validity until approved by the President of the United States. When such acts, ordinances, or resolu-

tions passed by the council of either of said tribes shall be approved by the governor thereof, then it shall be the duty of the national secretary of said tribe to forward them to the President of the United States, duly certified and sealed, who shall, within thirty days after their reception, approve or disapprove the same. Said acts, ordinances, or resolutions, when so approved, shall be published in at least two newspapers having a bona fide circulation in the tribe to be affected thereby, and when disapproved shall be returned to the tribe enacting the same.

It is further agreed, in view of the modifications of legislative authority and judicial jurisdiction herein provided, and the necessity of the continuance of the tribal governments so modified, in order to carry out the requirements of this agreement, that the same shall continue for a period of eight years from the fourth day of March, eighteen hundred and ninety-eight. This stipulation is made in the belief that the tribal governments, so modified, will prove so satisfactory that there will be no need or desire for further change till the lands now occupied by the Five Civilized Tribes shall, in the opinion of Congress, be prepared for admission as a State to the Union. But this provision shall not be construed to be in any respect an abdication by Congress of power at any time to make needful rules and regulations respecting said tribes.

That all per capita payments hereafter made to the members of the Choctaw or Chickasaw nations shall be paid directly to each individual member by a bonded officer of the United States, under the direction of the Secretary of the Interior, which officer shall be required to give strict account for such disbursements to said Secretary.

It is further agreed that all claims of any kind which either the United States may have upon the Choctaw Nation or the Chickasaw Nation, or the Choctaw Nation or the Chickasaw Nation may have upon the United States, shall be submitted to the Senate of the United States as a board of arbitrators for final determination, and without any unnecessary delay to make the award and provision for the settlement of whatever sum shall be by them awarded, and the other provisions of this agreement shall not be operative or effective, but shall remain in abeyance until said claims have been finally determined and settled.

It is further agreed that all of the funds invested, in lieu of investment, treaty funds, or otherwise, now held by the United States in trust for the Choctaw and Chickasaw tribes, shall be capitalized within one year after the tribal governments shall cease, so far as the same
789 may legally be done, and be appropriated and paid, by some officer of the United States appointed for the purpose, to the Choctaws and Chickasaws (freedmen excepted) per capita, to aid and assist them in improving their homes and lands.

It is further agreed that the Choctaws and Chickasaws, when their tribal governments cease, shall become possessed of all the rights and privileges of citizens of the United States.

It is further agreed that the Choctaw orphan lands in the State of Mississippi, yet unsold, shall be taken by the United States at one dollar and twenty-five cents ($1.25) per acre, and the proceeds placed to the credit of the Choctaw orphan fund in the Treasury of the United States; the number of acres to be determined by the General Land Office.

This agreement shall be binding on the United States when ratified by Congress, and on each tribe or nation, party hereto, when ratified by the constituted authorities of that tribe or nation, according to their respective laws on the subject.

In witness whereof the said commissioners do hereunto affix their names at Atoka, Indian Territory, this the twenty-third day of April, eighteen hundred and ninety-seven.

GREEN MCCURTAIN,
Principal Chief.
J. S. STANDLEY,
W. B. AINSWORTH,
BEN HAMPTON,
WESLEY ANDERSON,
AMOS HENRY,
D. C. GARLAND,
Choctaw Commission.
R. M. HARRIS,
Governor.
ISAAC O. LEWIS,
HOLMES COLBERT,
ROBT. L. MURRAY,
WILLIAM PERRY,
R. L. BOYD,
Chickasaw Commission.
FRANK C. ARMSTRONG,
Acting Chairman.
ARCHIBALD S. MCKENNON,
THOMAS B. CABANISS,
ALEXANDER B. MONTGOMERY,
Commission to the Five Civilized Tribes.
H. M. JACOWAY, Jr.,
Sec'y, Five Tribes Commission.

790 (Indorsed:) In the Court of Claims. No. 18932. Choctaw Nation, etc., *v.* United States, etc. Deposition of Levin C. Handy for defendants, the United States. Filed Nov. 3, 1897. Court of Claims.

791 *Queries put to A. P. Chouteau by the Senate Committee on Indian Affairs relative to the character of the country destined for the Indians beyond the Mississippi and the actual condition of the Indians which have removed there.*

Question 1st. Have you a residence in St. Louis, Missouri, and a trading establishment on the Arkansas River?

Answer. My present residence is at St. Louis, and for nine years past I have had a trading house on the Verdigris, a tributary of the Arkansas, falling into it about seven hundred miles above its junction with the Mississippi.

Question 2nd. Are you largely engaged in the Indian trade on the Arkansas?

Answer. I introduce into that country from 15 to 20,000$ worth of
ds annually.
Question 3d. Over what extent of country west of the Mississippi has
ur personal observation extended?
Answer. As far as the South Branch of the Columbia, and on the head
ters of the Arkansas and Red River as far as New Mexico, and along
e whole course of the Arkansas.
Question 4th. Will you please to state the character of the country
st of the Mississippi in the latitude of the Red River and Arkansas
stined for the Indians, its climate, soil, water (fresh and salt), naviga-
on, woodland, prairie, grass, game, adaptation to tillage and raising
ock, and proximity to the wild or savage Indians?
Answer. The country is somewhat elevated and not liable to inunda-
ons, its climate is mild. winter open and never cold unless the wind
omes across the great Western prairies, and then freezes the streams
nly where the water is slack. The greatest fall of snow I have seen
vas less than 4 inches, and it did not remain on the ground more than
6 hours. The soil is fertile. The country abounds in fresh-water
springs, boiling either through gravel or limestone rock, and it also
abounds in salt water, much of it very strong; one spring at which forty
gallons will make one bushel of salt. Many salt streams exist, which
are good for stock. The salt fork of the Arkansas, which falls in
792 from the S. W. about 170 miles above Fort Gibson, is strongly
impregnated with salt, and when the Arkansas is low and that
fork happens to be flush communicates a saline taste to its waters for
some hundreds of miles. The great salt plain I never was at, but have
heard it often described both by white hunters and Indians. It is about
220 miles S. W. of Fort Gibson, on the south side of the river. It is
about ten miles long, one mile and upwards wide. All over this plain
the salt forms under the heat of the sun about the ⅛ of an inch thick on the
sandy soil. I have seen this salt, and bought it by the bushel from the
Osage Indians. It is white, of a small, fine grain. The Indians for hun-
dred of miles around come to gather it. No nation owns it, and it is the
general resort of the various tribes to procure a provision of this essential
article. About 50 miles further and a little to the S. of W. the rock salt
is found; a place where the salt is procured in masses. I have never
been there, but I have bought of this salt, and I am told by the Indians
that it is like a large rock which protrudes through the bluff bank of a
creek, and they quarry it with hatchets. They speak of it as being in
great quantities. In its native state it has a mixture of red veins through
it, faint or dull red and white. The Arkansas is navigable for seven
hundred miles for steamboats, barges, and keels for four or five months
in the year, and passing through the Indian country. The timber of the
country is oak, black walnut, hickory, ash, hackberry, locust, mulberry,
pine, cedars, pacane, cherry, bois-de'arc, and other kinds common to the
banks of the Mississippi. The country allotted to the Chactaws and the
Cherokees has a larger proportion of timbered land than that laid aside
for the Creek Indians, though the latter have enough for their wants.
Throughout this country indigenous fruits are found in the greatest
abundance. They consist in a variety of fine grapes, plumbs, black-haws,
straw and black berries, papas, persimmons, May apples, and a species of

pomegranade, which is much esteemed for its flavor. Roots, used as food, are also abundant, and the rivers furnish an ample supply of good fish. As regards the fertility of the prairie lands, I have raised from 45 to 50 bushels of corn to the acre, and from 18 to 20 of wheat, which weighed 64 pounds to the bushel. The prairies are covered with fine grass. Stock do well on it winter and summer. In winter the grass of the prai-
793 ries dies and cures, and the cattle and horses prefer it and keep fat upon it, but in cold, windy, wet weather they resort to the timbered land to get cane, wild rye, and winter grass. The country abounds in wild game, as the buffalo, elk, deer, antelopes, bears, and furred animals. Wild horses are found to the S. W. in numerous herds. I have seen the face of the country covered with them as far as the eye could reach, and often I have been obliged to keep out guards to fire at and keep them from breaking in upon my camp or traveling lines. The same remark is still more applicable to the buffaloe. As relates to the adaptation of the country for tillage, excellent crops of corn, wheat, rye, oats, &c., may be raised with equal abundance as could be produced from the best lands in the State of Missouri. And as regards the proximity of the wild or savage Indians, the nearest band is the Paw-nis Pick, whose village is about 250 miles from Fort Gibson. They raise corn and vegetables in small quantities. Other rambling tribes are to be found. They are the Padocas, Aïtaus [or Aïtans], Huitsitas, Hichas, and Consadas. Their range is from the Pawnees Picks to San Antonio, in Texas, to the south. The Commanches, Arrapahoes, Cayouwas, and other bands, ramble from the head waters of the Great Platte, Arkansas, Red River, in the direction to San Antonio, and parallel to that chain of the Rocky Mountains running south.

Question 5th. Will you state the actual condition of the Indians which have removed to that country?

Answer. The condition of the Cherokees and Creeks who have emigrated is good. My trading house is within the Cherokee country and adjacent to that of the Creeks, and I know their condition well. They have good log houses, many of which are double, and fields according to the means of the individual; I know some who have under fence and under culture about 150 acres of land. They raise all the kinds of grains and vegetables common to that latitude; patches of cotton and tobacco and of upland rice are common among them. Spinning wheels and looms are in common use. Stocks of cattle, horses, hogs, sheep, and goats are owned by these people; they have poultry, to wit, chickens, turkeys, ducks, and geese. Their women ride on side saddles and dress according to their respective means to do so in the manner and fashion of the whites. The same remark will apply to the dress of the men. The furniture of
794 their houses comprise chairs, tables, beds, bedsteads, and, in some instances, bureaus. The table in many houses is neatly set, and a good comfortable dinner, supper, or breakfast is served. Tea and coffee are in general use. They supply the garrison (Fort Gibson), their agent and traders with poultry, butter, eggs, wild game, and other articles that are usually brought to market at our towns. In the last year (1830) the Creeks have raised a surplus of corn above the wants of their own consumption, by estimate of at least 50,000 bushels, and the Cherokees this year supply by contract the corn required at Fort Gibson for the public service. The Cherokees already have three salines in

operation, and are adopting measures to put two or more in operation during the current year, and it is believed that they will ere long be able to export salt extensively. The game of this country furnishes a rich source of relief to the emigrants. A few weeks hunt puts it in their power to procure a quantity of meat for their subsistence, besides skins enough to obtain from the traders such goods as are required for their wants, and finally, other resources exist in the country which must eventually add greatly to the wealth and prosperity of these people so soon as they are developed. I mean the exploration of the rich lead, iron, and coal mines abounding in those regions. So convinced are the people who have removed, of these advantages, that I have heard many say that no inducement which could be offered would induce them to return east of the Mississippi. I know them to be satisfied, and that many send for their relatives to come and join them, bearing their expenses. Many that were idle and worthless in their old country are now industrious and doing well. The Indians themselves have pointed out instances of this to me, and said, there is a man that was nothing; he was a vagabond; now he has a house; he has stock of his own, and he works. Their children are numerous and healthy. The tribes are increasing and the country is salubrious.

Question 6th. How long since the tribes, and from what tribes, began to emigrate from the east to the west of the Mississippi?

Answer. Having seen the statement of the Gen'l Clark before the
795 committee on this head, I beg to refer to it as substantially what I have to say in this respect.

Question 7th. What proportion of the Choctaws have emigrated?

Answer. The period at which they commenced emigrating I have no knowledge of. The country assigned to them, however, from personal examination, I know to be the best for emigrants west of the Mississippi.

Respectfully submitted.

Feb'y. 21st., 1831.

(Signed) A. P. CHOUTEAU.

Hon. Mr. BENTON,
U. S. Senate.

DISTRICT OF COLUMBIA,
City of Washington, ss:

I, William R. Cox, Secretary of the United States Senate, do hereby certify that the foregoing is a true copy of a statement of A. P. Chouteau, dated February 21, 1831, before the Senate Committee on Indian Affairs, as fully as the same remains on the files of this office.

Attest:

WM. R. COX, *Secretary.*

WASHINGTON, D. C., *December 1, 1897.*

796 (Indorsed:) Court of Claims. No. 18932, the Choctaw Nation and the Chickasaw Nation *v.* The United States and the Wichitaw and affiliated bands of Indians. Copy of paper from the Sec'r'y of the U. S. Senate. L. P. Pradt, Asst. Att'y. Gen'l. Filed Dec. 4, 1897. Court of Claims.

797 Refer in reply to the following: Land 4989–1898.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, February 7, 1898.

The honorable
The SECRETARY OF THE INTERIOR.

SIR: I am in receipt, by Department reference for immediate report, of a letter dated January 28, 1898, from Mr. L. A. Pratt, Assistant Attorney-General, requesting for official use an answer to the following question:

"Since 1866 what requests have been made to the Government of the United States by the Choctaw and the Chickasaw nations, or either of them, for the removal of white intruders from their territory, and what has been done in consequence of such requests?"

In reply, I have to say that a thorough examination of the records and files of this office and of the annual reports of the Commissioner of Indian Affairs for each year since 1866 has been made, and from this examination it appears that prior to the completion of the Missouri, Kansas & Texas Railroad through the Indian Territory no complaints of intruders of any consequence were made by the Choctaw and Chickasaw authorities.

The first reference to the matter of intruders in the nations named appears to have been made in the annual report of the U. S. Indian agent in charge of the Choctaw and Chickasaw Indians, dated September 2,
1872. In that report the agent states that immediately upon the
798 railroad crossing the Canadian River into the Choctaw Nation a horde of roughs who had accompanied the road in its progress through the country north came flocking into this country prepared to continue their deeds of lawlessness and violence. Active measures were at once taken for their expulsion under the direction of this Department, and with the aid of the military they were removed. At the time that this report was made the railroad had been constructed and trains were running to Atoka, in the Choctaw Nation.

The next mention of intruders in these nations is contained in the annual report for 1874, from which I quote the following paragraph:

"A serious difficulty in the not distant future is before these tribes, arising from the large and steady influx of white people. Since the emancipation of their slaves these Indians have sought exemption from labor by inviting emigration of the lowest whites from the surrounding States, to whom they rent their lands for one-third of the crops raised. These whites, once in the country, are seldom known to leave, and thus their numbers are rapidly increasing; the result will be a mixture of the lowest white blood with the Indian, thus propagating instead of curing the indolence and unthrift with which they are already cursed, and from which they can be delivered only by the example and competition of industrious and enterprising white neighbors. Rather than that the country should be filled with this class of emigrants, it would be for the better interests of these Indians to open it to white settlement in the ordinary way."

A fairly complete history of the matter of intruders in the Choctaw and Chickasaw nations is contained from year to year in the annual reports of this office, to which reference is made below.

In this report I shall not undertake to give a statement of the applications made to this office by the authorities of the two tribes mentioned for the removal of one or two persons alleged to be intruders within said nations. It has only been within the last fifteen or twenty years that there has been claimed by the Choctaw and Chickasaw authorities to be any large number of intruders in their country. The applications for removal of intruders prior to that time were confined to one or two, possibly as high as five, individuals whose removal the authorities desired.

These calls for the removal of a few individuals are so numerous that it is almost impracticable without extending this report to an unreasonable length for a full statement relative to them to be given.

Under date of July 23, 1880, the Choctaw delegate in this city, Mr. P. P. Pitchlynn, communicated with this office and enclosed a copy of a joint resolution of the Choctaw general council directing the principal chief of that nation to request the President of the United States to take steps for the speedy removal of intruders and to instruct the delegation to present the matter in person and urge the importance of enforcing the laws prohibiting intrusions.

The Indian Office communicated with the U. S. Indian agent of the Union Agency on the subject July 31, 1880, transmitting him a copy of Mr. Pitchlynn's communication, with instructions that immediately upon complaint being made to him by the chiefs, or their properly constituted authorities of the Choctaw and Chickasaw nations of the presence of an intruder therein, to cause him to appear at such time and place as the agent might appoint to show cause why he should not be forthwith removed from the nation; that if the person charged with intrusion failed or neglected to do as directed, the agent would proceed to effect his removal with the aid of such police force as might be at his command, and if his force was insufficient for the purpose he was directed to report the facts fully to the Indian Office in order that the aid of the military might be called into requisition in conformity with the treaty.

Under date of April 30, 1881, J. F. McCurtain, principal chief of the Choctaw Nation, again made complaint against intrusions in said nation, and set forth the many flimsy and insufficient excuses on which numbers of intruders remained in the nation.

In acting on this and others on the same subject the office, under date of June 28, 1881, gave the U. S. Indian agent of the Union Agency, John Q. Tufts, full instructions in the premises, directing him to remove intruders from the Choctaw and Chickasaw nations, and also, among other things, to give full and complete notice of the intention of the Government to remove all persons in the said nations who were there without authority of law or in violation of law.

It appears from a report, dated July 11, 1881, from the agent, that notices were published by him in the Indian Journal and by posting at all post-offices in the Choctaw and Chickasaw nations, and that he said that there was no doubt but that all persons interested would be duly notified.

He also stated that he had no anticipation of trouble in carrying out the instructions of this office, and that in cases where there was
801 doubt as to the innocence of the intruder he would have given him the benefit of the doubt, and remove as few farmers who planted their crops in good faith as to their right to do so as possible. The result of the agitation of the question of intruders during that year, as above set forth, is shown briefly in the annual report of Mr. Tufts, dated September 30, 1881, from which it appears that most of the persons who were charged with being intruders had obtained permission or left the nations, and that the few who had refused to do either had been removed by the military. See Annual Report, 1881, page 104.

The delegates of the Choctaw, Cherokee, Creek, and Seminole nations, under date of March 23, 1882, again brought the matter of intruders to the attention of this office, and Mr. J. S. Standley, Choctaw delegate, followed this joint communication with an individual application for the removal of intruders in the Choctaw Nation, dated July 8, 1882. On receipt of Mr. Standley's communication he was advised in a letter dated July 14, 1882, that instructions would be issued to Agent Tufts upon the presentation of a list of intruders to be furnished by the Choctaw authorities to investigate the facts with a view to the removal of all such persons as should be found trespassing as alleged and who were without permission, and those who could not present prima facie just claims to citizenship in the nation, and such instructions were given Mr. Tufts by a letter bearing the same date.

802 By a letter dated February 6, 1883, the Choctaw delegates in this city, filed in this office a statement from the principal chief of the Choctaw Nation, embracing the names of some 2,800 persons alleged to be intruders in the Choctaw Nation. In a report dated March 1, 1883, Mr. Tufts advised this office that he had received a similar list to the one above described from the principal chief of the Choctaw Nation; that many of the names appearing thereon are of the same persons removed by the military under his direction during the summer of 1881, and who returned to the nation the same day that they were removed. In discussing the matter Mr. Tufts stated that the removal of intruders from Indian reservations under the "present statute is an expensive farce;" that a large number of those reported by the chief for removal claim citizenship in the Choctaw Nation; that others claim rights to remain in the nation by virtue of contracts made with individual Choctaws. No action appears to have been taken on this matter until March 14, 1884, when the matter was submitted in a report to the Department with the recommendation that Agent Tufts be instructed to notify all disputed claimants to citizenship in the Choctaw Nation to appear before the proper tribunal and submit their claims for adjudication as provided by the Choctaw laws; that failing to do so, they be regarded as intruders and removed from the Territory, and that any party feeling aggrieved by the Choctaw tribunal be allowed thirty days in which to appeal to the agent, and at the expiration of that time be deemed an intruder if no appeal be taken.

803 Also that the agent be directed to hear all cases of appeal from the decision of the Choctaw authorities, giving proper notice to the principal chief of the time and place of hearing, receiving, and considering such proper evidence without distinction as to the face of wit-

nesses as may be presented, and that he be directed to submit all cases of appeal with the evidence and his findings thereon to this office for final determination by the Department, and all persons finally adjudged to be intruders be removed, allowing them a reasonable time in which to dispose of their improvements and property.

By letter of March 15, 1884, the Department concurred in the recommendations of this office, and Agent Tufts, under date of March 22, 1884, was instructed to proceed in accordance therewith. It does not appear that any other steps were taken to remove the persons, alleged in the list referred to, to be intruders in the Choctaw Nation.

Contemporaneously with the action taken by this Department, as above set forth, the matter of intruders in the Five Civilized Tribes, among which are the Choctaw and Chickasaw nations, was discussed in the annual report of the agent, 1882 (see Annual Report, 1882, p. 88), and by the Commissioner of Indian Affairs and the agent, in 1883. (See Annual Report, 1883, pp. LIV and 88, and also Annual Report, 1884, p. XLIII.)

Under date of May 28, 1884, the agent for the Union Agency transmitted copy of a communication from the governor of the Chickasaw Nation, with a list of intruders whose removal he desired, recommending that troops be furnished as requested by the governor for the removal of all intruders in the Chickasaw Nation.

804 Replying to this report, the office under date of June 10, 1884, advised Agent Tufts that the Department did not concede to the Chickasaw Nation the exclusive right to determine who were intruders, or that the Government is bound to remove all persons adjudged to be intruders by the Chickasaw courts or council, the Department reserving the right to determine for itself the existence and extent of the exigency upon which a requisition for the removal of intruders might be based, and he was instructed to investigate the cases mentioned by the governor of the Chickasaw Nation, and report to this office the names of those who might be unable to show a prima facie right to remain, and on receipt of his report steps would be taken to insure prompt action under the rules of the Department.

In a letter dated July 28, 1885, the principal chief of the Chickasaw Nation made complaint of a number of intruders and outlaws in that nation. This was forwarded by this office to the Department, and by the Secretary of the Interior under date of August 20, 1885, to the War Department, with the request that military aid be furnished in the arrest of the outlaws and the removal of the intruders. It appears that this military aid was provided for by the War Department, but on the arrival of Captain Wessells, 3rd Cavalry, commanding Troop H, detailed for the purpose, in the Chickasaw country, he was informed that the parties referred to by the Chickasaw authorities had left the country.

Under date of March 26, 1886, Mr. R. L. Owen, U. S. Indian agent for the Union Agency, reported to this office that he had located ranches, brands, and names of the parties holding cattle number-

805 ing 150,000 head, upon the public domain of the Chickasaw Nation against its will and without paying any tax, and which he proposed to remove; but fearing his agency police would not be strong enough to manage them should they offer resistance, asked for the cooperation of the U. S. troops at Forts Reno and Sill to prevent conflict

during the removal. The matter having been submitted to the Secretary of the Interior he, in a letter dated April 9, 1886, directed the removal of the cattle, together with the owners thereof, or other persons found therewith, in the Chickasaw country against the will of the Chickasaw Nation, under the provisions of section 2149 of the Revised Statutes.

By letter dated April 9, 1886, Mr. Owen was informed of the authority granted by the Secretary and the directions contained in the said letter of April 7, 1886, and instructed to proceed to effect the removal in accordance with the Department's direction, reporting his action to this office.

Under date of May 31, 1886, Agent Owen reported his actions under the instructions above set forth, in which it appears that on entering the Chickasaw country, the cattlemen intruding on the domain of that nation, who had already begun to "round-up" the cattle for the spring "round-up," attempted to evade the agent by flight, stating that they were alarmed; but the agent believed that their course was intended to discourage him in the execution of the order by presenting for his consideration a large area of country partly timbered, with the cattle scattered far and wide to be collected.

806 In view of the situation, it appeared that it was impracticable for the agent to remove the cattle with the force at his command and the small contingent fund available for the purpose. He therefore issued notices to the United States citizens holding cattle unlawfully on the Chickasaw domain, calling on them to organize outfits at once to proceed to gather and hold upon the ranches in close herd all cattle, horses etc., until such time as they could be inspected and permission given for their removal, and that every person refusing or neglecting and evading his summons would be proceeded against under certain sections of the Revised Statutes mentioned.

In this report the agent promised to make further and final report on the conclusion of his efforts to carry out his instructions in the fall, which final report does not appear to have been made; but it seems that on October 14, 1886, the Chickasaw Nation adopted a law contemplating the taxing of cattle held in the nation unlawfully, and in discussing this law the Secretary of the Interior held that so far as the said act of October 14, 1886, prescribed regulations for enforcing the provision of section 7 of the permit laws of the Chickasaw Nation, the citizens of the United States residing in the Chickasaw country under permits were subject to its provisions, but that the law would not be recognized as enforcible by the Chickasaw authorities against or as having any effect whatever upon any citizens of the United States or other persons who might be properly classed as intruders within the Chickasaw territory under article

807 7 of the treaty of 1855, and authorized this office to instruct the agent for the Union Agency to notify the proper Chickasaw authorities who had impounded cattle belonging to citizens of the United States that all cattle the property of such citizens as were not residing in the Chickasaw Nation under the Chickasaw permit law, which had been illegally seized or distrained upon, under the provisions of the said act of October 14, 1886, to restore the same to the rightful owners, and also to notify the Chickasaw authorities that the proper remedy of the nation

under the laws and treaties against citizens of the United States and other persons, and their property found unlawfully within the limits of the Chickasaw country, and not being there under the permit law, was in a prompt appeal to the United States Indian agent for expulsion of the intruders and their prosecution under the laws of the United States.

With exception of the matter of intruding cattlemen in the Chickasaw Nation, as above referred to, the correspondence between December 1, 1884, and August 14, 1890, respecting intruders in the Choctaw and Chickasaw nations can be found in Senate Ex. Doc. No. 219, 51st Congress, 1st session, a copy of which I transmit herewith for convenient reference.

From said document, on page 98, it will be observed that under date of July 24, 1888, the Secretary of the Interior directed the removal of intruders from the Choctaw and Chickasaw nations. It appears from the records and files of this office that the authority granted by the
808 Secretary in said letter was not executed on account of delays made necessary by the failure of the Choctaw and Chickasaw authorities to present the names of the intruders in such a way as to properly identify them, the other pressing duties of the Indian agent which prevented him from taking the matter up, the change of Administration, the appointment of a new agent, etc., until some time in the summer of 1891.

A very full history of the action of the Government with respect to the matter of intruders in the Choctaw and Chickasaw nations can be found in the annual report of this office for 1890, page LXXVII and 91; also annual report of this office of 1891, pages 80 and 241.

The statement in the annual report for 1891 is especially full. Since the action taken as shown by said report, it does not appear from the records and files of this office that there has been any organized attempt, with one exception, to remove intruders from the Choctaw and Chickasaw nations, but the office has from time to time received applications from the authorities of these two tribes for the removal of intruders. After the failure of the agent in 1891 to find any considerable number of intruders in the Chickasaw Nation, it does not seem that any further steps were taken under the authority of the Secretary of the Interior given in 1888, and renewed in July 24, 1890, as above described.

The exception to which I have above alluded was the removal from the Choctaw Nation during the autumn and winter of 1894 and 1895 of intruders in that nation, composed of striking miners who had
809 quit work in the coal mines at Krebs, Lehigh, and Coalgate, within the said nation, on account of a general strike of miners throughout the country.

On account of the conduct of the miners who were out on a strike and of the threatened destruction of property within the Choctaw Nation, the governor of that nation, sometime about June 23, 1894, requested the U. S. Indian agent to remove the intruding miners from said nation. On this request being forwarded to this office, the agent was instructed to obtain lists of intruders to be removed, and upon the submission of said lists the War Department was requested to furnish troops necessary to assist him in their removal. It seems that as a result of the complaints from the Choctaw authorities, something over 100 persons were removed

from the mining communities of Alderson, Hartshorne, and Krebs, a
that further removals were suspended at the request of the governor
the Choctaw Nation. An account of this matter will be found in
Indian Office report for 1894, pages 74 and 143.

By letter dated March 20, 1895, the principal chief of the Choc
Nation transmitted a petition, affidavits, and certified copy of a law of
nation in relation to intruders in the Choctaw Nation, and stated tha
copy of the same had been forwarded to the U. S. Indian agent. Act
on these, the office under date of April 20, 1895, wrote to the Ind
agent, advising him that he had authority under the Revised Statu
section 2147, to remove intruders in the Choctaw Nation, which autho
should be exercised at his discretion. There is no evidence t
810 the agent removed any one on account of the application of
governor of that nation above cited.

On receipt of a letter dated June 15, 1895, from F. M. Fox, per
collector of the Choctaw Nation, charging that noncitizens in said na
had refused to pay the permit tax imposed under the laws of the nat
this office communicated with the Indian agent under date of June
1895, and directed him to investigate Mr. Fox's complaint and take
action in the premises as seemed warranted by the facts and to repor
this office the action taken thereon.

The agent reporting under date of July 16, 1895, stated facts wh
warranted his recommendation that a troop of cavalry and the neces
wagons be placed at his disposal to aid him in the removal of the intru
complained against, together with their goods and effects, outside of
limits of the Union Agency.

Replying to this recommendation under date of July 23, 1895,
agent was informed that while the office desired to render him ev
assistance in the discharge of his duties, it was not deemed expedien
ask for troops in that case, at least until the agency shall have ascerta
by a fair trial that the removals could not be accomplished with the f
at its command.

The result of the action of the Government on this demand of
Chickasaw authorities is shown by report of September 4, 1895, from
Indian agent to have been the compliance by all the parties compla
against with the requirements of the Chickasaw permit laws and t
remaining in the nation.

810½ The foregoing is briefly a statement of the demands of
Choctaw and Chickasaw authorities on the Government for
removal of intruders generally from those nations, and the action of
Government on such demands.

The request of the Department of Justice covers such a long perio
time, and the correspondence on the subject in this office is of such g
volume, that a full and complete history of the same could not be
nished within a reasonable time, or in time for use in the Court of Cla
for which the Department of Justice indicates the information calle
is desired.

Very respectfully, your obedient servant,

W. A. JONES, *Commissione*

Murchison. (H)

811 DEPARTMENT OF THE INTERIOR,
Washington, February 8, 1898.

The Honorable
The ATTORNEY-GENERAL.

SIR: In response to your communication of the 28th ultimo requesting an official answer to the following question:

"Since 1866, what requests have been made to the Government of the United States by the Choctaw Nation and the Chickasaw Nation, or either of them, for the removal of white intruders from their territory, and what has been done in consequence of such requests?"

I have the honor to transmit herewith copy of a communication of the 7th instant, from the Commissioner of Indian Affairs, to whom your letter was referred.

Very respectfully,

THOS. RYAN,
First Assistant Secretary.

731 Ind. Div., '98, one enclos.

812 (Indorsed:) Court of Claims. No. 18932. The Choctaw Nation and Chickasaw Nation *vs.* The United States, &c. Interior Dep't transmits certain information in response to request of 28th ult. Filed Feb. 8, 1898. Court of Claims.

813 In the Court of Claims.

THE CHOCTAW NATION ET AL. *vs.* THE UNITED STATES ET AL. } No. 18932.

Motion for request upon the Secretary of the Interior for an original document or official copy thereof.

Come now defendants by their attorneys and move the court for a request upon the Secretary of the Interior to cause to be produced in the court, on Tuesday, the 8th day of February, A. D. 1898, the letter of Hiram Price, Commissioner of Indian Affairs, to the Secretary of the Interior, dated January 26th, 1885, or, in default thereof, any official record thereof showing the precise wording of said letter as signed.

CHARLES C. BINNEY,
Special Attorney for the U. S.

J. M. VALE,
One of the Attorneys for the Deft. Inds.

814 (Indorsed:) No. 18932. The Choctaw Nation et al. *vs.* The U. S. et al. Allowed: C. C. N. Motion for a request upon the Secretary of the Interior for an original document or official copy thereof. Filed Feb. 4, 1896. Court of Claims. Issued Feby. 4, 1898: J. R. Charles C. Binney, special atty. for U. S.: J. M. Vale, one of the attys. for deft. Inds.

815 [9 enclosures (map).]

Refer in reply to the following: Land, 1491–85.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, D. C., January 26, 1885.

The Honorable
The SECRETARY OF THE INTERIOR.

SIR: I have the honor to acknowledge the receipt, by Department reference of the 23rd instant, for prompt report of a resolution of the Senate adopted on the 22nd instant, in the following words, to wit:

"Whereas the United States in 1866 acquired, from the Creek and Seminole Indians, by treaty, certain lands situate in the Indian Territory, a portion of which have remained unoccupied until the present time; and

"Whereas a widely extended belief exists that such unoccupied lands are public lands of the United States, and as such subject to homestead and preemption settlement, and pursuant to such belief a large number of citizens of the United States have gone upon them claiming the right to settle and acquire title thereto under the general land laws of the United States; and

816 "Whereas it is understood that the President of the United States does not regard said lands as open to settlement, and believes it to be his duty to remove all persons who go upon the same, claiming the right to settle thereon, and for that purpose has directed the expulsion of the persons now on said lands by the use of military force, and there seems to be a probability of a conflict growing out of the attempt to expel said persons so claiming right and attempting to settle: Therefore

"Resolved, That the President be requested to advise the Senate as to the status of the lands in question as viewed by the Executive, the action taken, if any, to expel persons seeking to settle thereon, and the reason for the same, together with any other information in his possession bearing upon the existing controversy.

The resolution involves two principal inquiries:

First. The status of the lands in question, as viewed by the Executive.

Second. The action taken to expel persons seeking to settle thereon, and the reasons for the same.

I have the honor to report thereon as follows:

I. As to the status of the lands.

817 By the first article of the treaty with the Creeks and Seminoles, August 7, 1856 (11 Stat., 699), the Creeks ceded and conveyed to the Seminoles "the tract of country included within the following boundaries, viz: Beginning on the Canadian River a few miles east of the ninety-seventh parallel of west longitude, where Ock-hi-appo or Pond Creek empties into the same; thence due north to the North Fork of the Canadian; thence up said North Fork of the Canadian to the southern line of the Cherokee country; thence with that line west to the one hundredth parallel of west longitude; thence south along said parallel of longitude to the Canadian River; and thence down and with that river to the place of beginning," and the United States thereby solemnly

guaranteed that the Seminole Indians should hold said lands by the same title and tenure as that by which they were guaranteed and secured to the Creeks.

The preamble to the treaty with the Creeks of June 14, 1866 (14 Stat., 785), recites that "the United States require of the Creeks a portion of their land whereon to settle other Indians," and by the third article of that treaty it provided that, "in compliance with the desire of the
818 United States to locate other Indians and freedmen thereon, the Creeks hereby cede and convey to the United States, to be sold and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain, to be divided by a line running north and south, * * * and in consideration of the said cession of the west half of their lands, estimated to contain three millions two hundred and fifty thousand five hundred and sixty acres, the United States agrees to pay the sum of thirty (30) cents per acre, amounting to nine hundred and seventy-five thousand one hundred and sixty-eight dollars, in the manner hereinafter provided * * *."

This cession is indicated on the accompanying map as follows: That portion of No. 5 which lies west of the dotted line; that portion of No. 19 which lies east of the dotted line; all of Nos. 15, 16, 17, 18, and 20; that portion of No. 11 which lies south of the Cherokee line (dotted) and on the left bank of the Cimarron River; and that portion of No. 22 which lies between the Cimarron River and the North Fork of the Canadian River, and the west line of No. 20, and the south line of the Cherokee country or of No. 14 (S. Ex. Doc. 109, 48th Cong., 1st sess., p. 4).

Of the consideration money agreed to be paid by the United
819 States to the Creeks in respect of the lands so ceded the sum of three hundred thousand dollars ($300,000) was duly appropriated and paid in accordance with the terms of the treaty (see sundry civil act July 28, 1866, 14 Stat., 319; Ind. Appr. act July 15, 1870, 16 Stat., 341); and interest at five per cent on the balance, or sum of six hundred and seventy-five thousand one hundred and sixty-eight dollars ($675,168), is annually appropriated by Congress and placed to the credit of the treasurer of the Creek Nation with the assistant treasurer at Schoharis, Mo., under the Indian appropriation act of March 3, 1875 (18 Stat., 448).

The preamble to the treaty with the Seminoles of March 21, 1866, (14 Stat. 755) recites that "the United States * * * in view of its urgent necessities for more lands in the Indian Territory, requires a cession by said Seminole Nation of a part of its present reservation, and is willing to pay therefor a reasonable price, while at the same time providing new and adequate lands for them," and the third article of that treaty provides that, "In compliance with the desire of the United States to
820 locate other Indians and freedmen thereon, the Seminoles cede and convey to the United States their entire domain, being the tract of land ceded to the Seminole Indians by the Creek Nation, under the provisions of article first, treaty of the United States with the Creeks and Seminoles, made and concluded at Washington, D. C., August 7, 1856. In consideration of said grant and cession of their lands, estimated at two millions one hundred and sixty-nine thousand and eighty (2,169,080) acres, the United States agree to pay said Seminole Nation

the sum of three hundred and twenty-five thousand three hundred and sixty-two ($325,362) dollars, said purchase being at the rate of fifteen cents per acre."

By the same article the United States granted to the Seminoles a portion of the lands obtained from the Creeks by the treaty of 1866, above cited, sufficient to make two hundred thousand (200,000) acres, as and for the national domain of the Seminole Nation, for which the Seminoles agreed to pay the sum of one hundred thousand dollars ($100,000) to be deducted from the sum paid by the United States for Seminole lands under the preceding stipulations.

The 200,000 acres so sold to the Seminoles is indicated on the map by that portion of No. 5 which lies west of the dotted line. That
821 portion lying east of the dotted line, containing 175,000 acres, was subsequently purchased from the Creeks by the Seminoles, act of August 5, 1882, 22 Stat. 265 (see S. Ex. Doc. 109, supra, pp. 4, 5).

The cession made by the Seminoles to the United States is represented on the accompanying map as that part of No. 19 which lies west of the dotted line; all of No. 21, and that portion of No. 22 which lies west of No. 21 and between the Canadian River and the North Fork of the Canadian, and the south line (dotted) of the Cherokee country (No. 14) and the 100 of longitude.

Of the consideration money agreed to be paid by the United States to the Seminoles in respect of the lands so ceded, the sum of one hundred and fifty-five thousand three hundred and sixty-two dollars ($155,362) was duly appropriated and paid, in accordance with the terms of the treaty (see sundry civil act, July 28, 1866, 14 Stat., 319); and interest at five per cent on the balance, or sum of seventy thousand dollars ($70,000), is annually appropriated by Congress and placed to the credit of the treasury of the Seminole Nation with the assistant treasurer at St. Louis, Mo., under the act of April 15, 1874 (18 Stat., 29).

822 Upon the lands ceded to the United States for the purposes mentioned in the Creek treaty of 1866, the following-named tribes of Indians, exclusive of the Seminoles, as hereinbefore mentioned, have been located, viz:

Sac and Fox, under treaty of February 18, 1867, 15 Stat., 496 (No. 17 on map, containing 479,667 acres).

Pawnee, under act of Congress of April 10, 1876, 19 Stat., 28 (that portion of No. 11 on map within the Creek cession, containing 53,005.96 acres).

Iowa, and such other Indians as the Secretary of the Interior may see fit to locate thereon, by Executive order dated August 15, 1883 (No. 16 on map, containing 228,152 acres).

Kickapoo, by Executive order dated August 15, 1883 (No. 18 on map, containing 204,466 acres).

Pottawatomie and Absentee Shawnee, under act of Congress of May 23, 1872, 17 Stat., 159 (that portion of No. 19 on the map which lies east of the dotted line and within the Creek cession. The other portion is included in the Seminole cession and is hereafter referred to).

Cheyenne and Arapaho, by Executive order of August 10, 1869 (that portion of No. 22 on the map lying within the Creek cession, as hereinbefore indicated).

The remaining portions of the Creek cession, being tracts numbered 15 and 20 on the map, are hitherto unassigned. Their area be given hereafter.

Upon the lands ceded to the United States by the Seminoles for the poses declared in the treaty of 1866, the following tribes of Indians e been located, viz:

Pottawatomie and Absentee Shawnee, under act of Congress of May 1872, 17 Stat., 159. (That portion of No. 19 on the map which west of the dotted line, making, with that portion east of the dotted and within the Creek cession hereinbefore referred to, a total area of 5,877 acres.)

Cheyenne and Arapaho, by Executive order of August 10, 1869. hat portion of No. 22 on the map, covered by the Seminole cession, as reinbefore indicated.)

The remaining portion of the Seminole cession, being tract numbered on the map, is hitherto unassigned.

	Acres.
contains an area of	495,093.37
dd tract No. 15 (Creek cession), unassigned	677,155.76
tract No. 20 do do	715,551.34
Making a total of	1,887,800.47

hich, according to the understanding of this office, to-day constitutes what are commonly called the "Oklahoma lands."

24 The third article of the treaty of 1856 with the Creeks and Seminoles (11 Stat., 699) provides:

"The United States do hereby solemnly guarantee to the Seminole Indians the tract of country ceded to them by the first article of this convention, and to the Creek Indians the lands included within the boundaries defined in the second article thereof; and likewise that the same shall respectively be secured to and held by said Indians by the same title and terms by which they were guaranteed and secured to the Creek Nation by the fourteenth article of the treaty of March twenty-fourth, eighteen hundred and thirty-two, the third article of the treaty of February fourteenth, eighteen hundred and thirty-three, and by the letters patent issued to the Creek Nation on the eleventh day of August, eighteen hundred and fifty-two. * * * Provided, however, that no part of the tract of country so ceded to the Seminole Indians shall ever be sold or otherwise disposed of without the consent of both tribes legally given."

The fourth article provides: "The United States do hereby solemnly agree and bind themselves that no State or Territory shall ever pass laws for the government of the Creek or Seminole tribe of Indians, 825 and that no portion of either of the tracts of country defined in the first and second articles of this agreement shall ever be embraced or included within or annexed to any Territory or State, nor shall either, or any part of either, ever be erected into a Territory without the full and free consent of the legislative authority of the tribe owning the same."

The fifteenth article guarantees to the Creeks and Seminoles the unrestricted right of self-government so far as may be consistent with the

Constitution of the United States and the laws made in pursuance thereof to regulate trade and intercourse with Indian tribes. It also gives them full jurisdiction over persons and property within their respective limits, who are citizens by birth or adoption, and provides for the removal of all other persons not legally within their limits, assisted if necessary by the military of the United States for that purpose, &c.

The first article of the treaty of 1866 with the Creeks (14 Stat., 785) guarantees them quiet possession of their country, and the third article provides that the eastern half of the Creek lands, being retained by them,

shall be forever set apart as a home for the Creek Nation.

826 The tenth article prohibits the United States from legislation

that shall in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs, and by the twelfth article the United States expressly reaffirms and reassumes all prior obligations not inconsistent therewith.

Similar provisions will be found in the treaty of 1866 made with the Seminoles (14 Stat., 755.)

For some years past it has been claimed by interested parties that the unoccupied lands ceded to the United States by the Creeks and Seminoles under the treaties of 1866 with those tribes are in reality a part of the public domain, freed from any Indian title or trust, and as such open to public settlement under the general land laws of the United States. Upon this theory repeated attempts have been made by organized bands of citizens of the United States to take forcible possession of certain portions of said lands, which have only been frustrated by the aid of the military forces of the United States acting under Executive proclamations hereinafter referred to.

The provisions of the treaties of 1866, with the Creeks and Seminoles in respect of the ceded lands, have already been given, and, as indicating

the views and policy of the Department as announced at the out-

827 set of the trouble, I invite attention to a letter, dated May 1, 1879, written by the Hon. Secretary of the Interior to the Hon. Secretary of War, upon the occasion of the first organized invasion of the Indian Territory.

After referring in detail to the several acts of Congress under which the Indian Territory was created and defined as Indian country, also to the several earlier treaties with the Cherokees, Creeks, Choctaws, and Chickasaws and Seminoles, the Hon. Secretary said:

"By these treaties title was guaranteed to the several tribes, and it was provided that the lands should never be included within the territorial limits or jurisdiction of any State or Territory, but should remain subject to the intercourse laws, which laws have as before stated continued in force in all parts of the Territory to the present time.

828 "The title acquired by the Government by the treaties of 1866 was secured in pursuance and furtherance of the same purpose of Indian settlement which was the foundation of the original scheme.

"That purpose was the removal of Indian tribes from the limits of the political state and territorial organizations and their permanent location upon other lands sufficient for the needs of each tribe.

"These lands being ample in area for the purpose, it has become a settled policy to locate other tribes thereon as fast as arrangements can be

, and provisions have been constantly made by treaties, agreements,
cts of Congress to effect these objects.
That purpose is expressly declared in the said treaties. The cessions
ne Creeks and Seminoles are stated to have been made 'in compli-
with the desire of the United States to locate other Indians and
lmen thereon.'
These words must be held to create a trust equivalent to what would
been imposed had the language been for the purpose of locating
ians and freedmen thereon."

* * * * * * *

"The Executive order of August 10, 1869, for the Cheyennes and Arapahoes also covers all that portion of the Creek and Semi-
e lands west of the 98th meridian and south of the Cimarron River.
'It will be thus seen that the Indian country, as defined by statute,
braces the whole Indian Territory. No part of it has been brought
der the operation of general laws or made subject to settlement as pub-
lands. It is attached as 'Indian country,' for the enforcement of the
ercourse laws alone, to the western district of Arkansas by section 533
the Revised Statutes. It is expressly named as Indian country in the
t of March 3, 1875, 'to establish the boundary between the State of
ansas and the Indian country,' which recognizes the proper closing of
e surveys of the public lands upon its boundaries as originally marked.
"The consolidated provisions of the intercourse laws embrace two
tire chapters of the Revised Statutes, sections 2111 to 2157, inclusive.
"The fact that they have not in terms reenacted the boundaries
of the Indian country should not, in my judgement, be held to
destroy the previously recognized location, as the direct effect of
ch conclusion would render inoperative the entire legislation provided
r its government. Its recognition by the revised compilation and by
bsequent statutes has heretofore been noted.
"The persons now attempting settlement therein allege the acquisition
f these lands in 1866, as the date when they became subject to the
eneral laws of the United States. Thirteen years have now elapsed
nd Congress has made no attempt to provide for them the necessary
achinery for the execution of the general laws; but on the contrary, by
ecent enactment, has expressly provided for the continued jurisdiction
f the district court of western Arkansas. This must be held to nega-
ive an assumption that they are released from the special Indian pur-
poses for which they were acquired and to which they have been
ontinuously devoted.
"For the views of the Judiciary Department, see opinion of August
12, 1873 (14 Opinion, 290), where the whole subject is elaborately con-
sidered, and which is in entire accord with the foregoing conclusions so
far as it relates to the region of country in question." (See corre-
831 spondence in S. Ex. Doc. No. 20, 46th Cong., 1st sess., pp. 15–18,
copy herewith.)

The interpretation placed by the Hon. Secretary upon the various statutes and treaties referred to in connection with the Indian Territory was afterwards sustained by the United States court for the western district of Arkansas in the case of The United States v. Payne, decided at the May term of said court, 1881, in which the same question was raised

as that which forms the groundwork of the resolution now under consideration. (See 2 McCrary, U. S. C. C. Reports, 8th circuit, p. 290; also pamphlet copy decision of U. S. Judge I. C. Parker, herewith.)

That Congress still recognizes the ceded territory as Indian country is apparent from the recent act of January 26, 1883 (22 Stats., p. 400), annexing the whole of the Indian Territory, except those portions occupied by the Cherokee, Creek, Choctaw and Chickasaw, and Seminole Indian tribes, to the United States judicial district of Kansas and the northern district of Texas, respectively, with exclusive original jurisdiction in the United States district courts at Wichita and Fort Scott, Kansas, and at Graham, Texas, respectively, over all offenses committed against
832 United States laws within the limits of the territory so annexed to said district, but providing that nothing in the act shall be construed to give to said district courts of Kansas and Texas, respectively, any greater jurisdiction in that part of said Indian Territory so annexed, respectively, to said district of Kansas and said northern district of Texas than might theretofore have been lawfully exercised thereon by the western district of Arkansas; nor shall anything in the act contained be construed to violate or impair in any respect any treaty provisions whatever.

The status of the unoccupied lands of the Indian Territory, of which those mentioned in the resolution form a part, as viewed by this Department, is so fully set forth in Department letter above quoted, fortified by judicial opinions also referred to, that it appears unnecessary to add anything on the subject beyond remarking that as has already been shown it has been the established policy of the Department in performance of the conditions mentioned in the treaties by which the Govt. acquired lands or the right to use them in the Indian Territory for Indian purposes, whenever the best interests of the Government and the
833 Indians demanded it, to appropriate such unoccupied lands for the settlement of Indian tribes, where their removal to the Indian Territory is not prohibited by existing treaty stipulations or laws.

II. As to the action taken to expel persons attempting to settle on said lands and the reasons for the same.

The limited time at my disposal for the preparation of this report renders it absolutely impossible to accompany it with the usual copies of papers and correspondence in connection with this portion of the subject. I shall therefore be compelled to give a brief history only of the operations, taken from the annual reports of this office, leaving the correspondence to be supplied hereafter if it be required.

834 In the early part of the winter of 1878–79 an extensive scheme was organized to take forcible possession of certain lands in the Indian Territory which had been ceded to the Government for Indian purposes. Letters were published and circulated in the States surrounding the Territory by parties interested in the project, declaring that these were public lands, and were open to settlement by citizens of the United States. In a short time a large number of persons from Missouri, Kansas, and Texas were discovered in the act of entering the Territory, carrying their household goods and farming implements, with the evident purpose of making permanent settlement. This unlawful conspiracy was ascertained to be so extensive as to necessitate the adop-

on of speedy and vigorous measures in order to prevent serious complitions and trouble with the Indians. The attention of the President aving been called to the matter by this Department, on the 26th of pril, 1879, he issued a proclamation warning all persons who were ntending or preparing to remove to the Indian Territory without perission of the proper authorities against attempting to settle upon any lands in said Territory, and notifying those who had already so
835 offended that they would be speedily removed therefrom by Indian agents, and that, if necessary, the aid and assistance of the military would be invoked to enforce the laws in relation to such intrusion.

Accordingly, upon the recommendation of the Department, troops were posted at available points along the lines between the Indian Territory and Missouri, Kansas, and Texas, to prevent unauthorized parties from entering the Territory, and detachments and scouts were detailed to arrest and remove such intruders as could be found within its borders. By the diligent cooperation of the military authorities with the Indian Bureau, the intruders were speedily removed, and the unlawful invasion was checked. (For copies of correspondence and papers in connection with this movement, see S. Ex. Doc. No. 20, 46th Congress, 1st session, copy herewith.)

In February, 1880, information reached this office that a large number of persons were again organizing at various places in southern Kansas for the purpose of entering the Indian Territory and making settlements on lands therein which had been ceded to the Government for Indian purposes. To encourage this movement the promoters of the
836 scheme had publicly represented that the President had changed his views in regard to the status of the lands in question since the issuance of his proclamation of April 26, 1879, and that in his last annual message he had admitted that said lands were public and should be settled upon, and hence they were violating neither the President's proclamation nor any law of the United States in emigrating to and locating upon such lands.

The attention of the President having been called to the matter by this Department, he issued a second proclamation, dated the 12th of February, 1880. This proclamation declared the representations made to be wholly without foundation, and to have originated only in the minds of evil-disposed persons, and again warned all parties who were intending or preparing to remove upon such lands, or into the Indian Territory, without permission of the proper authorities, against any attempt to so remove and settle upon any of the land of said Territory. It notified all persons so offending that they would be speedily removed therefrom by the Indian agents, and that, if necessary, the aid and assistance of the military would be invoked to carry into execution the laws of the
837 United States in such case made and provided.

Upon the recommendation of this Department, a proper disposition of troops was made by the War Department along the line between the Indian Territory and Kansas, to prevent unauthorized persons from entering the Territory, and details were made for the arrest and removal of such intruders as might be found within its borders. These precautions resulted in the arrest by the military, on or about the 15th of May, 1880, of one D. L. Payne, the recognized leader of the movement, and

some eleven of his followers, who had established a camp at a point about forty (40) miles east of Fort Reno, and about a mile and a half south of the North Fork of the Canadian. Pursuant to an order of the Secretary of War, the intruders were conducted to a point outside the Territory and there discharged, with a warning not to return.

On the 15th of July, 1880, Payne and some twenty (20) associates were again discovered in the Indian Territory, were again arrested by the United States forces, and, in pursuance of the order of the President, turned over to the United States marshal for the western district of Arkansas, to be held for prosecution under the United States laws
838 relating to the intruders in the Indian country. The prisoners were subsequently released on bail, to appear for trial at the November term of the United States district court.

At the subsequent May term of said court a civil suit in the nature of an action of debt, brought against Payne in the name of the United States, to recover the statutory penalty of one thousand dollars ($1,000.00), was tried, and judgment rendered against him.

839 During the year 1882 two attempts at settlement by the so-called "Oklahoma Colony" were made under the leadership of D. L. Payne, first in May, when Payne, with a party of followers, was arrested in the Indian Territory by the military, and afterwards released on the Kansas border; and again in the latter part of August, when, with a party consisting of seven men and two women, and an outfit of horses, wagons, &c., he was again captured by the troops whilst endeavoring to effect a settlement at Oklahoma. Upon this last occasion, refusing to go out of the Territory peacefully, the party were disarmed and taken to Ft. Reno as prisoners. Upon the recommendation of this Department they were turned over by the military to the United States civil authorities at Ft. Smith, Ark., by whom, it is reported, they were subsequently released to appear at the November term of the U. S. court for the western district of Arkansas, to answer to civil suits for the recovery of the prescribed penalty of $1,000. During the year 1883 Payne and his party of Oklahoma colonists again made two ineffectual attempts at settlement in the Indian Territory, requiring the aid of the military, at great
840 expense to the Govt., to effect their removal. In 1884 Payne again twice sought to obtain a foothold in the Territory, first in May, when, with a party of about fifty, he endeavored to effect a settlement on the unoccupied lands south of the Cimarron River, from whence they were dislodged by the military, not without considerable show of resistance, and later in June, when, with largely increased numbers, he established himself on the Cherokee Outlet lands south of Hunnewell, Kans., locating settlements at various points along the Arkansas River, with headquarters at Rock Falls, four miles south of the Kansas line. The intruders were removed by the military on the 7th of August last, Payne and others, old offenders, being again arrested and turned over to the civil authorities at Ft. Smith. (For fuller particulars of this movement see Annual Rept. of this office for 1884, page XL, copy herewith.) This office is not advised what action was taken by the civil authorities at Ft. Smith, but it appears from the copies of the official reports of the War Department on file in this office that a large body of men, under the leadership of one Couch, have again entered the Territory, and are now

amped at or near the Cimarron River, whence they defy the military to remove them. The authority for the use of the military in such cases is conferred on the President by sections 2147–2150 of the Revised Statutes, which severally read as follows:

"Section 2147. The superintendent of Indian affairs and Indian agents and sub-agents shall have authority to remove from the Indian country all persons found therein contrary to law; and the President is authorized to direct the military force to be employed in such removal."

"Section 2150. The military forces of the United States may be employed in such manner and under such regulations as the President may direct."

"First. In the apprehension of every persons who may be in the Indian country in violation of law; and in conveying him immediately from the Indian country by the nearest convenient and safe route to the civil authority of the Territory or judicial district in which such person shall be found, to be proceeded against in due course of law." * * *

I enclose herewith copies of Executive proclamations dated respectively April 26, 1879, and February 12, 1880, hereinbefore referred to.

The resolution of the Senate is herewith returned, and a copy of this report is enclosed.

Very respectfully, your obdt. servt.,

H. PRICE,
Commissioner.

842 (Indorsed:) Commr. Indian Affrs., January 26, 1885. Returns Senate resolution Jany. 22, 1885, calling for information in regard to lands ceded by Creeks and Seminoles in Ind. Ty. and measures taken to expel persons attempting settlement, and reports thereon. 9 enclosures (map). Let. to the President. Jan. 26, '85.

843 DEPARTMENT OF THE INTERIOR,
Washington, February 15, 1898.

JOHN RANDOLPH, Esq.,
Assistant Clerk, Court of Claims.

SIR: In compliance with a call of the Court of Claims, dated the 4th instant, I transmit herewith the original letter addressed to this Department by the Commissioner of Indian Affairs, under date of January 26, 1885, in reply to Senate resolution of January 22, 1885, calling for information in regard to lands ceded by Creeks and Seminoles in the Indian Territory, and measures taken to expel persons attempting settlement.

Please return these papers to this Department when no longer required by the court.

Very respectfully,

THOS. RYAN,
Acting Secretary.

972, Ind. Div., '98. 1 inclosure. M. E. W.

844 (Indorsed:) 18932. The Choctaw Nation & the Chickasaw Nation, clmt., v. The United States & the Wichita and affiliated bands of Indians, defts. Reply of Interior Dept., accompanying letter. Filed Feb. 21, 1898. Court of Claims.

THE CHOCTAW NATION AND THE CHICKASAW Nation, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants.

HOWRY, J., delivered the opinion of the court:

The rights, legal and equitable, of the parties to this suit relate body of 743,257.19 acres of land lying between the ninety-eighth the one hundredth meridians of west longitude in what is known as Leased District of the Indian Territory. This leased district con 7,713,239 acres, and is a part of the country ceded to the United S by France in 1803 within the Louisiana purchase.

It is also a part of the country ceded by the United States to Choctaw Nation October 18, 1820. (7 Stat., 211.) The entire cessio described as follows:

"Beginning on the Arkansas River where the lower boundary lin the Cherokees strikes the same; thence up the Arkansas to the Cana Fork, and up the same to its source; thence due south to the Red Riv thence down the Red River to the mouth of Little River, which emp itself into the Red River on the north side; thence in a direct line to beginning."

The land in the leased district, if open to settlement as a part of public domain, has a fixed value of $1.25 per acre, thus aggregat between nine and ten millions of dollars. The petitioners, however, forty millions of dollars is a reasonable estimate of the value, and th is a statement in the record that a syndicate proposed to take the bod land at the Government price with the expectation of making thirty-f millions of dollars out of it, if given a good and sufficient title. T refers to all of the leased district, valued by a Senate committee at millions when the title was obtained in 1866, and more than forty milli of dollars in 1892. (Sen. Rep., 552, 1st sess. 52d Cong.) Under an graduating the price of public lands (in force in 1866) the price for e acre of the leased district might have been fixed as low as 12½ cents the United States had possessed the absolute title and had seen fit to pose of it. Inasmuch as lands adjoining those in controversy were val by the claimants and the United States at $1 per acre, it is fair to ass

that the lands herein mentioned were worth at least that s

846 (Art. 37, 14 Stats., 769.) These references to values are gi

because of their importance in considering the character of title to the lands in suit and the nature of the transaction which fo the large feature of this case.

Three parties allege title to the land. These tripartite claims pre some remarkable features, not alone for the amount and value of property, but because of the peculiar circumstances out of which controversy has arisen, and the history attending its progress; the nu ber and variety of the questions at issue and the differences of opin between the executive and legislative departments of the Governme from which unusual interest has come to be attached to the determinat of the case, now that the judiciary have undertaken to deal with it.

The petitioners are the Choctaw and Chickasaw nations of Indians, who are domestic, dependent nations, recognized as distinct political communities, with acknowledged territorial limits under various treaties with the United States. Under the guaranties of these treaties they occupy defined districts in the Indian Territory. The Choctaws number, according to the Report of the Commissioner of Indian Affairs for 1895, as many as 17,819 persons, and the Chickasaws number 6,000 souls. These figures include colored persons of African descent living with each tribe. By the census of 1890 there were 4,500 colored persons among the Choctaws, and 3,700 persons of the same color residing among the Chickasaws. These colored persons form a part of the inhabitants of those nations. (Census Bulletin of 1890, vol. 25.)

The defendants are the United States and the Wichita and affiliated bands of red men. The Wichitas in 1891 numbered 175 persons, but by later reports they do not exceed 153 souls. The affiliated bands are the Wacos, Towaconies, Caddos, Ionis, Keechies, and Delawares, with apparently a few Comanches. These affiliates in 1891 numbered about 885 persons, and are the remnants of tribes which either originally belonged in Louisiana or Texas, or wandered there a number of years ago. Since 1845 their history is substantially the same as that of the Wichitas, whose wanderings they have shared, and with whom they have made various more or less temporary settlements, and along with whom they were placed on the present Wichita Reservation in 1868. (Rep. Comr. Ind. Affs., Vol. I, 352; 1892, p. 386; 1893, p. 702; 1894, p. 576.)

The case arises out of an agreement entered into between the United States and the defendant Indians, June 4, 1891, at Anadarko, in the Indian Territory, under which the Wichita and affiliated bands ceded and relinquished to the United States all their claim, title, and interest in and to a certain tract of country within the leased district mentioned, and the United States stipulated to allot out of said tract lands in severalty to the said Indians.

The agreement also provided for opening the residue of the lands to white settlement.

The premises are described in the first article of the agreement as follows:

"Commencing at the point in the middle of the main channel of the Washita River where the ninety-eighth meridian of west longitude crosses the same; thence up the middle of the main channel of said river to the line of 98° 40′ west longitude; thence on said line of 98° 40′ due north to the middle of the channel of the main Canadian River; thence down the middle of said main Canadian River to where it crosses the ninety-eighth meridian; thence due south to the place of beginning."

847 When the agreement was promulgated the Choctaw and Chickasaw nations claimed that notwithstanding an alleged cession of the land by them to the United States the land was held in trust by the United States for them. The Wichitas and affiliated bands denied this claim and asserted an exclusive interest in themselves. The Executive Department of the Government also denied the claim of the Choctaws and Chickasaws. The provisions of the agreement were subsequently embodied in the following language in an act approved March 2, 1895, to wit:

"(a) Said agreement of June 4, 1891, is, by said act of March 2, 189
"accepted, ratified, and confirmed," as provided in said act.

"(b) There should be allotted to each and every member of the Wichi
and affiliated bands of Indians in the Indian Territory, native an
adopted, 160 acres of land, one-half thereof to be allotted in grazin
lands; the allotments to be selected within ninety days from the ratifi
tion by Congress of said agreement of June 4, 1891; the titles to th
land taken under such allotments to be held in trust for twenty-fiv
years, in the manner and to the extent provided for in the act of Congre
approved February 8, 1887. (24 Stats., 388.)

"(c) Whenever the lands acquired under said agreement of June
1891, shall, by operation of law or proclamation of the President, b
open to settlement, they shall be disposed of under the general provisio
of the homestead and town-site laws of the United States, provided tha
in addition to the land-office fees prescribed by the statute, the entryma
shall pay $1.25 an acre for the land entered at the time of submittin
final proof; and that all such entries, where the entryman has reside
upon and improved the land by him entered, in good faith, for a perio
of fourteen months, may be commuted to cash upon the payment of $1.2
per acre. Sections 16 and 36 and 13 and 33 in each township shall n
be subject to entry, but reserved—sections 16 and 36 for the use of co
mon schools, and sections 13 and 33 for university, agricultural colleg
normal school, and public buildings of the Territory and future State
Oklahoma.

"(d) As fast as the lands open for settlement under the act are sol
the money received from such sales shall be deposited in the Treasur
subject to the judgment of the court in the suit provided for in said a
less a reservation of not exceeding $15,000 for a designated purpose."

The petition alleges that the claimants are Indian tribes recognize
and dealt with as such according to the policies which the Governmen
has pursued in regard to the rights of such tribes, and that, at and pri
to October 18, 1820, the Choctaw Nation of Indians was the possesso
of certain lands east of the Mississippi River in the States of Mississip
and Alabama, which, by the first article of a treaty of that date betwe
the United States and the said nation, they ceded to the United State
and in consideration of said cession, and in part satisfaction therefor, th
United States ceded to the Choctaw Nation the tract of country describ
in the second article of said treaty, including, among other lands, thos
described in the petition. By the fourth article of said treaty the Unite
States stipulated that the boundaries of said cession to the Choctaw
should remain without alteration until the period at which said natio
should become so civilized and enlightened as to be made citizens of th
United States, and that Congress should lay out a limited portion o
parcel of such land for the benefit of each family or individual in th
nation (7 Stats., 211).

That the treaty of 1866 was agreed to by the petitioners and thei
representatives on the faith of the assurances that said lands were bein
acquired by the United States for the special and specific purpose of set
tling Indians thereon, and upon no other trust or purpose; and that th
cession in article three was subject to the said trust and condition, an
subject to the reservation and equity in favor of claimants that if sai

lands embraced by said cession should cease to be occupied by
848 Indian tribes and become divested of said trust and part of the absolute public domain of the United States open to occupation and entry under the land laws thereof, then the equity of the claimants should attach; that claimants have during the years since then failed to make any effectual objections to said treaty because of their then and continuing belief that said equity was in substance secured to the claimants by the provisions of said treaty as made; that the repudiation of said equity and trust in favor of claimants would operate as a fraud against them.

Claimants further show that the affiliated bands are fractions of certain ancient tribes; that the Wichita and affiliated bands have no right to or interest in the proceeds of the disposition and sale of said lands; that as between the United States and claimants, by reason of treaty obligations, it is beyond the competency of the United States, as against the grants and provisions of said treaties, to grant unto the Wichita and affiliated bands any title or interest in the lands in controversy or in the proceeds thereof, except the right of occupancy contemplated by the fifth proposition submitted to the Indians for their consideration in the negotiations which resulted in the treaty of 1866.

The prayer of the bill is that the court will pass its decree in favor of the claimants, decreeing that they are in law and equity entitled to the proceeds of the sale of all lands here in controversy (as to which proceeds it is provided in the said act that the same shall be deposited in the Treasury subject to the judgment of the court in this suit), and also are entitled to the just and full value of all lands which shall be allotted and reserved under the provisions of the said act and of the agreement which by said act is accepted, ratified, and confirmed, as therein provided, as such value shall be ascertained under an accounting made under the order and direction of this court.

The answer of the defendant Indians denies that the United States legally ceded the lands described in the petition to the Choctaw Nation, for the reason, as the defendants aver, that the United States possessed no title to the same, the aboriginal title of the Wichita defendants not having been extinguished at the time of the cession. They deny that the Quapaw tribe, from whom the United States derived title, possessed or that the United States received from that tribe any title to the lands west of the extreme eastern portion of what is now the Indian Territory, the said Quapaw Indians never having occupied said lands, being settlers of comparatively recent date upon the portion of the said cession contained in the present State of Arkansas, whither they had come from their former habitat east of the Mississippi.

That the United States had no authority of law to convey by patent or otherwise the lands which attempted to convey to the Choctaw Nation the title stipulated for in the second article of the treaty of September 27, 1830, because the Indian title had not been extinguished when the United States attempted to make the said conveyance.

The defendant Indians deny that the purchase of the lands involved in this suit was made subject to the trust and for the purpose of setting apart the lands embraced in said cession for the friendly tribes then in Kansas and elsewhere, except in so far as by the language used in said

treaty it was announced as the policy of the Government and understo
by the petitioners to cancel any shadow of title on their part
849 and to said lands that the same might be employed fully a
wholly by these defendants and other friendly tribes of India
to whom the Government had theretofore, or subsequently might, righ
fully grant it, after extinguishing the Indian title as required by law.

Specific grounds for the claims of the defendant Indians to the la
are set forth in the answer, as follows: That the pristine habitats of t
defendant Indians (except the Delawares) were in Louisiana, Arkans
Texas, Indian Territory, and Oklahoma. The similarity of the langua
spoken by them has led ethnologists to class them together as the Cadd
lingual family. The Siouan family, with the Quapaws as its southe
representative, lived northeast, the boundary between the two famili
following the watershed between the Red and Arkansas River system
The Caddo tribe occupied the eastern portion of Texas and weste
Arkansas and Louisiana. By a treaty with the United States made
1835 (7 Stats., 470), which, by reference, is made a part of the answe
the Caddo tribe ceded to the United States what are now Miller Count
Ark., and essentially, Caddo Parish, La., and agreed to leave the Unit
States forever. They retired into Texas, not then a portion of the Unit
States, and were residing there when that Republic was annexed to t
Union. Their right to be there was recognized by the United States
the treaty of 1846, made with the Caddos and other Indians (9 Stat
844), which treaty, by reference, is made a part of the answer, where
the signatory tribes were declared to be under the protection of t
United States.

About one-half of the Caddos remained in northern Texas until 187
when they were brought into the Indian Territory under an agreeme
made in that year at Fort Arbuckle. The other half of the tribe, on t
breaking out of the Mexican war, went to live on Caddo Creek, in th
Choctaw Nation, where they remained until moved, with the others,
their present location, in 1859.

It is further alleged that the Wichita tribe have ever lived along th
Red River, their habitat for more than 150 years having been west an
south of the Washita River, and hence west to the one hundredth degr
of west longitude.

That on August 24, 1835, the United States entered into a treaty wit
the Comanches and Wichitas in which the right claimed by them w
fully recognized by all the signatories, which treaty, by reference, is mad
a part of the answer (7 Stats., 474).

The Wichita and affiliated bands of Indians pray:

(1) That the petition of the claimants herein may be dismissed.

(2) That this court will decree that these defendants, in law and i
equity, are entitled to all the proceeds of the sale of all the lands at issu
and pass a decree that from time to time, as the said sales are made an
the proceeds thereof deposited in the Treasury, as provided by the act o
March 2, 1895, the same may be paid to these defendants.

(3) And for such other and further relief as shall seem proper.

The answer of the United States admits the allegations contained i
the first nine sections of the petition except as to the last paragraph o
the ninth section, which allegation is denied. The allegations containe

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in the last ten sections of the petition are denied except as to the first two paragraphs of the nineteenth section.

870 The allegations contained in the answer of the defendant Indians are denied in so far as they assert that the defendant Indians, or any of them, had any right of occupancy within the district between Canadian and Red rivers and the ninety-eighth and one hundredth meridians of west longitude prior to 1859, and in so far as they assert that the said Indians were promised or given in 1859 more than 155,240 acres within the said district, and in so far as they assert that the agreement of October 19, 1872, was executed without authority and under duress.

The Attorney-General prays as follows:

1. That the petition of the claimants be dismissed.

2. That the court will decree that the Wichita and affiliated bands of Indians are entitled to so much land in the present Wichita Reservation as may be allotted to them under Article IV of the agreement of June 4, 1891.

3. That no decree be made in favor of the Wichita and affiliated bands of Indians for the proceeds of the sales of unallotted or surplus lands in the said Wichita Reservation, unless it shall be also decreed that the said Wichita and affiliated bands of Indians shall execute to the United States a release and quitclaim of all right, title, interest, and claim of any nature whatsoever in, to, or for any lands outside of the limits of the said Wichita Reservation.

4. That the court will decree that unless such release and quitclaim be executed as aforesaid, the proceeds of the sales of unallotted or surplus lands in the said Wichita Reservation shall be and remain the exclusive property of the United States.

Departing from the usual practice of the court, we have made no findings of ultimate fact. The case is one of equity jurisdiction, and the rules relating to findings of fact in the nature of a special verdict have no application where on appeal the facts and the law may be reviewed as in equity cases appealed from courts of the United States other than the Court of Claims.

In a claim where the jurisdiction was conferred on this court to determine the amount, if any, justly due from the United States to the Western Cherokees, findings of ultimate fact were held to be not in the province of this court because of the intention of the jurisdictional act to have adjusted the rights, legal and equitable, of both the parties.

Commenting upon this case on appeal, Mr. Chief Justice Fuller, for the Supreme Court, said that the case would be considered and determined there upon an examination of the entire evidence, because the language of the act of Congress was manifestly used with the intention that equity powers should be exercised in the disposition of the case by this court. (United States v. Old Settlers, 148 U. S. R., 464.)

The present suit comes under the rule stated by the foregoing authority as well as by that laid down in Harvey v. The United States (105 U. S. R., 671).

An analysis of the evidence shows that the claims of the respective parties are rested—

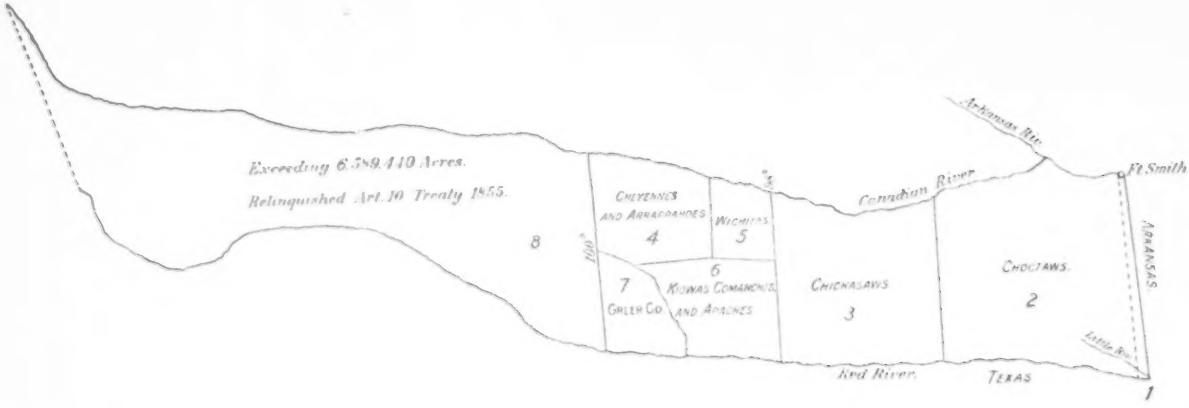
(1) As to the Choctaw and Chickasaw nations: Upon contracts and rights growing out of treaty agreements with the United States.

(2) As to the Wichita Indians: (a) Upon rights of ancient possession commencing before the Louisiana purchase and extending to the
851 use of the land as aboriginal occupants down to and past the time of the treaty between the United States and the Quapaw tribe in 1818; (b) upon the recognition alleged to be contained in the treaty of 1835 between the said Wichitas and the United States confirmatory of their first possession; (c) upon their removal from Texas in 1859 to the leased lands; and (d) upon rights acquired to the lands under an alleged agreement in 1872 with the Commissioner of Indian Affairs on behalf of the United States, and which agreement was never formally ratified. This claim applies not only to the lands in suit, but to all of the leased district.

(3) As to the affiliated bands: Upon the interest acquired in the Wichita title of occupancy and whatever other rights they had acquired July 1, 1859, under an agreement at Fort Arbuckle, in the Chickasaw country.

(4) As to the United States: Upon the ninth article of the treaty of 1855 and the third article of the treaty of April 28, 1866, entered into between the claimant nations and the United States, under which it is claimed the United States reacquired whatever rights the Choctaw Nation had obtained under preceding treaty stipulations from the United States.

Following is a diagram of the land in dispute, and of the land incidentally involved in the controversy, including also the land originally granted by treaty to the Choctaws; then granted to Spain by the United States and relinquished as to any claim on it by the Choctaws in 1855



852 Tracts 1 to 8, inclusive. Claimed to have been conveyed to Choctaws, 1820, by U. S. Claim admitted except as to tract No. 8.
Tract 8. Choctaw land ceded to Spain by U. S. without Choctaw consent, 1821.
Tract 1. Re-ceded to U. S. by Choctaws 1825, now in the State of Arkansas.
Tract 3. Set apart for Chickasaws by Choctaws, 1837. (4,650,935 acres.)
Tract 8. Relinquished to U. S. by Choctaws, 1855. (Exceeds 6,589,440 acres.)
Tracts 4, 5, 6, and 7. Compose land leased to U. S. by Choctaws and Chickasaws in 1855. Choctaws and Chickasaws retaining full right of settlement thereon.
Tracts 4, 5, 6, and 7. Ceded to U. S. in trust (as claimed) by and for other Indians. (Art. 3, 1866.) (7,713,239 acres.)
Tract 4. Assigned to Cheyennes and Arapahoes by Ex. order Aug. 10, 1869, and freed from trust limitation by purchase March 3, 1891. (2,489,159 acres.)
Tract 5. Lands occupied by Wichitas by Executive permission, and now in litigation in Court of Claims. (Case No. 18832.) (743,610.)
Tract 6. Lands "set apart" for use of Kiowas, Comanches, and Apaches, Oct. 21, 1867. Art. 2. (2,968,893 acres.)
Tract 7. Greer County. A portion of leased district not assigned to Indians. (1,511,958 acres.)

853 Inasmuch as, by the contentions of some of the parties, a large part of this case is made to rest upon rights resulting from aboriginal occupation of the country in dispute, it is well to consider briefly the nature of Indian tenures and determine whether the occupancy claims of those now asserting the same have anything in them to supersede the titles acquired by those who contend that all aboriginal claims have been extinguished.

Under the agreement which originated the suit the defendant Indians reserved the right to prefer against the Government any and every claim they might believe they had, save and except any claim to the tract of country described in the first article of that agreement. (Art. IV, Agreement of 1891.) The act of 1895, ratifying the agreement of 1891 and conferring the jurisdiction, also provided for the claims of all the parties to be fully considered and determined, and under this the defendant Indians assert that the Quapaws, from whom the United States obtained an Indian title of occupation, possessed no such title, but allege the Wichitas did, in which the affiliate tribes came ultimately to share. Thus, this claim of the defendant Indians underlies everything else in the case if, being sustained, it is made to operate on the land itself and not merely treated as a claim for compensation for land appropriated by the Government and ceded to others. The matter, then, of the prior occupation of the tract of country at issue and the claims founded thereon by alleged recognition of this occupation will first be considered.

Rights following discovery of lands in this country were first treated by European nations above the possessory claims of the aborigines. Vattel declared that the unsettled habitations of Indians were such they could not be legal possessors of the soil. The discoverers, however, came to concede the rights of occupants, and the Indians in possession were permitted to retain their original natural rights as the undisputed possessors of the soil, subject to such conditions as were imposed by those making the discoveries. Discovery gave title to the country and power to grant the soil, subject to the Indian right of occupancy. But the Indians were not permitted to grant title to the lands occupied by them, their right being merely that of occupancy and not of ownership.

Early in our history the character of Indian holding was defined substantially as outlined. The United States "unequivocally acceded" to the broad rule by which its civilized inhabitants held the country, and it was not doubted that either the General Government or the several States acquired a clear title to all the lands within the boundary lines described in the treaty of peace between England and the United States, subject only to the Indian right of occupancy; and the exclusive power to extinguish the right was thus vested in that Government which might constitutionally exercise it. (Johnson v. McIntosh, 8 Wheat., 543.)

The general principles announced were followed by cases which declared that Indian possession or occupation must be respected until they chose to make a cession of their lands to the Government, or made an authorized sale to individuals or abandoned the possession. Their occupation was considered with reference to their habits and modes of life, and consequently their hunting grounds were declared to be as much in their actual possession as the cleared fields of the whites. When their

rights became extinct as the lands were abandoned or sold, the grants could be made by the Government unincumbered of the right of occupancy. (Mitchell v. United States, 9 Pet., 711–746; rk v. Smith, 13 Pet., 195.)

The Choctaw claimants allege that these decisions apply to the aborigi- rights of occupancy existing in Indians generally, without reference those rights existing in one tribe independently of the right of any er tribe to the same tract of country; and, aside from this, they say e claim of the defendant Indians to the land in dispute can in no way nflict with that of the Choctaws and Chickasaws to the proceeds of the les provided for in the act of March 2, 1895, so long as tribal organi- tion should exist in the particular tribe in possession or until they ould sell.

The consequences of an abandonment of the occupancy would appear have been the subject of consideration when the court, in Cherokee ation v. Georgia (5 Pet., 1, 17), said, in referring to the Indian occupa- on: "They occupy a territory to which we assert a title independent of eir will, which must take effect in point of possession when their right f possession ceases." And again, in United States v. Cook (19 Wall., 91, 593): "The possession, when abandoned by the Indians, attaches self to the fee without further grant."

After these announcements another case referring to the power of the Government over the Indian title was considered by the Supreme Court, nd the rule declared in United States v. Cook was quoted with approval. Said Mr. Justice Field: "It is to be presumed the United States would e governed by such considerations of justice as would control a Chris- ian people in their treatment of an ignorant and dependent race; * * * the propriety or justice of their action toward the Indians with respect to their lands is a question of governmental policy;" but the power of the United States to transfer the fee was never denied. Beecher v. Wetherby, 95 U. S. R., 517–526.)

More or less cloudiness respecting all titles based on Indian occupa- tion no doubt existed in our early dealings with the tribes, and the uncer- tainty of occupancy claims must have been greatly augmented as the tribe asserting a possessory right was small in number or roving in habit. But the principles adopted by all departments of the Government in the premises relate to the aboriginal rights of the separate tribes as they were asserted and ascertained. Differences of language, custom, and tradition generally separated the different bands, and the occupation of particular country marked these differences of speech and habit and largely gov- erned those who dealt with the tribes in fixing the bounds of their respective habitations.

Boundaries may have been in numerous instances poorly defined, but some general boundary lines must have existed to the places of abode or hunting grounds claimed to justify any specific claim of title by virtue of occupation.

The history of the Indian race shows that some of the tribes had recog- nized places of abode with defined hunting grounds, while other tribes had none and made no pretenses to ownership of territory at all. Some of the warlike bands depredated extensively, and were not infrequently the scourge of the whites, but of the other tribes as well, while others

wandered from place to place with no apparent desire for permanent homes and with no special aim to gratify but their nomadic instincts.

855 In all cases there must have been actual use or occupancy and not mere constructive or desultory possession; some mastery of a tribe over the soil to the exclusion of others, or the joint possession of two or more tribes such as gave to each something of a fixed habitation or use of the land as hunting ground to establish a title by occupancy.

Occupation in its usual sense is where a person exercises physical control over land. (2 Rapalje and Lawrence, Law Dict., 893.)

The absolute nature of the political and territorial rights of Indians was stated by a learned commentator to have been denied by our colonial ancestors only so far as Indian nations had formed themselves into regular organized governments, within reasonable and definite limits, necessary for the hunter state. (3 Kent's Com., 387.)

This states the case restrictively in view of our actual dealings with tribes claiming as occupants of territory, but there must have been in all cases tribal organizations at least and subjection of land to the will and control to form the basis of any valid claim of occupation by virtue of more ancient discovery and use on the part of Indians claiming as occupants.

The first question, then, is whether any of the Indian defendants actually occupied the land in suit, in the sense of an Indian occupation, at the time of the Quapaw cession to the United States in 1818. Except as any occupation at other times may throw light upon their claim of possession as of the time of that cession, it does not become material to inquire whether any of the defendant tribes were in possession or not, but in this view the entire matter of possession will be examined.

The Wichitas claim an unextinguished title to the whole reservation in suit, besides the right of permanent settlement thereon under the agreement which placed them there in 1859. These double claims are not consistent, and so much in conflict, apparently, they can not both stand. Rights by virtue of prior occupation, if established with all the consequences claimed for them, would supersede the agreement which conferred privileges upon the other bands along with the Wichitas independent of occupancy claims of one of the tribes going upon the land under the agreement. Having acquiesced, when placed upon the land, to the admission of the affiliates to what is now asserted to be exclusive territory, the Wichitas can not have a decree by which the United States must by any possibility make other provision for the affiliated bands, except upon the clearest evidence of original right, and unless the circumstances originating the later right are not such as to operate upon the Wichitas as an estoppel.

If the Wichitas are entitled to the premises, by virtue of prior occupation, the agreement which permanently settled them there must of course be held ineffective and insufficient to meet the full equities of their case.

Resting their claim of prior occupation upon traditions and the writings of travelers and historians, it can not be denied that some things have been shown well calculated to throw a cloud not only upon the extent of the Quapaw occupation at the time of that cession to the United States, but also to leave room for doubt as to who really did

ccupy the disputed territory. It remains to be seen whether the doubts attending the claim now asserted have been removed.

536 The nature and necessity of the case, and the evident intent of the jurisdictional act to have the court consider all the testimony necessary to aid in the determination of the case, has left us no alternative but to carefully examine everything offered; and where doubts have arisen respecting the relevancy or competency of evidence we have not hesitated to give the parties the benefit of the doubt in the spirit suggested by the broad and liberal terms of the statute.

Title by occupation is asserted to the Great Prairie west of the Cross Timbers to the western limits of the United States. This covers an immense scope of country in Texas and all the territory between the Red River on the south and the Canadian and its North Fork, or the Cimarron and the Arkansas on the north, as well as the country at 95° on the east to the 100th meridian on the west. Not only the reservation, but the entire leased district is repudiated as a geographical entity by the Wichitas, but that district is used by them as a convenient form of designating, not their pristine home, but only a portion of it. As they deny the validity of its original setting apart, they say its boundaries should not be used as specially designating their early home.

The Cross Timbers are a growth of small timber, two long narrow strips between the ninety-sixth and ninety-ninth meridians, extending parallel to each other from the Indian Territory southward to central Texas. (33 Amer. Jour. of Science, 3d ser., 291.) High on the dividing ridge between Red River and the False Washita there is a range of hills, the southwestern portion of which extends to about the one hundredth degree of longitude. These are generally called the Wichita Mountains. South of the Canadian, a branch of the Cross Timbers projects off westward for 100 miles, then inclines northwest beyond the North Fork, and ultimately ceases in the great sandy plains. (Gregg's Commerce of the Prairies, 1842.) This woodland is from 5 to 30 miles wide, and from the Arkansas River runs in a southwesterly direction to the Brazos, some 400 miles. (Marcy's Rep., 1852.)

The country to which title is really asserted by the Wichitas is the whole of the Great Prairie, which includes the "Staked Plains," the general level of whose surface is broken only by the Wichita Mountains. These plains are bounded on the west by the mountains of New Mexico and Colorado, while to the north and south there are no natural boundaries nearer than the Arkansas and the Pecos. On the east the claim would cut into the country of the Creeks and Cherokees, as well as the claimants' country.

It is not within our province to determine claims beyond the immediate reservation in suit, but as this claim goes to the whole prairie, and the evidence to sustain an occupation is the same for all and nearly inseparable, we will examine the issues as presented.

The extent of the country claimed is not the only remarkable feature of the Wichita contention. They say they were a pastoral and peaceful people. We know they wandered from place to place with great frequency, and that even in the eighteenth century they were few in number. History does not attribute to them any strength and vigor as a tribe, or any characteristics denoting aggressiveness or prowess. It is

difficult to see how such a body of people should possess either the inclination or the ability to assert or maintain dominion over so
857 much country in the presence of so many more warlike tribes who, in great numbers, inhabited the same region and roamed over it to supply their wants by force where other means should fail.

That the archæology of the western prairie is associated with the history of the Wichita Indians is testimony of value in support of a claim by occupation by those asserting it, but this testimony with respect to the country in issue is impaired by the use of the same name in designating streams in other sections of country. The name Wichita, or Washita, applies to certain streams in Louisiana, Arkansas, Texas, and the Indian Territory alike. The Washita River of Arkansas and Louisiana was believed to rise near the source of the Arkansas. (Senex's map, 1710; Le Page du Pratz, vol. 1, p. 152, 1758.) It is inferable that the name Fausse Ouachita (False Washita), given on the early maps to the Washita River of the Indian Territory, grew out of the error disclosed by Senex's map. The value of the testimony is again impaired by the want of proof showing when the Wichita name was impressed upon the country and by whom. Wichita, in the State of Kansas, took its name from the temporary settlement of the tribe there during the war between the States. It does not appear whether white men named the Wichita Mountains or whether the Wichitas undertook to do so.

The word "Wichita" is said to be Osage for "moving about," "migrating." (Amer. Antiquarian, xiii, p. 251.) As a tribe the Wichitas were not savage and warlike like the Comanches and Kiowas, whose tendencies were generally asserted as occasion offered; nor yet gentle and passive as the Shawnees and Delawares, who had permanent homes as long as they could maintain them. The Wichita women cultivated the ground as opportunity and settlement at any one place long enough permitted, but the men, in their later history, had horses and hunted on the plains and roamed over the country much of the time. The tribe built round, grass-covered huts when stationary, tilling the soil, but changed their location every few years, and official reports leave but little room to doubt that for years before they were taken to the present reservation they were marauders and horse thieves. Wandering from place to place for subsistence, they can not be said, from the time they first came into notice until prevented from moving about, to be other than a nomadic people, and by their roving tendencies and the conditions as they existed before they were placed on their present reservation must their claim to any part of the Great Prairie be measured.

The Wichita tribe are called in their own language Kitikitish; by the Spaniards, Taovayase; by the French, Ouachita and Panis Piqués (tattooed Pawnees), and when used on maps and in reports, narratives, and histories the names Wichita, Witchita, Towiache, Tahawayase, Toweash, Toyash, Towish, Taoviase, Taouayache, Ouichita, Ouachita, Ouasita, Ousita, Wachita, Washetaw, and Panis Piques designate the same tribe or band.

In the classification of the Caddoan groups the tribe has a place, while to the Siouan lingual family ethnologists have assigned the Quapaw and Osage tribes. (Seventh Annual Rep. Bu. Eth.) This is contradictory of their Osage derivative, but we will not stop to discuss this, as the

858 Wichita synonym may have come from their enemies. The connection of the Wichitas with the Caddoan family is thought by their counsel to be a matter of considerable importance, but why it is so does not clearly appear. Even if the two bands were of common origin, we fail to see the bearing of this upon the Wichita claim to country two hundred miles above any known place of occupation of the Caddos nearest the leased district. The Caddos themselves never had any title to any part of the leased district or pretended that they ever had. It is admitted that they resided in the Brazos River country in Texas, whence they migrated from southwestern Arkansas, northwestern Louisiana, and northeastern Texas in the early part of the present century. There is nothing substantial to show that they ever saw the immediate country in dispute or that the Wichitas ever saw it until 1859. The fact that ethnologists have classed the Wichitas with the Caddos can not strengthen the claim of the former to the disputed territory merely because the country inhabited by the Caddoan family was separated from that occupied by the Siouan family. The evidence does not establish to our satisfaction that the boundary line of the Caddoan groups of Indians ran close to the Canadian west of the ninety-eighth meridian or included in the Caddo country all but a small portion of the leased district. That it is mere speculation to attempt to accurately fix this boundary line close to the Canadian west of the ninety-eighth meridian is found in the admission of the Wichitas that it is "an entirely possible line."

In 1682 the Wichitas do not seem to have been known to white men. History is silent and tradition gives no account of them before 1688. They are mentioned by Tonty, the Italian explorer, as being in that year along with the Natchitoches. This would put them in what is now known as the site of the town of Natchitoches, in the State of Louisiana. The early maps and authorities generally show the Natchitoches to have lived in Louisiana in the vicinity stated, and the village of the Wichitas is placed in that neighborhood by many maps of the eighteenth century.

Tonty does not state where the Quasitas actually dwelt, his narrative not fixing a precise location because of the incidental references to them. But he does speak of the chiefs of the Quasitas and Capichis meeting him, along with those of the Natchitoches, and he explicitly says that the three tribes constituted one people. (Discouvertes en Amérique, Paris, 1697, p. 319; Rélation de la Louisiane, Amsterdam, 1720, p. 196.)

Historians tell us that in 1700 or thereabouts the northern part of Louisiana contained a tribe of Indians called by the French "Ouichita," who gave their name to the river. In an account of a journey of St. Denys and Bienville in 1699 it appears that, after having proceeded to the village of the Wachita, where was found but five huts, it seemed to those travelers that the Indians of that name had mostly removed to the Natchitoches. (Martin's Hist. of Louisiana, 102.) It is admitted that the connection of the "Ouichita" with the Wichita is "undoubted," but insisted that about this time there was a severance of the tribe.

The time of this severance is conceded to be problematical, but thought those who represent that part now recognized as the survivors to be too ancient to become a matter of tradition. At all events, it is said that in 1700 the Wichitas moved to the village of the Taensas, on the Mississippi, where the parish of that name now is, and afterwards went west

859 among the Caddos, who occupied the country in the bend of the Red River, in Louisiana, Arkansas, and Texas; that the number of these Wichitas was small, having no tribal connection with the Indians of the same name living on the plains; that in 1719 there was a large village of Wichita and kindred Indians on one of the branches of the Arkansas River in the eastern portion of the Indian Territory and that in 1737 these same Indians, after having lived some years on the Canadian, moved to the southward.

Bienville's journal of a voyage from the Taensas (4 Margry, 432 et seq.) shows that at a certain place that explorer found Wichitas who had abandoned their village to go and live with the Taensas. The argument is that Bienville found but few Wichitas then leaving their Louisiana home forever. Le Page du Pratz, who wrote about 1758, states that the Ouachitas went westward, and Dunbar, who visited the Washita River in 1804, reported that the tribe of that name, formerly dwelling on its banks, was said to have gone "into the great plains to the westward." (Am. State Papers, Ind. Affs., vol. 1, p. 732; Jefferys's History of the French Dominions in North and South America, London, 1761, vol. 1, p. 165.) The removal mentioned by Du Pratz could not have been the same referred to by Bienville, there being nothing in his journal to sustain this argument. Bienville does not state how many Wichitas he met on their way to the Taensas country, nor that no other parties were on their way or had arrived. For aught that he says, there is no reason to suppose that Bienville met all of the tribe who were then in Louisiana, and still less reason for limiting their number. There may have been hundreds of them for anything that appears in his narative. It is reasonably certain that the migration referred to by him was not the same as that mentioned by Du Pratz.

The relation of La Harpe and the discovery by him of certain Indian nations situated in the West is also relied upon as historical evidence in support of this contention of early location of the Wichitas. (6 Margry, 249 et seq.) La Harpe says that he advanced to the mouth of the Ouachita River, 14 leagues from the Mississippi, and in his further explorations found on the Canadian, in 1719, certain Wichitas, who, according to the contention of counsel, must have separated from the Louisiana Wichitas some time before.

Counsel for the Wichitas say that there is no reference to a western migration of the Wichitas from Louisiana but of the handful who merged in the Nachitoches in 1700, and that in 1719 La Harpe met those of the same blood on the Cimarron.

It is reasonably certain that Bienville and Du Pratz do not refer to the same migration, and neither of them make any definite statement as to the numbers of the Wichitas. Neither of them suggest a merger in another tribe. According to La Harpe, the Touacaras (Towakonies) were the leading tribe on the Canadian (or, as counsel for the Wichitas suggest, the Cimarron), as he invariably refers to the village as that of the Touacaras, and states that the chief of that tribe was the most respected of all, enjoying certain special privileges which in a savage community would assuredly not have been granted except to a chief whose followers were numerous enough to compel respect and obedience. At the same time La Harpe states that the Teajas were the most numer-

ous nation. He further says that the chief of the Touacaras and
860 six other chiefs of nations met him, and he mentions seven distinct tribal names, counting the names Toayas, Quirasquiris, and Onsita as referring to one tribe. Thus, it appears, he met seven tribes in all, to wit: Tawakoni, Southern Comanche, Kiowa, Apache, Caddo, Waco, Adäi, and Wichita. Leaving out the Wichitas, every one of the other tribes belonged at that time in Texas, except the Caddos, who belonged in Louisiana, near the Texas border. The evidence does not show that any of the tribes remained long in or near the locality where La Harpe met them, or that they were in the course of the migration to Texas from some other point. It is probable that their stay, which was only during the summer season, lasted but a few seasons, after which they returned to the region where they properly belonged. If the Wichitas did not return to Louisiana and move westward along the Red River, but went southwestwardly from the Canadian to the Wichita Mountains and other parts of the leased district, there is no explanation as to what became of the other tribes or why they did not continue their association with the Wichitas in such a movement to the leased district.

It is again contended by the Wichitas that they were the same as the Panioussas mentioned in an anonymous memoir in Margry, and that they lived on the Upper Arkansas. This anonymous report is taken from the early French records, and it speaks of the nations who lived or who were established on the course of the Red River from the mouth to points within the knowledge of men, and includes one tribe called "Touacana" or Panioussas, and these last are placed near the river of the Otouys. The latter name is thought by counsel for the Wichitas to be synonymous with the Otoes, who were, according to the maps of that time, on the Upper Arkansas. Inasmuch as there was a tribe named Sotouys on the Lower Arkansas, near its mouth (written by De l'Isle "Sitouis," by La Harpe "Zautouys," and by Ross and D'Anville "Sotouis"), it is more probable than otherwise that the location of the tribe described as Touacanna, or Panioussas, was not near the Otoes.

We have examined the contentions relating to the origin of the Wichitas, their early traditions, associations, and movements, not alone for the interesting discussion which goes back to the twilight of Indian history west of the Mississippi, but for the earnest argument for the Wichitas in support of their claim, and the information which we have supposed might lead to the establishment of something certain for them. But for anything that appears on the maps or in the statements of the early explorers we have nothing sufficiently definite or certain to lead to the conclusion that the Wichitas had such an early aboriginal claim as they state. Close examination of the early French and Spanish records, the statements of travelers, and the accounts of historians suggest the most reasonable conclusion to be that the French found the Wichitas originally in Louisiana; that for a short time the tribe, or a portion of it, passed the summer season on the Canadian in company with portions of other southern tribes, but that ultimately they were driven westward to the Red River by the Chickasaws, after which time they were found among the Indians whom the Spaniards met and dealt with in Texas. Their descendants are now asserting the title.

There is less of conjecture in this conclusion than in any other, and it is really not inconsistent with the opinions which the Wichitas
861 themselves have on this branch of their case. They admit an early habitation in Louisiana, and do not satisfactorily prove such a severance of the tribe and departure of a part of the land from the country south of Red River into the country of which the leased district forms a part as to enable us to say with any degree of accuracy or precision that there was an actual permanent division, or that any of them ever laid claim or had a right to claim that country which forms the subject-matter of this suit. The learned counsel for these respondents, recognizing this, say they are "content for the purposes of this cause to base possessory title on the history of the Wichitas from the middle of the eighteenth century." (Rec., 491.) If they are content to do so, then the court is also content to reject such statements as explorers have offered concerning the location of the Wichitas outside of what is now Louisiana and Texas, since they are at best, as they appear to us, conjectural for the most part and too indefinite to found upon them the substantial rights claimed upon their authority.

The following is a summary of evidence upon which, for the purposes of this case, the Wichita claim of occupancy to the "Great Prairie west of the Cross Timbers to the western limits of the United States" (which includes the leased district) is mainly rested, to wit:

In 1759 the account of Parilla's defeat shows their residence at "San Teodoro." (Record, 485 and 601.)

This name of San Teodoro was given, in 1778, to one of two Wichita villages visited by Mesieres, one each side of Red River, west of the Cross Timbers. (Rec., 485–6 and 492.)

In 1788 Fragoso, in a journey down Red River, visited and remained six days at the Wichita villages just west of the Cross Timbers. (Rec., 486 and 603.)

In 1805 Sibley reported two villages of the Wichitas on the south bank of Red River, 340 miles in a direct line west from Natchitoches, 30 miles by land west of the False Washita. (Rec., 486.)

In 1805 Dublanc, governor of Natchitoches, reports (in Robin, 1807) that the Wichitas occupied two villages, one each side of Red River, 80 leagues above the Caddos, who were in northwestern Louisiana. (Rec., 1042 and 1339.)

The statement accompanying the letter of J. C. Carr (which, without the statement, is printed in the Record at page 1039), dated at Natchitoches, in 1819, and purporting to include the Indians of Texas, does not include the Wichitas.

The Melish map of 1818 gives a Wichita village south of Red River, below the mouth of the Blue River. Long's map of 1823 shows a Wichita village north of Red River, at the mouth of the Blue, the note stating that it was abandoned in 1810. Melish got his information from Darby. (Rec., 600.) Darby, in his work on Louisiana, at pages 28-9 gives the Wichita villages east of the Blue, but on page 51 says that the Washita flows into the Red 70 miles above the Blue and a short distance below the Wichita towns.

The statement of Uts-tuts-kins, then a child, states that the villages on Red River were deserted for one at the mouth of Cache Creek, and

that there they had smallpox, which we know was in 1816. (Rec., 1340, and Senate Ex. Doc.

862 Morse's report (Census, 1890, Indians, p. 11) states that the Wichitas lived on Red River, 1,200 miles above its mouth, in 1822.

In 1830 A. P. Chotean reported that there was a Wichita village 250 miles from Fort Gibson. (Rec., 1086 and 1342.)

In 1832 Albert Pike was informed that the Wichitas had always lived in the country around the Wichita Mountains. (Senate Ex. Doc. 13, supra, p. 29.)

In 1834 Colonel Dodge visited the Wichita village on the North Fork of Red River, near the mouths of Elm Fork and Elk Creek and Mount Webster. He was informed that the tribe formerly lived farther south, and that their oldest men were born there. (Rec., 1087 and 1343.)

The report of the Texas Boundary Commission (pp. 64 and 67) gives a statement of a Waco chief, Shot Arm, who was an old man in 1858, that he was born at a village on the North Fork of Red River, at Mount Webster. (Rec., 487.)

Catlin's map of Indian localities in 1833 shows a Waco village on one side of Red River and a Wichita village on the other. (Census, 1890, volume on Indians, p. 45.)

Wichita Indians informed James Mooney that they moved from North Fork to Fort Sill in the summer of 1834. (Rec., U. S. v. Tex., 676.)

Xiastor, a Wichita Indian, claims to have been born at Fort Sill in 1837. (Rec., 610.)

General Bee visited the Wichita village on Cache Creek, near Fort Sill, in 1843. (Rec., 503.)

Captain Marcy, in 1849, reported that the Wichitas lived between the Red and Washita rivers. (Rec., 1331.)

In 1852 Captain Marcy was at the remains of the Wichita village at Fort Sill, which had been deserted two years before because, as Albert Pike tells us, of inundation and attacks of hostile Indians. (Rec., 503, 1097, and 1341.)

In 1852 Captain Marcy found the Wichitas living at Rush Springs, west of the Cross Timbers, and at the head of Rush Creek. Both of the above locations are shown on the map accompanying Marcy's report. (Rec., 269 and 604.)

In 1858 the Wichitas deserted the village at Rush Springs and took refuge at Fort Arbuckle. (Rec., 504.)

In 1852 Marcy reported that the Wichitas were entitled to the country around the Wichita Mountains by the right of occupancy and possession. (Rec., 604.)

In 1853 Horace Capron reported that the Wichitas were entitled to the country north to the Canadian and around the Wichita Mountains, it being originally their country, they never having relinquished the same. (Rec., 1098 and 1343.)

In 1859 Rector reported that the Wichitas had lived in the country north to the Canadian River from a time beyond anyone's memory. (Rec., 607.)

Beginning with the account of an expedition in 1759, it appears that Parilla's defeat was at a place which shows the residence of the Wichitas

to have been at San Teodoro, one of the Towaiache villages on the main Red River, west of the Cross Timbers. The statement respecting the expedition and its results is taken from Hubert H. Bancroft,
863 work (vol. 5), and is quoted in the record of the case of United States v. Texas (162 U. S., 733), from which it substantially appears that plans for a campaign were made by a conference of officers at Bexar in January, 1759. An army of 500 soldiers and volunteers, with a large force of Apache auxiliaries, started in August under the command of Parilla. After marching some 150 leagues they surprised a rancheria, killing 55 of the foe and making many captives. They then advanced against the towns of the Taovaiases and, in the region of what was later called San Teodoro, found 6,000 Indians, of different tribes, in a strongly fortified position, many of them armed with muskets, and displaying a French flag. The savages did not wait to be attacked, but made a sortie in force and the Spaniards fled in a panic. This affair occurred south of the Red River, thus showing that Taovaiases were located, not north, but south of the Red River in 1759. If the Wichitas were located where they were when Mesierres found them in 1778, their location in 1759 was east of the ninety-eighth meridian. Hence, even if the Wichitas had been north of the Red River, and not south of it, they would not have been in the leased district.

A Spanish officer named De Messieres made a report in 1778, which also appears in the record in United States v. Texas (890–891), in which he substantially stated that from the Brazos River, where the Tuacans dwelt, to the stream that waters the Taoviase village there was seen on the right a forest justly called by the natives the "Big Forest" (Cross Timbers), and that the Taoviase nation was divided into two villages, one situated north of the Rio Bermejo (Red River), or River of Nachitoches, and the other opposite; the former village was composed of 57 houses and the latter of 123 houses. There is nothing in the entire statement to show that the Taoviases occupied any land north of the river beyond the place of the few houses mentioned, and nothing tending to show that they occupied or claimed any part of the leased district. More than three-fourths of the tribe was on the south bank of the river. The double village was east of the ninety-eighth meridian, and that meridian constitutes the eastern boundary of the leased district. The Cross Timbers reach the Red River at 97° 15′ west longitude, as shown by the maps of Austin, 1830; Hunt and Randel, 1839; Kennedy, 1841, and Tanner, 1846. South of the Red River their western border is east of 97° 30′.

It does not appear that De Mesieres traveled north of the Red River at all, and on the whole statement, with other evidence, we conclude that the proofs relating to the Parilla expedition and De Mesieres' visit locate the Wichitas east of the ninety-eighth meridian and not in the Wichita Mountains. The ninety-eighth meridian being the boundary of the leased district on the east, the Wichitas could not have been in the leased district.

The narrative of another expedition about that time (1778) shows that Fragoso started eastward from Santa Fé June 24, 1788. According to his account, he left the Wichita village July 26 and traveled that day 7 leagues in eleven hours. On the next day he traveled twelve hours, but

does not state the distance made. On the 28th, after traveling 4 leagues, he reached the Cross Timbers. The average hourly distance made during the twenty-two days prior to his arrival at the Wichita village, 864 for which the distances are stated, was four-fifths of a mile. This would make the distance from the Wichita village to the Cross Timbers about 21 leagues, or 63 miles. From the Wichita village to the Cross Timbers by the course of Fragoso's journey the village would appear to be east of the ninety-eighth meridian. The course of the Cross Timbers south of the river is southeast. The more directly south Fragoso went from the Wichita village to the Cross Timbers the nearer was that village to the meridian of the Cross Timbers. The contention that Fragoso did not travel along the Red River all the distance from the Wichita village to the Cross Timbers, but traveled southward a part of the time, finds its answer in the statement that the more southerly his course during this journey of two and one-half days the nearer was the Wichita village to the meridian of 97° 15′ and the farther was that village east of the meridian of 98°, which formed the eastern boundary of the leased district. And it does not appear that Fragoso traveled along the river the whole 63 miles of his journey, as the river in that region often flows in a southerly and sometimes in a southwesterly direction.

In his report to the Secretary of War (Amer. State Papers, vol. 1, Ind. Affairs, 721 et seq.), Dr. John Sibley said in 1805 that the Panis or Towiaches lived on the south bank of the Red River, by the course of the river upward of 800 miles above Nachitoches, and by land about 340 miles; that they had two towns near together, the lower town, where the chief lived, being called Witcheta and the other Towa-a-hach. From the mouth of this river, known as the False Washita, through the prairie to the main branch (Canadian) of the Arkensa was a three days' journey, some 60 or 70 miles in a straight line. From this mouth of the river to the Panis or Towiache towns the distance was about 30 miles by land and double that distance by water, where the river is nearly a mile wide. The mouth of the False Washita is about 4 miles west of the meridian of 96° 30′, according to maps of the Land Office of 1891 and 1897 and by the Indian Office map of 1896. According to Sibley, then, the Wichitas, Towiaches, and Tawakonies were south of the Red River in Texas in 1805, some fifty-odd miles east of the ninety-eighth meridian.

According to the statement made by Robin, 1807 (vol. 3, p. 3), concerning the report of Governor Dublanc, the distance from the Natchitoches (then located near the present site of the town of that name in Louisiana) to the villages of the Taouayaches and Ouiteitas was 185 leagues by water. The distance from Natchitoches by land to the sharp bend of the Red River in the State of Arkansas is in a straight line 132 miles. The distance in a right line from that bend to the ninety-seventh meridian is 181 miles. If the distance by this crooked river from the Natchitoches to the sharp bend of the Red River and from that bend to the ninety-seventh meridian was three-fourths greater than the distance by the right lines connecting those three points, the whole distance by water from the Natchitoches to the ninety-seventh meridian was about 548 miles; that is to say, only a few miles less than Robin's estimated distance from the Natchitoches to the villages of the Taouyaches and

Quiteitas. There is apparent harmony, therefore, between Dr. Sibley and M. Robin in the location of these villages east of the ninety-eighth meridian.

865 An attempt was made in 1806 by Captain Sparks and others to visit the "Pawnee Piquas," but they were prevented by the Spaniards, who must have had jurisdiction over the land, as Sibley had reported. (Long's Expedition, vol. 2, pp. 302–314.)

Writing from data collected in 1804–1810, and advising the establishment of a garrison and factory on the Red River at the present northern boundary of Louisiana, Stoddard said that the Indians, who were then obliged to trade at Natchitoches, would be equally well, and perhaps better, supplied at the proposed factory, and that in addition to this the Pawnees (who were a different people from those of the same name on the river Platte) and Ietans and some other Indians high up on Red River and to the southwest of it might also obtain supplies from the whites, and thereby be prevailed on to break their connection with the Spaniards. Stoddard described these Pawnees as pursuing no other game than the buffalo, stating, however, that they attended to agriculture and raised more than double the quantity of corn and vegetables necessary for their own consumption, and furnished their neighbors with the surplus in exchange for peltries, so that their trade, then engrossed by the Spaniards, was deemed of considerable value. (Sketches of Louisiana, 455.) According to this statement the Wichitas would seem to have lived in the villages referred to by Sibley.

In his Views of Louisiana, published in 1817 (p. 88), Brackenridge states that the "Tawakenoes or Panis" live "south of the Red River, above the Caddoques." Inasmuch as the Tawakenoes are also referred to in their proper place by that writer, we conclude that this is a misprint for "Towiaches or Panis."

The maps of Melish of 1816, 1818, and 1820 show a "Panee" village on the south side of the Red River, about 96° 15′ west longitude. The Wichitas say, however, that the Melish maps are inaccurate. Since the interpretation given those maps by the Supreme Court in United States v. Texas (162 U. S. R., 1), their inaccuracy as to the location of the meridians, astronomically considered, is established. No doubt the longitude of some of the localities is incorrect, and the Panee village is placed farther east by the Melish map than it should have been, according to Sibley's report; but the fact is probably established that the village was on the south side of Red River, but somewhat farther west.

Humboldt's map, published in 1811 from data obtained in 1803, shows "Indiens Taouaiazes" about latitude 36° 30′ north, longitude 103° west. This indicates a Mexican belief that the Tawehash (Wichitas) were one of the nomad tribes of the Great Prairie.

Pike's map of the internal provinces of New Spain, based on information received by him in 1807, shows "Indiens Yawayes" south of the Red River. This probably is an engraver's error for "Tawayes"—that is, Tawehash.

The Wichitas, as Panis or as Paniassa, are located in Louisiana by De l'Isle's map of 1703, by Moll's map of 1715, by Bernard's map of 1720, and by De l'Isle map of 1722; by De l'Isle's map of 1741 on the south bank of the Arkansas River, in the Choctaw Nation; on Popple's map

of 1741 in Louisiana; but by his maps of 1735 and 1737 they are located "north of the Arkansas River." Mitchell's map of 1766 and Le Rouge's map of 1778 place them north of the Arkansas.

866 Referring to the Morse report, which states that the Wichitas lived on Red River 1,200 miles above its mouth in 1822 (Census, 1890, Indians, p. 11), Clark's census of Indian tribes, dated November 4, 1816, contains a statement that the Cadeau and Pancas Pique (Caddo and Wichita) tribes reside "on Red River near the south boundary line of the Missouri Territory." Major Long's report, February 20, 1821, states that the Osages had recently driven the Pawneys of Red River from their place of residence and compelled them to seek an abode upon the head waters of the "Brassis" or Colorado. (II Long's Exp., sec. 21, p. 366.) The Pawneys of Red River to whom he refers can only mean the Wichitas, because they are frequently referred to in Long's expedition under the name of Pawnee Piquas, whom Long confidently expected to find on the river which he thought to be the Red, but which proved to be the Canadian. Long's statement apparently explains the removal from the villages referred to by Sibley in 1805.

When the Chouteau treaty of 1830 was before the Senate, inquiry was made of Chouteau, who was a well-known trader, and who had traveled in the region of the Arkansas and Red rivers, as to the proximity of wild Indians to the Choctaw country. He replied that the nearest band of wild or savage Indians was the Paw-nis Pick, whose village was about 250 miles from Fort Gibson. He stated that they raised corn and vegetables in small quantities, and that other rambling tribes were to be found. These were the Padocas, Aitans, Huitsitas, Hichas, and Cousadas. Their range extended south. The Comanches, Arapahoes, Cayouwas, and other bands were reported as rambling from the head waters of the Great Platte, Arkansas, and Red rivers in the direction to San Antonio and parallel to that chain of the Rocky Mountains running south. This statement shows not merely that a distinction was made at that day between the roving Huitsitas (Wichitas) and the more sedentary Pawnee Picks (Panis Piques), but that the latter did not live within the country granted to the Choctaws in 1820 and regranted in 1830. A distance of about 250 miles from Fort Gibson indicates that the village was somewhere on the Red River, near the mouth of the Big Wichita, or perhaps on the Big Wichita, where Austin's map of Texas (published the year Chouteau's statement was made) shows a Towiash village. Wherever the village referred to by Chouteau was, it could not have been within the bounds of the country granted to the Choctaws, for Chouteau not only knew what those bounds were, they having been established ten years before, but he actually knew the country from personal examination, and it can not be doubted that if the Pawnee Picks, as he called them, or any other Indians had had a settlement within that country he would both have known the fact and would have reported it.

In the record are certain Indian statements which largely rest upon the traditions of the Wichitas. The most important of these and carrying the greatest weight in establishing an occupancy of the country are the statements of two aged members of the tribe named Ut-tuts-kins and Es-quetch-chee (Old Man) and of Niastor, chief of the Towaconies.

(Sen. Ex. Doc. 13, 48th Cong., 1st sess., 32 et seq.) These are supplemented by the opinions and information of Horace Capron, set forth in his report as special Indian agent for Texas, which in itself is a strong statement of the Wichita case.

867 Respecting these traditions, there is such an apparent want of any certain knowledge in the persons from whom the information is professed to have been derived, and such absolute want of competent knowledge on the part of the declarants of those material things to which they profess to speak, the statements do not address themselves to the court as possessing any great value, even if admissible as traditionary evidence under the principle relating to ancient boundaries. Neither the circumstances under which the testimony seems to have been derived nor the number and situation of the witnesses entitle the traditions to that credit usually attached to such evidence, weak though it may be at best.

Things transmitted from one generation to another in the lapse of time must necessarily come to be surrounded with much of error and untruth. Such is the case with matters of oral communication not covered by the written memorials of intelligent people. What, then, must be said of the traditions of a race of rude red people, whose reason was weak and imagination strong; who worshiped the sun and danced in the light of the moon to music made from the skin of snakes; of the children of Nature, whose superstitions led them to revel in stories of witchcraft and evil spirits, and whose powerful imaginations, fed by these superstitions, originated the weird tales respecting their origin and lineage?

With limited ideas of their ancestry, knowing but little of places whence their fathers came, an experienced traveler has testified that they could only speak upon the subject in general terms, and that in some instances, where their term of residence in a place was of short duration, they would either lose or conceal their knowledge of a country whence their ancestors came and assert that the Master of Life had created and planted their fathers on the site where they, their posterity, then lived. (II Long's Expedition, 371.)

The pages of fiction contain nothing more fanciful than the story of Pushmataha, founder of a dynasty and the white man's friend, who, according to the story of his race, sprang full-armed from the splinters of a pine tree as it was shivered by the lightning's flash. And yet this mythology of a race whose descendants are now before us as claimants finds its counterpart in the Wichita tale that their ancestors sprang from the rock of the Wichita Mountains. As proof, the one story is of no greater value than the other, and the Wichita theory of their origin is of no more importance than the early story of the Choctaws, who, according to Gayarre, ascribed their origin to Kamschatka.

But it is said that Albert Pike, when on the Red River in 1832, heard of a tribe called Pawnee Picts, living in villages in the vicinity of some mountains north of Red River, cultivating the soil near by, and who had, as his informants expressed it, "lived there always." That the Indians had lived in the neighborhood of Red River for a long time, though at different points, is substantially true, and the expression must be taken as meaning probably no more than that. If the expression meant the site of the particular village, it was not true, and the statement can not be relied upon even as evidence that the Wichitas had lived there a long time.

Ski-sa-ro-ka, "an intelligent Toyash," told Dodge "that their nation lived formerly south," a statement which is opposed to the theory of a migration from the north. (Am. State Papers, Mil. Affs., vol. 5, 381.)

868 Albert Pike was the commissioner of the Confederate States who made treaties with the reserve Comanches and other small tribes. Among these were the Wichitas, first known to him as the Ta-wai-hash, and so called in the treaty. This was in August, 1861, at which time the Wichitas, or Ta-wai-hash, preferred a claim to him for compensation "for the country south of the Wichita Mountains, on Cache and Clear creeks," and the treaty agreed that their claim for compensation should be considered and examined, and that which might be found just and right should be paid to them. Pike expressed the opinion, in his letter to the Secretary of the Interior, that when the United States sold their country to the Choctaws and Chickasaws an indisputable claim, by long-continued occupancy and possession and partial cultivation, to the country west of Cache Creek, between the mountains and Red River, to an indefinite distance west, existed in the Wichitas, for which they ought in common justice and honesty to be paid.

But General Pike possessed no personal knowledge that the Wichitas had occupied the leased district from time immemorial, and there are no circumstances which lend to his opinion the force of testimony. His letter was merely the expression of an opinion resulting from a promise to repeat in writing what, preceding the date of his letter (July 12, 1882), he had said to the Secretary of the Interior in regard to the Wichita tribe. The statements made by him were not under oath, and, while their integrity is not questioned as far as his knowledge went, the most that can be said for them is that the Wichitas preferred a claim to him for a small part of the leased district now known as the southern end of the Kiowa and Comanche Reservation. The claim then made does not include the present Wichita Reservation.

Catlin's North American Indians shows the Pawnee Picts and Wicos on the Red River about latitude 35° 10′ N., longitude 103° 15′ W. This would be in the "panhandle" of Texas. (Rec., U. S. v. Texas, supra, 171.)

General Bee found a Wichita village on Cache Creek about 30 miles from its mouth. (Rec., U. S. v. Texas, pp. 1219, 1221, 1225.) It does not appear how many of the tribe lived on Cache Creek, nor how long they had lived there. The proofs are numerous that the residence of the Wichitas was in Texas between 1836 and 1850.

The following maps show a Towiash village on the Big Wichita west of the ninety-ninth meridian, to wit: Lee's map of Texas, 1836, reproduced in United States v. Texas, 184; Austin's map of Texas, 1837, reproduced in United States v. Texas, 292; Hunt & Randel's map of Texas, 1839, reproduced in United States v. Texas, 168 and 1016; Arrowsmith's map in Kennedy's Texas, 1841; De Cordova's map of Texas, 1849. This shows a "Tanawash" village west of the one hundredth meridian and a village on the south side of Red River just above the mouth of the Big Wichita. Young's map, published by Mitchell in 1838 (U. S. v. Texas, 292), shows a Towiash village north of the Red River, west of the one hundredth meridian, omitting the Big Wichita altogether; but this map was admitted by Kennedy to be inaccurate, who reproduced it

in his book merely to show the location of land grants. (Kennedy's Texas, vol. 1, p. 336.)

Besides the maps there are other proofs of the residence of the Wichitas in Texas. In alliance with the Wacos were the Pawnee Picts,
869 or Towcashes, residing on the Red River, sometimes on the side of the United States and sometimes in Texas. (Kennedy's Texas, 1841, p. 349.)

Referring to the Towaccanies and Towcash, who were said to resemble each other and are often found associated in the same village, it is stated that they live high up on the Colorado, above San Saba. (Moore's Description of Texas, 1844, p. 32.)

The Whacoes, Tawacanies, Towcash, Aynies, San Pedros, Nabanchies, Nacadochuts, and Hitchies are small tribes, fragments of tribes long resident in Texas and properly belong to it. Originally, Hitchies excepted, they are of the Caddo stock, being offsetts from that family. (Statement of David G. Burnet, August, 1847; 1 Schoolcraft's Information Respecting Indian Tribes, 239.) A Wichita chief called Tawak-o-nee Jim testified in United States v. Texas (Rec., 364) that he was born in 1843 in Texas, and came to Fort Sill when about 10 years old, and that the Wichitas used to live at the To-wako-nee Hills in Texas.

Two years before the annexation of Texas the Republic of that name established a bureau of Indian affairs. All the country west of a line drawn from Red River to the Rio Grande through the five posts established was Indian country, from which settlers were to be excluded except by special permission. (Act Jan. 14, 1843, Tex. Laws, 19.) On the annexation of Texas, in 1845, jurisdiction over the Indians therein passed to the United States, and the Commissioner of Indian Affairs made a report declaring it to be necessary to organize a branch of that department within the boundaries of the territory acquired. He says: "Owing to the unsettled condition of the Comanches, Witchetaws, and other tribes who lead a wandering life, * * * sometimes being in Texas and sometimes in the United States, it has been impossible to extend over them the eye of this department. They have neither belonged hitherto to the one Government nor the other." (Sen. Doc. No. 1, 29th Cong., 1st sess., p. 454.) In 1846 the habits of the Indians within the Texas border were reported as so uncivilized and so predatory and wandering that correctness as to their number could not be relied upon. This report shows that the Towcash, Waco, Towagany, and Wachita Indians were on the Red River above the Cross Timbers, with their villages on both sides and near each other. (Pitchlynn's report, Jan. 19, 1846, to the Commissioner of Indian Affairs.) In March, 1846, commissioners met chiefs of the Comanche, Mescalero (Lipan), Tawakoni, Waco, Keechi, Kickapoo, Wichita, and "Towcash" tribes at Comanche Peak and held a talk with them in regard to a cessation of hostilities and horse stealing. This resulted in the treaty of May 15, 1846 (9 Stats., 844). This treaty was made in Texas, with Texas tribes, because of the sovereignty which the United States had acquired over them by the annexation. (We fail to see anything in the suggestion of the counsel for the Wichitas that the United States failed to carry out this treaty.) In 1847 a special Indian agent for Texas went to the village of the Wacos, Witchetas, Tah-wah-ca-roos, and Keechies

and compelled the return of stolen horses. This village was situated on the Wichita River, and the six tribes met there were reported as making corn to considerable extent. (Sen. Ex. Doc. No. 1, 30th Cong., 1st sess., 894–896.) If this statement be true the main Wichita village was on the Wichita River (i. e., the Big Wichita, where the village is
870 shown on De Cordova's map), while another village was near the Brazos. If the Wichitas lived on Cache Creek near Mount Scott at that time, it could only have been but a few families. In 1849 the Chickasaw agent reported the Wichitas and other Texas Indians as living in the western part of the Chickasaw country. (Ex. Doc., 31st Cong., 1st sess.) Catlett's report of that year (ibid., 968) stated, however, that they lived upon the Brazos head of the Trinity and upon the Big Wichita. Agent Neighbors, to all intents and purposes, confirms this report, and consequently before they could have been living in the Chickasaw country.

In 1851 the Wichitas * * * together with about eighty warriors from the Caddoes, Wacoes, and Keechies, together with a small proportion of women and children, were reported to have "within the last two years left Texas, and are now inhabiting the Wichita Mountains beyond Red River." (Sen. Ex. Doc. No. 1, 31st Cong., 1st sess., 523.) This is the first evidence of a residence north of Red River aside from the fraction of a village shown on that side many years before.

In 1851 the Indian agent reported the Wichita population as not over 500 souls. Two years later he reported the total population to be 314. (Sen. Ex. Doc. No. 60, 34th Cong., 1st sess., p. 37.) On July 19, 1852, Marcy passed the deserted Wichita village on Cache Creek, and three days later he came upon the new Waco and Wichita villages on Rush Creek, built after the removal from Texas reported by the agent in 1851. Marcy was probably ignorant of the fact that the Wichitas, or most of them, had been living in Texas. His report must be taken for what it is worth. He was of opinion that their claim to the country around the Wichita Mountains was guaranteed to them by the right of occupancy and possession. (Sen. Ex. Doc. No. 54, 32d Cong., 2d sess., pp. 69, 72, 77.) We attach no value to his opinion.

No treaty of limits has ever been made with the Wichitas. If they were the substantial people in the early days they now claim to have been, the omission to treat with them is remarkable. If the United States did not favor the peaceful and friendly tribe having some permanent abode, it was not because there was any desire to establish friendly relations with wandering savages at the expense of those willing to aid the pioneer whites in civilizing the country.

During the times the French, Spanish, Mexican, and Texas governments had dominion over the tribe the Wichitas were not recognized as aboriginal possessors of the soil. Ignored for two centuries by the political departments of five governments, how can the judiciary now establish limits of territorial occupation for them without something more specific than what we have to tell where their limits begun and where they ended in that vast region known as the Great Prairie west of the Cross Timbers?

We find as a fact that, even if the Wichitas occupied any portion of the prairie, they did not do so alone. Their claim, then, can not be considered an exclusive claim. Prior to 1833 twenty-seven other tribes resided

between Red River and the Canadian. And some six years before
removal of the Wichitas to their present reservation the North
Comanches and Kiowas were reported as numbering 18,950, while
Southern Comanches were placed at 1,000 in number. (Report A
Supt. Howard, 1852.) Whatever their number in the eighte
871 century, these last three bands roamed over the prairies and
certainly as much prairie Indians as any others. They were
numerous than the Wichitas, and, making greater use of the prairie,
more entitled to be called prairie Indians.

Which of these tribes was first on the prairie does not clearly app
but as the entire region was used indiscriminately by the various ba
and all were there in common from time to time, one insignificant b
can not now be deemed to have held the only original occupation of
country.

The failure of the Wichitas is greater still to show an established oc
pancy ahead of others to the reservation in suit, in the sense of Ind
occupation, until a date comparatively recent. It is quite probable t
from time to time they passed over it while roaming over other parts
the country north of Red River, but it is doubtful if their claim to
reservation would ever have been given life but for the act of the G
ernment in quartering them upon it after the Choctaw lease of 1855.

From all that appears in their earlier history, we find that the Wichi
were inhabitants of the country now constituting the present State
Louisiana, whence they were driven by the Chickasaws into the Cad
Nation, which, about the middle of the eighteenth century, was in nor
western Louisiana and northeastern Texas. For years before the annex
ation of Texas they were as much the subjects of foreign control a
jurisdiction as one of the domestic tribes within the jurisdiction of t
United States.

The court would be lost in the realms of conjecture in attempting
reconcile the different theories of the origin of the Wichitas. One
their traditions places the main tribe on the Neosho River, in Kans
about 1781, from whence two bands left the main tribe, one taking up
residence in Texas and the other locating near the present town of Wich
in Kansas. Modern reports class them as Wacoes and Towaconies, an
virtually one people. The three tribes speak the same language, an
those Wichitas prosecuting the present claim presumably came out
Texas. The Wacoes and Towaconies lived there beyond the prairies, an
pretend to nothing in the way of an interest in the land except unde
recent agreement.

We deem it unnecessary to pursue the inquiries into this branch of th
case further. The main issues have been presented. The labyrinth o
detail, if fully stated, would but serve to encumber the record. Our con
clusion concerning the matter of occupation is that the Wichitas hav
not established such an occupancy of the land in suit at the time of it
acquirement by the United States as would support the customary India
title, or possession of such character that the United States can now rec
ognize or is under obligation to protect for purposes of compensation.

We are strengthened in this conclusion not alone by the fact of the
purchase of the land from others claiming to be inhabitants of the country
but by the reports of the agents of the United States and the action o

the executive and legislative departments of the Government thereunder; the subsequent sale of the country to the Choctaws in 1820 under the supposition that the rights of the aboriginal occupants had been extinguished; the confirmation of the sale to the Choctaws in 1830 as to the reservation in suit; the subsequent admission of the Chickasaws
872 to certain rights; the lease of the land in 1855; the agreement which in 1859 put the Wichitas and their affiliates on the land, and, finally, the failure of the Wichita defendants to assert any claim of prior occupation at the time of the agreement which admitted them to possession. Every presumption is against them as rightful inheritors of the country which the proofs have not overthrown. We therefore dismiss this part of their claim, remitting to further consideration the agreement which established them on the reservation and the extent of their rights measured by that agreement alone.

The Quapaw occupation need only be considered with reference to the extent of country occupied by them with relation to the territory ceded to the Choctaws.

It is entirely possible that the territory actually occupied by the Quapaws did not extend as far west as the cession would indicate, but we know that they were a tribe friendly to the whites who lived west of the Mississippi River, and that they asserted dominion over an extensive scope of country in Arkansas and beyond. Except when the Osages, with whom they were often at war, did not successfully dispute their sovereignty, they attempted to exercise dominion over all they claimed. The Osage feud and the varying chances of war probably diminished their right to some of the country as an exclusive claim, but that is a question foreign to this cause. According to Clark and Chouteau, the Osages and other governments considered all the property included in the Quapaw cession as belonging to that tribe. (Amer. State Pap., vol. 11, Ind. Affrs., 177.)

The cession discloses some doubt on its face as to the extent of their possessions, but is sufficiently certain to include the leased district. Certain Quapaw "claims" are mentioned in the cession, but they relate to "land east of the Mississippi and north of the Arkansas River," and these claims were transferred with country more certainly thought to be owned by the Quapaws. The country west of the Mississippi and south of the Arkansas included in the cession is referred to not as territory merely claimed by the Quapaws, but as territory which both parties accepted as Quapaw country without referring to it merely as country "claimed." As to this, the Government believed that the Quapaws were in unquestionable ownership, not only because that tribe was found in possession, asserting dominion, and using it as a part of their territory, but because others were not found on the land asserting claims or in position to assert any. These coincidences made up rights of occupancy by the tribes, unlike the paper muniments of title prevailing among civilized people.

The contention that the Quapaws never laid claim "of their own accord" to anything but a small tract of land, the boundaries of which bear much resemblance to the reservation retained by them, and that through the machinations of the whites they were led to claim more than they would have done of their own volition, is not proven. There is reason to believe that the treaty with the Osages, subsequent to the

Quapaw treaty, embracing a part of the same land, grew more out of the desire of the United States to keep the peace among the Indians than by any belief that the Osages had any real title to the country acquired in the cession from them, which had previously been included in the Quapaw cession. But this fact does not help the Wichitas. For, as between two tribes like the Osages and the Quapaws, who were willing to stay in a country and hunt over a large portion of contiguous territory and fight for the right to do so, it is not probable that a wandering band like the Wichitas, indigenous to no place and unwilling to contend with their more warlike neighbors, had any such equal claims.

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There is less reason to suppose that the United States in first treating with the Quapaws sought to extinguish their supposed or exaggerated claims to the country than to believe that by the subsequent treaty with the Osages the object was to extinguish their real claims to previously acquired possessions. Without something more tangible on the subject than that before us we must conclude that the Osage treaty, covering a part of the leased district, evidences the interest which that tribe was willing to quitclaim to the United States and the Government was willing to buy, rather than the transfer of any substantial right to the land acquired from the Quapaws.

What rights did the Wichitas acquire in these lands by virtue of the treaty of August 24, 1835? And did the United States and the Choctaw Nation acknowledge the Wichita title by occupancy to the Great Prairie which they are now estopped to deny? (7 Stats., 474.)

Texas at the time of that treaty had not been admitted to the Union and the territory covered by its terms lay anywhere between the United States and the settlements and hunting grounds of the Indians named in the treaty and the Republic of Mexico within the meaning of its third article; and covered all of the country north of Red River within the meaning of its fourth article, which are only material to notice in this connection.

It can not be determined from the proof precisely where this treaty was made, but it could not have been far from Red River. Its effect as a grant and an acknowledgment of a Wichita title by occupancy are material to consider.

The treaty of 1835 was the result of an expedition sent out by the United States to our western border under the command of Colonel Dodge. On July 22, 1834, Colonel Dodge made an address to the Toyash chiefs and warriors in which he stated that his party were the first American officers who had ever come to see the Pawnees, and that they had met as friends, not as enemies, to make peace; that the great American chiefs wished also to make peace between them and the Osages, who had been at war with the Pawnees, and to secure peace also between them and the Cherokees, Senecas, Delawares, Choctaws, and all other red men. It was shown to the Wichitas that the American officers had met a party of Comanches, with whom it was also desired they should be at peace. (Doc. 2, 23d Cong., 2d sess.) On the next day a similar address was made to the Comanches, but supplemented by a statement as follows:

"You say that the Indians over Red River are your enemies. They kill you when you meet. These are Mexican Indians and do not make treaties with our great father, the President. But he will protect you when you make peace with the Osages and other tribes that have been at war against you." (Doc. 2, 23d Cong., 2d sess., p. 83.)

Major-General Macomb, in giving an account of the expedition, says that Colonel Dodge held a council with the Comanches and
874 Pawnees (or Toyaslas), the Kiowas, and the deputation of Indians which accompanied him, amounting in all to about 2,000 persons, explaining the object of the expedition and that he was instrumental in bringing about a friendly intercourse between several hostile tribes. (Ibid., p. 44.)

The official report of the Secretary of War shows "that some of the western tribes of Indians roaming through the extensive prairies west of Arkansas and Missouri, particularly the Comanches and Kiowas, have for some years interrupted the peace of that quarter by predatory attacks upon our citizens, and upon the indigenous and emigrant Indians whom we are under obligations to protect. * * * The dragoons were ordered to establish permanent tranquillity; and if this should fail, to repel any hostile demonstrations which might be made. The object of the expedition was obtained without a single act of hostility." (Ibid., pp. 33, 34.)

The President informed Congress in his message of the movement "into the territory of the wandering and predatory tribes inhabiting the western frontier and living adjacent to the Mexican boundary, known principally by their attacks upon our own citizens and upon other Indians entitled to the protection of the United States," and that the object of peace had been effected. (Ibid., 17.)

The treaty accomplished, then, what was contemplated to be done. The preamble states that it was entered into "for the purpose of establishing perpetual peace and friendship between the United States and the Comanche and Wichita nations and their associated bands or tribes, and between those nations or tribes and the Cherokees, Muscogee, Choctaw, Osage, Seneca, and Quapaw nations or tribes of Indians." Whatever rights, then, recognized or given were incidental to the main object of peace, and the treaty was not one of limits or of cession.

The first and second articles provide for perpetual peace and forgiveness for past injuries.

Article 3 provides:

"There shall be a free and friendly intercourse between all the contracting parties hereto, and it is distinctly understood and agreed by the Comanche and Wichita nations, and their associated bands or tribes of Indians, that the citizens of the United States are freely permitted to pass and repass through their settlements or hunting grounds without molestation or injury on their way to any of the provinces of the Republic of Mexico, &c."

Article 4 provides:

"It is understood and agreed by all the nations or tribes of Indians, parties to this treaty, that each and all of the said nations or tribes have free permission to hunt and trap in the great prairie west of the Cross Timbers to the western limits of the United States."

Article 5 provides:

"The Comanche and Wichita nations, and their associated tribes or bands of Indians, severally agree and bind themselves to pay full value for any injury their people may do to the goods or other property of such traders as the President of the United States may place near to their settlements or hunting ground for the purpose of trading with them."

Article 6 provides:

The Comanche and Wichita nations, and their associated bands or tribes of Indians, agree that in the event of any of the red people belonging to the nations or tribes residing south of the Missouri River and west of the State of Missouri, not parties to this treaty, should visit their own towns or be found in their hunting grounds they will treat them with kindness and friendship and do no injury to them in any way whatever."

875 The treaty was not signed by any of the associated bands, and for this reason it is contended that they were not parties to the agreement. This is true as far as any obligations to or from the associated bands extended, but not true in the sense that the signatories did not recognize them to be in possession of such settlements and hunting ground on the way to the Republic of Mexico from the United States as were possessed by the others. In any event whatever rights were conceded to be in the Wichitas the same rights were also recognized to be partly in the Comanches, so that if the few hundred Wichitas in existence at that time had settlements and hunting grounds in the pathway of travel from the United States to Mexico, then numbers of Comanches had settlements and hunting grounds along the same route.

The contention that the Comanches were improperly joined because of the probability that they were in Texas can not be accepted in the face of the treaty which recognized the Comanches to be in the United States as well as in Mexico; and as Colonel Dodge found a large body of them not far from the border, as he did the Wichitas and the associated bands, and both Comanches and Wichitas treated for a common purpose, the Comanches can not be held to have been improperly joined. That all of the associated bands and Wichitas, as well as Comanches, roamed in one country about as much as in the other, and had been living in Mexico as well as in the United States, appears in the history of that time. They were all regarded as land pirates of the great West who depredated upon the Mexicans of the interior States and murdered our own people on the road from St. Louis to Santa Fe (Raines's report to Lewis Cass, Secretary of War, Mar. 11, 1836), and were on Red River, sometimes in the United States and sometimes in Texas, in alliance with the Wacos and the Caddos as far as the Pawnee Picts were concerned. (Rep. Tex. Commr. Ind. Affs., Nov. 3, 1838; Sen. Rep. 171, 30th Cong., 1st sess. 47; Kennedy's Texas, vol. 1, 349.) Fragments of tribes, separately considered and quite insignificant, include the Toweash, "long resident in Texas" and properly belonging to it. (Statement of the President of the Texas Republic, Aug. 20, 1847; 1 Schoolcraft, 239.)

Whatever presumptions arise from the recitals respecting the settlements of the border tribes, the references relating to such settlements apply to the year of the treaty. This was seventeen years after the extinguishment of the Quapaw title and ten years after the Osage quitclaim. And it does not appear when the border tribes established their

settlements or to what extent or where. The evidence leaves no room to doubt that whatever settlements the Comanches, Wichitas, and associated bands possessed they were either on the border or close to it, but when they got on the American side is not shown. Even if on the American side there is no proof showing any of the settlements on the immediate land in controversy. There is a gap in the history of the Wichitas from the time Sibley mentions them, in 1805, to the time Dodge visited them, in 1834. This the Wichitas admit (Rec., 1340), and the account they attempt to give of themselves in the meantime does not satisfactorily account for what they themselves admit.

Again, it is unreasonable to suppose that several thousand Choctaws would, for the sake of peace with a few hundred Wichitas, knowingly surrender large bodies of land which the larger tribe was very well
876 able to defend, and as neither the Choctaws nor the United States supposed the treaty referred to claims of any kind on the land, and the cession of territory was not the purpose of the treaty, neither the Choctaws nor the United States are estopped to deny the Wichita claim of prior occupation.

As the Choctaws and Creeks extended their occupation and improvements to the country acquired by them under grants from the Government the Comanches became dissatisfied. This led to a construction of the treaty of 1835 by the Indian Office. In 1837 instructions were given to the special Indian agent which, after calling his attention to the dissatisfaction of the Comanches, directed him to explain to that tribe the matter so that they might understand the United States had purchased the lands from the tribes possessing the occupant title and had guaranteed the exclusive right in the emigrant Indians. (Instructions to Agent Chouteau.)

The emigrant Indians included the Choctaws, and under the instructions Chouteau and another commissioner for the United States entered into a treaty on May 26, 1837, with the Kiowas, Katakas, and Towacoros. (7 Stats., 533.) This treaty was in effect a construction of the previous treaty of 1835. It was at least inconsistent with any cession in 1835 to the Wichitas or others, and at variance with the idea that the Government supposed in 1835 it was making any admission as to the title to these lands.

But if the treaty of 1835 be considered an admission of Wichita occupation, it must also be construed with that of 1837 as an admission of Osage, Quapaw, Seneca, Comanche, Muscogee, and Cherokee occupation. Neither treaty appears to us as an admission of title in favor of any tribe at the expense of the emigrant tribes who already owned the land under contracts, and who only agreed to share the privilege of hunting on the land with the nomads of the treaty to secure the peace and quiet designed by the Government in the first instance.

The joint claim of the defendant Indians to the lands leased is based upon an alleged agreement made with the United States at Fort Arbuckle on July 1, 1859. This supposed agreement is not made the foundation of the Wichita claim, but as confirming their more ancient title and admitting the affiliated bands to an interest in it.

Under apprehensions of an attack from the Comanche tribe, the Wichitas in a body had abandoned their village at Rush Creek and retreated

to Fort Arbuckle, in the Chickasaw country, in 1858. Under threats of extermination a number of other tribes had fled from Texas to the same vicinity.

By the treaty between the United States and the petitioners in 1855 certain territory was leased for settling thereon a large number of Indians, described as follows:

* * * "The Wichita and such other tribes or bands of Indians as the Government may desire to locate therein, excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas River, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas." (11 Stats., 613.)

That the defendant Indians were not to have exclusive occupation of the leased district, but only sufficient land for their actual occupancy, was contemplated, and that the Government intended to settle other tribes there is shown by the official history of the time. (Ind. Commr's
877 Reports, 1855, p. 473; 1856, pp. 566, 726; 1857, pp. 296, 549; 1858, pp. 354, 355–360, 526.)

Fifty thousand dollars was appropriated for the expense of collecting and establishing the southern Comanches, Wichitas, and certain other bands of Indians, on reservations to be located south of the Arkansas and west of the ninety-eighth degree of longitude. (Act of March 3, 1857, 11 Stats., 183.)

The tribes whose permanent ranges were immediately south of the Arkansas were the Comanches, Kiowas, and Apaches, with whom the United States had made a treaty on July 27, 1853, wherein they are described as "inhabiting the said (Indian) territory south of the Arkansas River." (10 Stats., 1013.) The authority to settle upon the leased district all Indians who properly belonged south of the Arkansas and east of New Mexico is clear, but when the district was first leased it was not intended to place upon it the greater number of affiliated bands, viz, the Anadahkos, Caddoes, Tawakonies, Wacoes, Tonkawas, and Penetethka Comanches, as they had but recently been placed on reservations in Texas, where they were doing fairly well, and the Texan hostility to them did not break out till the latter part of 1858. (Reports for 1855, H. Ex. Doc. No. 1, 34th Cong., 1st sess., pp. 330, 497–505.) These reservation Indians, however, were as much within the purport of the provision for the use of the leased district as other Texas Indians. While the Choctaws and Chickasaws retained the right to settle in the leased district, it does not appear that any of them actually did so.

Besides the language employed in the treaty of 1855 respecting the purposes for which the leased district was obtained, we find that the western end of the Choctaw country was to be opened to the permanent settlement of the Southern Comanches, Wichitaws, and such other Indians, within prescribed limits, as the United States might determine to locate therein. (Ind. Commr's Rept., Nov., 1855, p. 329.) The southern Comanches were nomadic savages, living in the central and southern part of western Texas, and numbered several thousand. The Penetethka Comanches were not of the same band. They numbered something under 300, in 1855, in Texas, where they had just been placed on a reservation. (Ibid., 498.)

On March 30, 1859, the Acting Commissioner of Indian Affairs instructed the superintendent within whose charge the leased district lay as follows:

"Fix upon a suitable location for the Wichitas, and make such examination of the country as will enable you to determine the proper places for locating and colonizing the Texas and other Indians which it is intended to place within that district. In carrying out this policy, the different bands, so far as they can not be united, are to be located upon distinct reservations, with circumscribed limits, containing only so much land as may be necessary for their actual occupancy and use. * * *

"So soon as it may be practicable and safe for the Wichitas to remove to their new location, you will require them to go there, giving them to understand that it is to be their permanent home. * * * The same understanding must be impressed upon the other Indians."

On September 20, 1859, the agent reported as follows:

"In pursuance of instructions from your office * * * I selected, in the month of June last, reserves on the Fausse Wachita River, near the old Kechai village, and about 40 miles northeast of the eastern extremity of the Wichita Mountains, in the river valley, on the
878 south side for the Comanches and other Indians from Texas, and on the north side, between the river and Sugar Tree Creeek, for the Delawares and Caddoes, heretofore affiliated with the Wichitas or Ta-wai-hash; and for the latter and the bands of Kechais affiliated with them, I selected a reserve on the Canadian, some 25 miles west of those on the Fausse Wachita." (Sec. of Interior's Rep., 1859, pp. 382–3, 533, 633.)

He further reported that, for reasons stated, he had included pasture lands in these reservations, making them much larger than was needed for cultivation. Their aggregate area was 154,240 acres.

Superintendent Rector, of the southern superintendency, primarily represented the United States in the council at Fort Arbuckle. Major Neighbors and Albert Pike were officially associated with them in behalf of the Government. It is conceded that contemporary correspondence concerning the agreement alleged to have been made there is silent on the subject of what promises were made to the Wichitas and others (Rec., 630), but it is claimed that the evidence given since then by those present proves the contentions of the answer respecting the confirmation of the more ancient title of the Wichitas.

We deem it unnecessary to review the occurrences between the agents of the United States and the defendant Indians which led to their removal. We find as a fact that the tribes assembled at Fort Arbuckle were told that the Government would give to them for their occupancy reservations then established, containing 154,240 acres, for farming and grazing purposes, and that they would be allowed to hunt, when permitted to leave the reservations for that purpose, on any land within the leased district not specifically assigned to other Indians.

The Indians who had fled from Texas got larger reservations by consenting to remove than the 12 square leagues they had while in Texas. These numbered three-fourths of the tribes present. The Wichitas and the remnants of other tribes, who constituted one-fourth of those present, then possessed the right to hunt and trap on the Great Prairie, but had been deprived of even that privilege to any appreciable extent by hostiles.

This right was surrendered when they consented to go on the new reservation, but nothing more. The Texas Indians surrendered nothing which they were then either able to enjoy or claiming the privilege of enjoying.

The agents of the United States made no treaty with these people in 1859. Evidently the Government considered treaties to be unnecessary. The want of them does not relieve the Government of its duty to make good its duly authorized promises; but no agreement, in point of fact, was made to give to the defendant Indians the leased land, and if any construction there was, those representing the United States were without authority to make such agreement. Nothing stated then could bind the United States with respect to the title to the reservation; still less could anything which occurred at Fort Arbuckle take from the Choctaws and Chickasaws rights reserved by them under the treaty of 1855 in the leased land.

A Government astronomer employed to locate the ninety-eighth and one hundredth meridians made a map of the leased district, writing across it the words "Leased country for Caddoes, Wichitas, Keechies." An army officer transmitted this map to the War Department with a letter alluding to the district as the "Wichita country." This is the origin of the name applied to the reservation in suit.

879 The defendant Indians fled to Kansas during the war, but returned apparently to the same reservations in 1867. (Ind. Commr.'s Rept., 1867, p. 23.) In the meantime, however, the Government had made a treaty with the Comanche and Kiowa Indians, October 18, 1865. (14 Stats., 717.) It was provided that a district bounded by the New Mexico line, a line from the southeast corner of New Mexico to the mouth of the North Fork, the Red River to the ninety-eighth meridian, that meridian to the Cimarron, that stream to the Kansas line, to the New Mexico line, "or such portion of the same as may hereafter from time to time be designated by the President for that purpose," should be "set apart for the absolute and undisturbed use and occupation of the tribes who are parties to this treaty and of such other friendly tribes as have heretofore resided within said limits, or as they may from time to time agree to admit among them." This district included the entire leased district; and ultimately the present Kiowa and Comanche Reservation was established within that district by the treaty of October 21, 1867. (15 Stats., 581.) The Cheyenne and Arapahoe Reservation, disposed of by the act of March 3, 1891 (26 Stats., 1022), was similarly carved out of the leased district by Executive order of August 10, 1869.

The title to Greer County was then in dispute between Texas and the United States. With the setting apart of the reservations above named the country covered in the present Wichita Reservation was left undisposed of and open.

An agreement between the Wichitas and the United States is offered in evidence as the only action of the Government looking to an extinguishment of the occupancy of the Wichitas of territory outside their present reservation to which that tribe was a party. This agreement appears to have been made October 19, 1872. (Sen. Ex. Doc. 13, 48th Cong., 1st sess.; Rec., 435.) The only importance claimed for it by the

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defendant Indians is that it first laid out the restricted bounds of the reservation in suit in which it was intended the Indian defendants should live.

The agreement purports to grant to the defendant Indians, for a home, the tract of country known as the Wichita Reservation in consideration of the cession by the Indians of all right, title, interest, or claim of any nature in and to any lands in Texas, Louisiana, Indian Territory, or elsewhere within the limits of the United States. It was made on the part of the Indians by members of the tribe, professedly without authority; and on the part of the United States by the Commissioner of Indian Affairs, also without authority, and was never recognized by Congress until the act of March 2, 1895, under which the rights of all the parties to this suit were to be ascertained. The agreement is therefore subject to the rights of the parties as ascertained by the courts.

The efforts to revive the agreement for any purpose is met at the outset by the absence of the claimants as parties to it and the fact that their rights can not be affected by it. Nor can the defendant Indians claim title to the reservation assigned and at the same time be heard to repudiate the agreement for what it takes from them. This they are attempting to do in asserting larger claims. If any trust of any character in the lands existed it would be inconsistent in the United States to say that the agreement assigned homes to Indians which now can be taken
880 from them by opening the lands to white settlement. The most that can be said for the agreement is that if valid for any purpose it became so for the assignment of homes to the tribes by the Indian Office, for which the tribes paid nothing, either in money or in land as the equivalent of money.

The questions in this case involving greater difficulty are: (1) The character of the estate conveyed by the Choctaw Nation to the United States by the treaty of 1855, and (2) in what respect the rights of the petitioners have been violated, if at all, and to what extent, and (3) upon what basis, if any, rights of the claimants have been violated shall the interests of all the parties be adjusted?

Certain subordinate matters are necessary to be examined to properly interpret the treaty claimed to be violated.

The Choctaws are an ancient race of red people whose early homes were east of the Mississippi River. The United States made their first treaty with them in 1786, by which certain aboriginal rights of the tribe as occupants of the soil were specially recognized. Thus, before the adoption of the Constitution, following the example of the discoverers of the continent, the United States began to recognize customary Indian rights in the Choctaws to lands occupied by them.

Before the Revolution the right to regulate trade with the Indians within the colonies was understood to belong to the prerogative of the Crown (Story on Const., sec. 1099), and Federal supervision and control of the tribes was conferred by the Constitution, which gave power to Congress "to regulate commerce with foreign nations and among the several States and with the Indian tribes." (Const., sec. 8, art. 3.) The first Indian-intercourse act was passed July 22, 1790, and was followed by the permanent act of 1802, which established Federal supervision over contracts for the extinguishment of Indian title to lands within the several States.

Difficulties were encountered in the enforcement of the intercourse laws, which resulted in the policy of removing the tribes from the white settlements and segregating Indians upon reservations. Exchanges of lands were accordingly made by treaty with the tribes, not merely because of duty to a dependent people, but also because any other course was incosistent with the public peace. The character of the titles obtained by the Indians under these treaties have never been questioned. The lands conveyed to the Indians were qualified as to the fee in more or less degree, while those given in exchange to the United States by the Indians generally conveyed whatever rights of occupancy the Indians had.

When the Louisiana territory was acquired Congress manifested its policy of removing Indians by authorizing the President to exchange for lands occupied by the tribes east of the Mississippi River the country owned by the United States lying west of the river, where the tribes would be free from the encroachments of the whites and under the general superintendency and protection of the Government. (Act March 26, 1804; 2 Stats., 283.)

In 1817 Mississippi was admitted to be a State in the Union, and some of the lands occupied by the Choctaws were wanted, and as the result a treaty was concluded between the United States and the Choctaw Nation October 18, 1820, in which the removal of the tribe was provided
881 for in part upon the assurance that the objects of the United States were grand and humane in the promotion of their civilization and their perpetuation as a nation.

In consideration of the cession to the United States by the first article of the treaty of the land therein mentioned, lying in Mississippi, by the Choctaws, the second article of the treaty "and in part satisfaction for the same" ceded to the Choctaw Nation a tract of country west of the Mississippi River situate between the Arkansas and Red rivers and bounded as follows:

"Beginning on the Arkansas River, where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian fork and up the same to its source; thence due south to the Red River; thence down Red River three miles below the mouth of Little River, which empties itself into Red River on the north side; thence a direct line to the beginning." (7 Stats., 211.)

By treaty of January 20, 1825 (7 Stats., 234), the eastern boundary line of the Choctaw Nation, as defined by the first treaty, which took some of those people west of the Mississippi, was modified by the retrocession to the United States of a fraction of the land first acquired in 1820 by the Choctaws from the United States. But no land was retroceded in this readjustment of boundary lines by the Choctaws from their possessions on the west. So, if by the treaty of 1820 the Choctaws acquired title to any territory beyond the 100th meridian, that title remained unimpaired so far as any agreement was concerned.

The defendants say that prior to the cession to the Choctaw Nation the land west of the one hundredth meridian had been ceded to Spain. This contention will be examined later, but for the present is noted to array the facts in consecutive order.

The treaty of 1820 did not satisfy the demand for Indian land, and the enactment of certain laws subjecting the Indian occupants to local

vernment caused the United States to take steps looking to the establ-
hment of the Choctaws on the reservation west of the Mississippi, which
sulted in another agreement under which assurances were given that
on the removal of the tribe they were to be free from the presence of
hite men.

By the treaty concluded September 27, 1830, called the treaty of Dance-
g Rabbit Creek, it was provided in the third article (7 Stats., 333) that
e Choctaw Nation should and did thereby cede to the United States the
ntire country they then owned and possessed east of the Mississippi
iver, and that they would remove as early as practicable; and that the
hoctaw Nation should and did surrender to the United States all the
emaining lands at that time owned by them in Mississippi. Under this
reaty the body of Choctaws removed from their possessions east of the
iver to the lands purchased and acquired by them west of the river under
he terms of the treaty of October 18, 1820, as modified in 1825, and as
he limits were defined in the treaty of Dancing Rabbit Creek. Thus
here was no cession of lands east of the Mississippi River for lands west
f that river by the treaty of 1830. The exchange made in 1820 left
he Choctaws with ten million acres of land, which, by the treaty of 1830,
he United States got for nothing.

The amount and sufficiency of the consideration received by the Choc-
aws for their possessions need not be considered. Whether the bargain
which dispossessed them of their early possessions and gave to
82 them other land was upon adequate consideration, and whether
their removal was forced upon them and how it was done, is no
art of our duty to consider. It is enough to say that the Choctaws had
ubstantial rights to barter; and in surrendering lands and agreeing to
move and carry out agreements the Choctaws furnished a sufficient con-
ideration for whatever contracts the Government entered into with them
respecting their new possessions. The treaty agreements had all the
ecessary elements of binding contracts. (Foster v. Neilson, 2 Pet., 314;
Head Money Cases, 102 U. S. R., 540.)

The reasons that prompted the Government to contract for the change
f domicile of the Choctaws and Chickasaws also moved the authorities
o treat with the Cherokees, the Creeks, and the Seminoles. These tribes
nd the petitioners together had their early homes in Tennessee, Georgia,
Alabama, and Mississippi. Seven treaties were made with the Cherokees
between 1785 and 1835, and nine treaties were made with the Creeks,
beginning in 1790 and ending in 1833. Two treaties were made with
the Seminoles, who constituted a branch of the Creeks, in 1834. (7 Stats.,
—.) Most of these treaties related to the rights and claims of the tribes
as occupants of the soil east of the Mississippi, and were based on the
same political motives which actuated the Government to obtain the title
n the case of the Choctaws.

Under the trade and intercourse act of June 30, 1834, Congress pro-
vided that "all that part of the United States west of the Mississippi
nd not within the States of Missouri and Louisiana or the Territory of
Arkansas" should, for the purposes of the act, be considered the Indian
country. Reduced by the successive formation of States and Territories,
he remainder now constitutes the Indian country. Under the policy

which secured the removal of the Southern Indians, other tribes were at various times removed to that region from different parts of the country, but some of them now there are indigenous to the soil.

The treaties with the Cherokees, Creeks, Seminoles, Choctaws, and Chickasaws, providing for their removal, were executed nearly contemporaneously and, having the same objects and purposes, contained many similar provisions. Under them these five tribes were placed near each other in the Indian country. There they formed Indian governments, unmolested for many years by the whites, becoming known as the Five Civilized Tribes, and their institutions prospered as no other experiment of the kind before or since has done among the Indians, without any great degree of intelligence among the masses, it is true, but in a manner generally satisfactory to the Government.

In contracting with the Five Tribes, the Government intended and the Indians expected that the exchange of lands would insure to the tribes permanent homes and local self-government not inconsistent with the Constitution of the United States and the acts of Congress regulating trade and intercourse, but free from white intruders. Messages of State and Territorial governors, letters from heads of Executive Departments, propositions of commissioners authorized to deal for the Government with the tribes, and general history abound in statements which prove the inducements held out to the tribes to be as stated, if they would but make an exchange of lands. These official and historical statements need not be repeated in detail, as judicial notice will be taken of them. Guarantees followed each treaty, or were a part of each, substantially
883 securing to the tribes (which included the Choctaws) governments of their own unembarrassed by white intrusion or the jurisdiction of any State or Territorial government.

The act authorizing the President to cause a patent or grant to be made to a tribe for their new possessions was pursuant to the policy of keeping the whites away from the Indians. (Act of May 28, 1830, 4 Stats., 411.)

The early treaties with the Cherokees, the Creeks, and the Seminoles are mentioned because subsequent treaties with them will hereafter be noticed as serving to explain the dealings of the Government in its attempt to secure more land for the use of Indians without reservations; and they illustrate, in part, at least, if they do not materially interpret, the treaty made with the Choctaws and Chickasaws when the Government came to treat with those tribes for the land described in this suit.

The treaty of 1830 stipulated that the United States should issue a patent to the Choctaw Nation as follows:

"ARTICLE 2. The United States, under a grant specially to be made by the President of the United States, shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in fee simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it, beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas River; running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning."

Besides the patent promised to the Choctaws, the United States obligated themselves, by the fourth article of the treaty, to secure to the Choctaw Nation the jurisdiction and government of all the persons and property that might be within their limits west, so that no Territory or State should ever have the right to pass laws for the government of the Choctaw Nation and their descendants; no part of the land granted them should ever be embraced in any Territory or State; but the United States should forever secure said nation from and against all laws except such as from time to time might be enacted in their own national councils, not inconsistent with the Constitution, treaties, and laws of the United States, and except such as might, and which theretofore had been, enacted by Congress, to the extent that Congress, under the Constitution, were required to exercise and legislate over Indian affairs. It was further provided that all intruders should be removed from the Choctaw Nation and kept without.

Private property was to be always respected, and on no occasion taken for public purposes without just compensation being made therefor to the rightful owner.

Pursuant to the stipulation the patent provided for was issued to the Choctaw Nation, of which the following is a copy:

"The United States of America, to all whom these presents shall come, greeting:

"Whereas by the second article of the treaty begun and held at Dancing Rabbit Creek, on the fifteenth day of September, in the year of our Lord one thousand eight hundred and thirty [as ratified by the Senate of the United States on the 24th day of February, 1831], by the commissioners on the part of the United States, and the Mingoes, chiefs, captains, and warriors of the Choctaw Nation, on the part of said nation, it is provided that 'the United States, under a grant specially to be made by the President of the United States, shall cause to be conveyed to the Choctaw Nation' a tract of country west of the Mississippi River, in fee simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it, beginning near Fort Smith, where
884 the Arkansas boundary crosses the Arkansas River; running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning, the boundary of the same to be agreeably to the treaty made and concluded at Washington City in the year 1825.

"Now, know ye that the United States of America, in consideration of the premises, and in execution of the agreement and stipulation in the aforesaid treaty, have given and granted, and by these presents do give and grant, unto the said Choctaw Nation the aforesaid tract of country west of the Mississippi, to have and to hold the same, with all the rights, privileges, immunities, and appurtenances, as intended to be conveyed to them in the aforesaid article, in fee simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it, liable to no transfer or alienation except to the United States, and with their consent."

The act of Congress of May 28, 1830 (4 Stats., 411, supra), referring to patents to be issued to land, is as follows:

"Be it enacted, &c., That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States west of the river Mississippi, not included in any State or organized Territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside and move there, and to cause each of said districts to be so described, by natural or artificial marks, as to be easily distinguished from every other.

"2. And be it further enacted, That it shall and may be lawful for the President to exchange any or all of such districts, so to be laid off and described, with any tribe or nation of Indians now residing within the limits of any of the States or Territories, and with which the United States have existing treaties, for the whole or any part or portion of the territory claimed and occupied by such tribe or nation, within the bounds of any one or more of the States or Territories, where the land claimed and occupied by the Indians is owned by the United States, or the United States are bound to the State within which it lies to extinguish the Indian claim thereto.

"3. And be it further enacted, That in the making of any such exchange or exchanges it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made that the United States will forever secure and guaranty to them, and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: Provided always, That such lands shall revert to the United States if the Indians become extinct or abandon the same."

The contention that the United States derived their sole authority to convey the lands covered by the patent to the Choctaws under the act of Congress of May 28, 1830 (supra), relates to the defense of the Wichitas with respect to their claim as aboriginal occupants. They aver that no authority of law existed for the conveyance to the Choctaws by patent under that act, because the Wichita title as occupants had not been extinguished when the patent was issued to the Choctaws. As the Wichitas have not shown any aboriginal title to extinguish and the United States have not denied the validity of the grant as far as admitted to be extended, it follows that for all the land the Choctaws acquired under the patent title thereto passed to them according to the recitals of the grants; but upon the theory that the Wichitas have rights as occupants their contention will be noticed.

By the first section of the act May 28, 1830, the right of the Government to convey public lands to which title of the Indians had not been extinguished was limited, but the right to convey by treaty independent of that act existed as full as before the enactment. It has been held that although the act might be applied to lands ceded to the Cherokees, it did not necessarily apply under that treaty, because a sale could be made directly by a treaty. (Holden v. Joy, 17 Wall., 211.) In the case of a grant by the Government under these circumstances, no doubt, rights by

virtue of occupation would be recognized in the form of compen-
885 sation to those deprived of aboriginal possession by Government interference, but the superior right of those claiming under a cession from the Government by treaty and without the patent is not open to discussion. (Beecher v. Wetherby, supra.)

The second treaty with the Choctaws providing for the cession of lands to them contains no allusion to the act of May 28, 1830, and that treaty must be regarded as a confirmation of the session made in 1820 within the limitations imposed by the terms of the last grant.

Even then, if the Wichitas possessed an unextinguished aboriginal title, the treaty with the Choctaws operated directly upon the grant, free from any occupation claim on the land itself, or for the value of the land as against the grantees. That was a matter between the Indian occupants and the United States.

The valid and binding force of the treaty of 1830 has been repeatedly recognized by various acts of Congress. One act provides for the satisfaction of all claims arising under the treaty. (Act of August 23, 1842, 5 Stats., 513.) Another authorized a suit to be brought by the Choctaws in this court, for the recovery of money claimed to be due them under the treaty. (Act March 3, 1881, 21 Stats., 334.) In the case of The Choctaw Nation v. The United States, the judgment in favor of the Choctaws largely rests upon the provisions of the treaty of 1830. (Choc. Nation v. U. S., 119 U. S. R., 1.) The treaty had been carried into effect, and came within the rule declared in Holden v. Joy (supra), where it was said, "but it is not necessary to decide the question in this case, as the treaty in question has been fully carried into effect, and its provisions have been repeatedly recognized by Congress."

The Chickasaws were neighbors of the Choctaws east of the Mississippi River. They were a distinct nation, occupying a large tract of country in Tennessee and Mississippi, and spoke practically the same language as the Choctaws. Efforts were made from time to time by the Government to remove that tribe, with the result that a treaty was made between the United States and the Chickasaws, which was proclaimed 1st day of March, 1833 (7 Stats., 381), by the first article of which these Indians ceded to the United States all of their property lying east of the Mississippi. By its second article the Government agreed to have the property ceded to it surveyed and sold, and another article provided for a payment to the Chickasaws of the proceeds of such sale as compensation for said lands. The Chickasaws agreed to hunt up and procure homes for their people west of the Mississippi, suited to their wants and conditions. It was stipulated that, should they fail to procure such a country to remove to and settle on, previous to the first public sale of their lands east of the Mississippi, they were to select out of the surveys in the Chickasaw Nation a comfortable settlement for their families, to include the then present improvements if the land was good for cultivation, and if not they might take it in any other place in the nation unoccupied by any other person. Following this came the treaty of May 24, 1834 (7 Stats., 450), in which it was provided that "the Chickasaws are about to abandon their homes, which they have long cherished and loved, and, though hitherto unsuccessful, they still hope to find a country adequate to the wants of their people west of the Mississippi and within the limits

of the United States. Should they do so the Government of the
886 United States hereby consents to protect and defend them against the inroads of any other tribe of Indians and of the whites, and agrees to keep them without the limits of any State or Territory." Under these conditions negotiations were commenced between the Choctaws and Chickasaws at the instance and under the supervision of the Government, the result of which was that on January 17, 1837, a convention was entered into between the Choctaw and Chickasaw nations (11 Stats., 573), which was approved by the United States. Its third article provides as follows:

"ARTICLE 3. The Chickasaws agree to pay the Choctaws, as a consideration for these rights and privileges, the sum of five hundred and thirty thousand dollars, thirty thousand of which shall be paid at the time and in the manner that the Choctaw annuity of 1837 is paid, and the remaining five hundred thousand dollars to be invested in some safe and secure stocks, under the direction of the Government of the United States, redeemable within a period of less than 20 years, and the Government of the United States shall cause the interest arising therefrom to be paid annually to the Choctaws in the following manner: Twenty thousand dollars of which to be paid as the present Choctaw annuity is paid, for four years, and the residue to be subject to the control of the General Council of the Choctaws, and, after the expiration of four years, the whole of said interest to be subject to the entire control of the said council."

Under the agreement of 1837 the Choctaws sold to the Chickasaws certain rights and privileges, out of which grew some dissensions resulting in the treaty of June 22, 1855, proclaimed March 4, 1856 (11 Stats., 611), between the United States and those nations. By article 1 the boundaries of the Choctaw and Chickasaw country were defined, and the country guaranteed to the Choctaws and Chickasaws, subject to the reversionary rights of the United States.

By article 2 the Chickasaw district was reestablished to the ninety-eighth meridian on the west.

By the ninth article the Choctaws relinquished all their right and title to the lands which by the treaty of 1820 they claimed had been ceded to them but which the United States had also ceded to Spain in 1821. The lands thus relinquished to the United States lay west of the one hundredth meridian.

And by this article the Choctaws and Chickasaws leased to the United States the district known to this case as the leased district of which the Wichita Reservation is a part.

Negotiations which resulted in the treaty of 1855 began between the Choctaw delegates and the Secretary of the Interior about April 1, 1854. In a letter dated July 11, 1854, the Choctaw delegates announced that their country extended west to the source of the Canadian, and they threatened to take possession of that portion which they claimed lay west of the one hundredth meridian. The reply of the Secretary stated that he refrained from noticing some expressions in the Choctaw letter because he did not doubt they were used "without due reflection," but no specific answer was made to the claim of the Choctaws respecting the extent of their territory. About the 1st February, 1855, pending the negotiations, Robert L. Neighbors, an Indian agent for Texas, suggested the propriety

of negotiating with the Choctaw delegates for a tract of land lying on the east side of Red River "for the colonization of the Wichita Indians and such other prairie Indians as may be convenient to that location." (Sen. Ex. Doc. No. 13, Forty-eighth Cong., first sess., p. 15.) This suggestion impressed the Government, and accordingly the delegates were
887 asked their terms for land to be used for the purposes indicated. They said they would take $400,000 for the lease of their country west of the ninety-ninth meridian for the purpose named. The Secretary of the Interior on being informed of this gave instructions to the Indian Commissioner as to the proposed lease, stating that, notwithstanding the claim of the Choctaws to the country west of the one hundredth meridian was regarded by the Department as without foundation in law or equity, yet further trouble might be prevented in regard to it by inserting an article in the convention then about to be held requiring the Choctaws to relinquish and abandon all right or claim to the land described. On being asked the terms upon which they would agree, the Chickasaws consenting, to lease the country between 98° and 100° and the Red and Canadian rivers for the permanent settlement of the Wichita and other bands of Indians, with an understanding that the Choctaws should relinquish and quitclaim in favor of the United States whatever interest they had in the country lying west of the one hundredth degree of west longitude, the Choctaw delegates replied that for the lease alone they would want $600,000, but $800,000 for the lease and relinquishment together, i. e., $400,000 for each. The Indian Commissioner then proposed that, "If the Choctaws will propose to lease to the United States the territory west of 98° and east of 100° west longitude, the Chickasaws assenting, and couple with it a relinquishment of all claim west of 100° west longitude, the Government will agree to pay them $600,000." (Sen. Ex. Doc. No. 13, Forty-eighth Cong., first session, p. 15; Choc. Nat. v. U. S., 1292–1295.) This was accepted and the treaty resulted. The Chickasaws agreed to take $200,000 for the lease of their interest in the country between 98° and 100°, and this agreement was incorporated in the treaty.

It is earnestly contended by the defendants that the Choctaws had no real claim to any lands west of the one hundredth meridian because the treaty of 1820 had given them no such lands, but even if it had been afterwards believed to have done so such grant had become void by the subsequent Dancing Rabbit Creek treaty and because of the intervening cession to Spain.

Two of the calls of the conveyance of October 18, 1820, to the Choctaw Nation are for natural objects, namely: First, the source of the Canadian River, and, second, the Red River; a third call is for the course due south to the Red River, connecting the two streams. This course, being due south from the source of the Canadian, is inconsistent with the other two calls, because the source of the Canadian is farther west than that of the Red River by several degrees and far enough west of the one hundredth meridian, if fractional townships are included, to amount to over 12,000 square miles or 8,225,280 acres of land.

The evidence of the circumstances under which the treaty of 1820 was made, it is claimed, is such as to show that neither party thereto intended that any land west of the one hundredth meridian should be included in

the cession, and therefore no such land was included. Maps are introduced to prove that the parties to the Quapaw treaty of 1818 intended to fix the western boundary of the Quapaw cession on or near the one hundredth meridian, because by those maps the source of the Canadian was located in that degree of west longitude, and it is asserted that they were the only maps published prior to 1820 which located the
888 cource of the Canadian. By the map of Arrowsmith its source was fixed on the meridian of 97° 5′, by that of Pinkerton at 97° 15′, by that of Melish at 99° 45′, by that of Pike at 100° 18′, and by that of Darby at 99° 9′.

While it may be true that no map published prior to 1820 delineated the Canadian River, by that name, with its source west of the one hundreth meridian, yet there were maps in existence which did in fact delineate the stream subsequently known as the Canadian, with its source west of the one hundredth meridian. (Map of De l'Isle, De l'Isle's Atlas Nouveau, vol. 1, No. 5; Vol. 2, No. 28; Boehme's map, published at Amsterdam in 1746; American Maps, vol. 1, No. 18.)

During the period commencing in 1805 and ending in 1821 there are evidences that some of these maps were used by the United States in the negotiations with Spain, at different times, preceding the treaty with that country which resulted in an exchange of the land between the Canadian and Red rivers, west of the one hundredth meridian, for Florida, then owned by Spain.

Among the proofs of the title of the United States to all the land between the Mississippi and the Rio Grande del Norte, watered by rivers flowing into the Gulf of Mexico or the river Mississippi, are the maps last mentioned. They were used by Secretary Madison, by Ministers Monroe and Pinckney, by Secretary Monroe, and by Secretary Adams, and as later geographical explorations gave to the world the absolute information that the true source of the Canadian was on the meridian at 104° 30′ west longitude, we think the evidence sufficiently clear to conclude that the possessions of the United States covered the territory ceded to the Choctaw Nation by the treaty of 1820.

As to the understanding and intention of the parties to the treaty of 1820 and that of 1818 respecting the source of the Canadian and the western boundary of the cessions named in those treaties the evidence discloses but little. We know, however, that in the year 1885 France became the owner of the province of Louisiana, which included all the lands west of the Mississippi and east of the Rio Bravo, between rivers emptying into the Mississippi, or the Gulf of Mexico. This province was ceded, in its full extent, by France to Spain, November 3, 1762. It was retroceded, in its entirety, to France, October 1, 1800. France made the cession to the United States, April 30, 1803.

When the United States actually sold the western part of the province of Louisiana, including all the land west of the one hundredth meridian, to the Spanish King, the treaty with the Choctaws had been closed. But the treaty with Spain which gave to that country the western part of the province of Louisiana had been signed February 22, 1819, and approved by the Senate within two days thereafter. The King of Spain refusing to ratify, the treaty expired by its own limitation August 22, 1819. After further negotiations the Spanish King ratified the treaty October 24, 1820.

Upon its presentation to this Government the Senate ratified and the President approved the treaty February 19, 1821. Thus over one month had elapsed after the Choctaws had acquired title by the ratification of its treaty when by another act of the Government Spain obtained title to the same territory.

There is no evidence that pending the Choctaw treaty the United States disclosed to the people of that nation any purpose to sell the land
889 to a foreign power or that negotiations had been resumed for the sale after the rejection of the treaty which proposed to convey it to Spain.

On July 30, 1820, Maj. Stephen H. Long, of the Topographical Engineers, in command of a detachment of a small exploring party which had been sent out by the Secretary of War in 1819 to explore the Mississippi, Missouri, and navigable tributaries, reached a small stream which he believed to be the Red River. Following along near it about 800 miles (by the windings of the stream about 1,000 miles), he reached its confluence with the Arkansas River on September 10, when he discovered that the stream was the Canadian River. Reaching Belle Point (Fort Smith) on September 13, 1820, he communicated with the Secretary of War the last of a series of brief reports of his journeys, in which he substantially reported that the source of the Canadian was in the neighborhood of the one hundred and fourth meridian. (Am. State Papers, Ind. Affs., vol. 2, 335–339; Rec., 745; Long's Expedition, vol. 2, pp. 58–168.)

This report of Major Long reached the War Department in November, 1820. He himself left Belle Point on September 21, reached Cape Girardeau on October 8, went on to or toward St. Louis, but was taken ill on the way, returned to Cape Girardeau toward the end of the month, being still in ill health, and proceeded to Washington. On November 24, 1820, orders were addressed to him at Washington directing him to go to Philadelphia, and as soon as practicable furnish a report of the country traversed by his expedition, with a map. This he ultimately did, the report bearing date Philadelphia, February 20, 1821. (Long's Expedition, vol. 2, pp. 264, 284, 321, 324.)

If Long's letter was received before November 8, 1820, it was in possession of the Government two months before the ratification of the treaty with the Choctaws. If received on the last day of November, it was more than a month before. No matter what time in November the letter was received, the Government had knowledge before the ratification of the treaty that the source of the Canadian was far west of the one hundredth meridian. The presumption must be that the treaty-making powers had this knowledge.

There is no proof that in the negotiation or in the ratification of the Quapaw treaty either the Quapaws or the United States used any maps at all or considered the matter of longitude. When the Choctaw treaty of 1820 came to be negotiated by Generals Jackson and Hinds for the United States at the Choctaw treaty ground, October 13, 1820, the chiefs and headmen of the tribe were told that the limits of their new country "will extend from the Arkansas River, where the Cherokee line begins, south to the Red River and west to the head source of the Arkansas River." When the treaty, as it was signed five days later, was forwarded

it was accompanied by an official report of Generals Jackson and Hinds to the Secretary of War, under date of October 19–21, 1820, in which they stated:

"We have the pleasure to inform you that on yesterday we concluded and signed a treaty with the Choctaw Nation of Indians, by which the United States have obtained a cession of about six millions of acres of land, in exchange for the country between the Arkansas and Red rivers, beginning on the Arkansas where the lower line of the Cherokee boundary strikes the same; thence up the Arkansas River to the Canadian Fork; thence up the same to its source; thence due south to Red River; thence down Red River to a point 3 miles below the mouth of Little River, which empties itself into Red River on the north side; thence a direct line to the beginning. From an examination of the map you will find that Little River is about 60 miles above the Great Raft on Red River, and that we have located the Choctaws as high up the same as practicable." (Am. State Papers, Ind. Affs., vol. 11, 241.)

If calls for natural objects control courses and distances in the case at bar, then, on the principle declared in Preston's Heirs v. Bowmar (6 Wheat., 580) and Newsom v. Pryor (7 Wheat., 7), the western boundary of the ceded territory was on a right line drawn from the source of the Canadian (104° 30′ W.) to the source of the Red River (103° 30′ W.). If the maps relied on by the defendants constitute a part of the treaties, then the matter of longitude must govern as shown by the maps. Under these last conditions the western boundary would not only be restricted to the one hundredth meridian, but by some of the maps this boundary would be east of the one hundredth meridian far enough to exclude from the original Choctaw cession the whole of the leased district. This would be the case on the meridian fixed by Arrowsmith, as well as that fixed by Pinkerton.

Taking the proof all together, we do not think it was the intention to place the western boundary at the one hundredth meridian. It does not appear, except inferentially, that the commissioners made use of any of the maps, nor does it appear, even by inference, that these maps were exhibited to the Choctaws. The minutes of the commissioners show that they reduced to writing the propositions submitted respecting the extent of country the tribe was to receive, and these propositions, and the action of the parties with respect to them, negative the belief that longitudes or meridians were mentioned. Natural calls being matters easily understood by ignorant and untutored Indians, and longitudes and meridians not being terms they would likely comprehend, we do not think, from all that is before us on this subject, that the Choctaws understood the United States to cede not what was actually ceded in proper form but what was not ceded. It is certain that the Government was in possession of information before the ratification of the treaty that the source of the Canadian was far to the west of the one hundredth meridian as delineated by the earlier maps, and in the absence of proof it can not be assumed that the treaty was ratified with the knowledge that the boundaries fell short of the actual source of that river.

There is as much reason to say that the maps which excluded from the cession much of the country now occupied by the Chickasaws were used

as to say that the other maps then in existence delineating the source of the Canadian about the one hundredth meridian were made the basis of the treaty boundaries. The use of all the maps involve contradictions and destroy the value of the argument. Upon the question of intention we think it more probable that the Government originally intended to acquire from the Quapaws, and also intended to grant to the Choctaws, all the territory west of the one hundredth meridian to the dominions of Spain.

The ratification of the Spanish treaty which fixed the boundary of the United States on the line of the one hundredth meridian was subsequent to the ratification of the treaty with the Choctaws which gave to those people the land that extended to the source of the Canadian. With
891 the ratification of the Spanish treaty, however, such title as had been granted to the Choctaws became extinguished. Ratification related back to the time of the signing of the treaty as between the United States and Spain. (Vattel, B. 4, C. 2, sec. 22; Davis v. Police Jury, 9 How., 280, 289; Haver v. Yaker, 9 Wall., 32, 34.) The treaty with Spain being binding on the United States from the date of the signing thereof, the treaty rights of domestic Indians to the land itself were lost, but the right to compensation for the value of the land remained with the Choctaws as against the Government which first gave, and then took from them, the land.

But the questions relating to the extent of the original cession to the Choctaws and the intention of our Government in ceding land to them which at the time we were trying to sell to Spain in exchange for Florida, as well as the matter of the inconsistency of the treaty of 1830 with that of 1820, and the intermediate action of the Government in actually ceding the land west of the one hundredth meridian to Spain, can only be material now in determining what amount of money was ultimately paid by the United States for the leased district. No relief is sought by the nation on account of any early claim to country which they failed to get. Whatever interest the Choctaws had in the land ceded to Spain after its apparent cession to them was settled by the treaty of 1855. Having treated the Choctaw quit claim to the territory west of the one hundredth meridian as the relinquishment of a substantial right, the Government is not in a position to raise that question anew and assert that the treaty of 1820 was made void by that of 1830, so as to deprive the Choctaws of the right of compensation to land ceded in 1820 but not ceded in 1830. Nor do we understand that the Government has denied the effect of its action in recognizing the claim of the Choctaws to compensation since its acceptance of the offers to relinquish the claim until this suit. The probabilities are that when this question arose the parties viewed the matter as one best kept out of the courts for their respective interests, and, in the doubts which each had as to their rights, compromised the difference in the manner set forth, from which resulted the agreement of 1855.

While we have gone far enough into the question to say that by the cession of 1820 the Choctaws acquired land beyond the one hundredth meridian, we decline to enter that field of discussion respecting the alleged surrender by them, under the terms of the second grant, of what

they had acquired by the guaranties of the first cession, because unnecessary. The extent of our opinion is for the purpose of showing a basis for the claim preferred by the Choctaws in 1855; but whether their claim was dealt with as one of strict legal right, or made to rest upon moral considerations alone, it was clearly recognized by the language of the treaty, which recited a consideration for the relinquishment of a certain tract and the lease of another.

In the Net Proceeds Case it was said that the treaty of 1830 was evidently and purposely executed not so much to secure to the Indians the rights for which they had stipulated as to effectuate the policy of their removal. (Choctaw Nation *v.* United States, 119 U. S., 38.) So, if the treaty of 1830 annulled that of 1820, we have the spectacle of the United States acquiring ten million acres of land in Mississippi for nothing and also extinguishing a title to several million acres west of the Mississippi without the payment of anything.

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This treaty of 1855 was the result, in part, of the necessities of the Government in locating tribes on convenient reservations. The colonization of the Wichita and Prairie Indians, however, seems to have been nowhere suggested before the special Indian agent for Texas communicated to the Commissioner of Indian Affairs the propriety of opening negotiations with the Choctaw delegation, as stated. The delegates were then in Washington, and the land designated as desirable was a tract of country lying on the east side of the Red River, known as Cache Creek, near Wichita Mountains. (Sen. Ex. Doc. No. 13, 48th Cong., 1st sess., p. 15.) When the treaty came to be made, the preamble expressed the desire of the Government for the Choctaws to relinquish all claim to any territory west of the one hundredth degree of west longitude, and also to make provision for the permanent settlement within the Choctaw country of the Wichitas and certain other tribes or bands of Indians. The preamble further recited a willingness on the part of the Choctaws and Chickasaws to lease, on reasonable terms, to the United States that portion of their common territory west of the ninety-eighth degree of west longitude. When the transaction was consummated the United States held, free from any other claim of the Choctaws, all of the land west of the one hundredth degree, and it held a perpetual lease from both the Choctaw and Chickasaw nations to that portion of their common territory west of the ninety-eighth degree, subject to the right of Choctaw and Chickasaw settlement as owners of the land.

The lease did not secure, or purport to secure, to the United States the right to locate Indians generally upon the leased land. The restriction imposed excluded all the Indians of New Mexico and all whose usual ranges were then north of the Arkansas River and whose permanent locations were north of the Canadian.

The defendant Indians were placed on the leased land in 1859.

It is argued for the Government that the lease provided for in the treaty of 1855 was in fact not a lease, and that the use of the term "lease" was really a misnomer; that certain parts of the agreement indicate that the Choctaws and Chickasaws permanently parted with their title, and that the land was in fact sold for a particular purpose, but none the less sold—that is, sold in trust.

The land was not sold at all. The United States negotiated for a lease, and though perpetual in character it was none the less a lease.

If anything was needed at the time to continue the rights of the Choctaws and Chickasaws as owners, subject to permanent occupation by certain other tribes as tenants under the control of the United States, the first article of the treaty is a sufficient answer to any doubt cast upon the title of the lessors.

Again, it is argued there was no term fixed. This is true, but the lease rested upon a rental value. The instrument itself does not express what that rental value was, and no apportionment was made of the amount paid for the lease and the amount given for the other land, but we
895 know the character of the preceding negotiations. Certain Indians to whom the lessors did not object could come on, but other Indians to whom they did object could not. The leased territory was to remain open to settlement by Choctaws and Chickasaws, as before, and the jurisdiction of the Choctaw Nation was to remain as agreed upon at or immediately after the time of the severance of the government of that tribe from that of the Chickasaws. (Arts. 1, 2, and 3, Tr. 1855.) The land was inalienable without the consent of the lessors, which implied a future sale for their use. The lease must, therefore, be viewed as a mere permit, the premises remaining Choctaw and Chickasaw country, subject to special uses by the Government for other Indians.

Under their political control and government the Choctaws fixed four boundaries for the districts of their country. The Hotubbee district was embraced within the limits of the ninety-eighth and *and* one hundredth degrees of west longitude and between the Red and Canadian rivers, known as "lease land." (Choc. Cons., 1861, 7, 8, and 13; Choc. Laws, 1869; Art. 3, Tr. of 1855.) Under their constitutions the Supreme Court had jurisdiction of the other three districts until Hotubbee district should be duly organized and officers elected therein. (Art. 4, sec. 2, Jurisdic. Dept.) Under the articles, which include general provisions of the constitution, appears the following:

"Until Hotubbee district shall be duly organized, the principal chief of the Choctaw Nation shall exercise such authority over the citizens of this nation living in that district as he may deem expedient for the protection of person, life, and property." (Art. 7, sec. 1, Genl. Provs.)

This assumption of Choctaw exercise of government was never objected to by the United States.

The rights of the Choctaws and Chickasaws as between themselves had been fixed by agreement, with the consent of the Government, in the proportion to three-fourths to the former and one-fourth to the latter tribe in all land to which either tribe could lay claim. The western boundary of the Chickasaws was the ninety-eighth degree. Their eastern boundary, which is the western boundary of the Choctaws, was so located as to embrace in their country 4,650,935 acres. East of them were the lands of the Choctaws, 6,668,000 acres. West of them is the leased district, 7,713,239 acres. The total acreage aggregated 19,052,174. One-fourth of this closely approximates the quantity embraced in the Chickasaw boundaries, entitling the Choctaws to 14,289,136. Thus, the leased district must be embraced to get that number of acres. Without the leased district they would have but 6,688,000 acres. This proportion would make 6 to 4 instead of 3 to 1. If the Government's theory be correct, the Choctaws would be wanting in more than 7,000,000 acres of their

jurisdiction, as well as that much of their pro rata part of land, for no consideration at all. Such a result does not appear to be sustained by any agreement made at any time between the nations or the United States.

Early after the beginning of hostilities between the States the slave-holding tribes of the Southwest made common cause with the South. There were individual Indians in the Territory connected with these nations who adhered to the United States throughout the war, but the large majority of Choctaws and Chickasaws did not do so. The Choctaws and Chickasaws entered into an alliance, offensive and defensive,
894 with the Government of the Confederate States July 12, 1861. (1 Confed. Stats., 311–331.) The Creeks, Cherokees, Seminoles, and other tribes made similar treaties with the Confederate Government, but it is not material to notice the extent of any of them. Sufficient it is to say that hostilities were carried on under them against the United States until June, 1865. Many of the wild tribes who had in the great struggle taken up arms against the Government remained in hostility for some time after the surrender of the Southern forces. The history and extent of the operations of those Indians are set forth in various decisions of this court, and are mentioned to show that when the Government resumed negotiations with the tribal organizations of civilized Indians some of the border tribes continued to create a great deal of trouble for the Government. (Litchfield v. U. S. et al., 32 C. Cls. R., 585.) And this state of affairs produced an era of treaty and concession with the hostiles as far as the United States could approach them.

The importance of preserving certain country for the use of Indians alone was greatly felt by the Government as the civil war began to close. Undoubtedly the Government had in view in the treaties made subsequent to the close of the war the greater peace and security of the Indian country and of all persons put there by Government authority. The public domain contained millions of acres of unoccupied land, and no purpose was expressed by any one in authority for the Government to buy more land for public uses.

To secure homes for such tribes as it might be expedient to remove, it was officially recommended that in all treaties thereafter to be made with the former owners of the country terms should be insisted upon, and, if need be, enforced, for the purpose of locating nonreservation Indians. (Rep. Comr. Ind. Affs. for 1865, p. 34.) This report recognized (what the commissioners for the Government subsequently acted upon) the existence of rights which the tribes had previously acquired by treaty. Although the act of August, 1862 (12 Stats., 528), conferred power upon the President to abrogate treaties with hostile tribes, this authority was never exercised with respect to the treaties existing between the United States and the Choctaws and Chickasaws, nor was it generally exercised as to other Indians. The results vindicated not only the beneficence but the wisdom of the policy of the President in refusing to declare the forfeitures, inasmuch as that policy tended to disarm the hostiles and bring them in subjection to the Government at a time when its military strength was sorely tried. The act clothed the President with discretion to declare the treaties abrogated if the same could be done consistently with good faith and legal and national obligations. Whatever the motive in permitting the obligations of Indian treaties to remain in effect, the fact can

not be obscured that the close of the war found every obligation with the civilized tribes unimpaired, just as if they had not taken up arms against the Government. (Rep. 262, pt. 2, H. R., 50th Cong., 1st sess.)

When the policy of the Government to locate other tribes in the Indian Territory without reference to their previous habitations became manifest another problem presented itself. There were several thousand freedmen there who had formerly been held as slaves. They were without property or rights of property in the soil, and, being dependent upon Indian protection and living upon Indian land, the Government
895 undertook to supervise the interests of the blacks and at the same time to make some small provision for them because of their precarious situation.

The commission apppointed to carry out the objects of the Government met a number of Indian delegates in council at Fort Smith, Ark., September 8, 1865. Besides the representatives of the Five Civilized Tribes, there were present representatives of the Osages, Senecas, Quapaws, Wyandottes, Wichitas, and Comanches. (Rep. Commr. Ind. Affs. for 1865.)

At the beginning of the conference there were present only loyal Choctaws and Chickasaws. President Cooley made a statement, from which it appears:

"Immediately upon the opening of proceedings the tribes were informed generally of the object for which the commission had come to them; that they, for the most part as tribes, had, by violating their treaties by making treaties with the so-called Confederate States, forfeited all rights under them, and must be considered as at the mercy of the Government; that there was every disposition to treat them leniently, and above all a determination to recognize in a signal manner the loyalty of those who had fought upon the side of the Government and endured great sufferings on its behalf. On the next day the delegates were informed that the commissioners were empowered to enter into treaties with the several tribes upon the basis of the proposition submitted."

The propositions were under consideration for several days. The loyal Choctaws and Chickasaws were divided as to the action to be taken, the Chickasaws declaring that they were not prepared to reply to some of the propositions, while the Choctaws stated that they were willing to accept every proposition but the seventh. As to that the answer of the Choctaws and Chickasaws was substantially the same. Both desired its modification so as to provide that no person of African descent, except their former slaves, or free persons of color, who were then or had been residents of the Territory, should be permitted to reside therein unless formally incorporated with the tribe according to the usages of the band. Meantime, regular delegates from the Choctaw and Chickasaw nations, with authority to act, appeared. (Act Sept. 6, 1865, Choc. Laws. ed. 1869, p. 405.) The preliminary treaty of peace, which the council had been informed was essential to the adjustment of any and all questions under any old treaty, had been signed by the loyal Choctaws and Chickasaws before the regular delegates came. The day after the appearance of the authorized delegates the treaty of peace was signed by them, and Commissioners Sells and Parker were appointed on behalf of the United States to confer with committees of the Choctaws and Chickasaws in relation to additional treaties.

On the last day of the council the Choctaw and Chickasaw delegates were informed that an additional treaty for their consideration was ready.

Just before final adjournment Commissioner Parker announced that the commission had considered certain modifications of the proposed treaty which had been submitted by the Choctaws, but would decline to entertain the modifications suggested.

There is no proof as to what the modifications suggested were, but the draft of the unsigned treaty is in existence (Choc. Laws, ed. of 1869, p. 410), and in the report of Commissioner Cooley we have a statement concerning this treaty. (Rep. of 1865, p. 36.) This report shows that a treaty was agreed upon with the Choctaws and Chickasaws upon the basis of the seven propositions mentioned, and that the tribes agreed to
896 the opening of the leased lands to the settlement of any tribe whom the Government of the United States might desire to place thereon, and to the cession of one-third of their remaining area for the same purposes, the United States to restore the Choctaws and Chickasaws to their rights forfeited by the rebellion.

Following is a copy of the unsigned treaty:

"Articles of agreement and convention between the United States and the Choctaw and Chickasaw tribes of Indians, made and concluded at Fort Smith, Arkansas, the day of September, A. D. 1865, by D. N. Cooley, Elijah Sells, Ely S. Parker, and Thomas Wistar, commissioners on the part of the United States, and the delegates of the Choctaw and Chickasaw tribes of Indians, signing this instrument.

"Art. 1. Peace and friendship are hereby firmly established between all the citizens of the United States and all the individuals comprising the aforesaid tribes; and all the friendly relations that existed between them before the rebellion shall be and the same are hereby renewed.

"Art. 2. The Choctaw and Chickasaw tribes of Indians do hereby bind themselves to use their influence, and whenever called upon by the Government to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians of the Territory, and with the United States.

"Art. 3. The Choctaw and Chickasaw tribes of Indians hereby admit that the institution of slavery is abolished, and that slavery or involuntary servitude shall never hereafter exist in either tribe, except in punishment of crime, whereof the party shall have been duly convicted, and they promise and agree that measures shall be immediately taken by their respective national councils to properly provide for such emancipated slaves as may have belonged to the members of the respective tribes; such provision to be subject to the approval of the President of the United States.

"Art. 4. The Choctaw and Chickasaw tribes of Indians hereby agree to open their country to the settlement of friendly Indians from Kansas and elsewhere, upon such terms as may hereafter be agreed upon by the respective parties and approved by the Government, and the Government may settle such friendly Indians on a portion of said Territory east of the ninety-eighth degree of west longitude, not necessary for the use of said Choctaw and Chickasaw tribes, as it may desire, not exceeding one-third of the whole remaining Territory, for a fair and equitable consideration, to be fixed by the Government.

"Art. 5. The Choctaw and Chickasaw tribes agree to a modification of the 9th article of the treaty concluded at the city of Washington, the 22nd day of June, A. D. 1855, by which they agree that all that portion of their common territory west of the ninety-eighth degree west longitude, leased to the United States, may be used for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate thereon, without exception or restriction as to the character of the tribes.

"Art. 6. The Choctaw and Chickasaw tribes of Indians promise and agree to submit and recommend, at the first meeting of their respective general councils, the adoption of the plan proposed in the Senate bill 459, 38th Congress, 2d session, to provide for the consolidation of the Indian tribes, and to establish civil government in the Indian Territory; it being understood to be the settled policy of the Government of the United States that all the nations and tribes in the Indian Territory be formed into one consolidated government, after the plan proposed in the bill above referred to, adopted by the United States Senate, 1865, the Government of the United States reserving said right.

"Art. 7. The United States, in the event of the adoption by the Choctaw, Chickasaw, and other Indian tribes of the Government proposed to be established in the Indian Territory referred to in the preceding article, promise and agree that no white person except officers, agents, and employees of the Government, and of any internal improvement authorized by the Government, will be permitted to go into and settle in said Territory, unless formally incorporated and naturalized into one of the resident tribes, according to their laws, customs, and usages.

"Art. 8. The Choctaw and Chickasaw tribes of Indians, anxious for the restoration and preservation of kind and friendly feelings among themselves, do hereby declare a general amnesty of all past offences, either against their government or the Government of the United States, and no Indian or Indians shall be proscribed, or any act of forfeiture or confiscation passed against those who may have remained friendly and loyal to the United States, but they shall all enjoy equal privileges with other members of said tribes.

"Art. 9. The United States hereby promise and agree to restore the Choctaw and Chickasaw tribes of Indians to all their rights and privileges in lands and annuities that they were possessed of and entitled to, and they shall be applicable to the same objects as existed at the
897 breaking out of the rebellion, except such part or parts of annuities and moneys as have been expended by the President in providing for the relief of destitute Indians who were reduced to want on account of their friendship to the Government of the United States, which shall not be refunded.

"Art. 10. It is hereby mutually agreed that all of the provisions of the treaty of June 22d, 1855, between the United States and the Choctaw and Chickasaw tribes of Indians not inconsistent with the foregoing articles are hereby adopted and made a part of this instrument.

"Art. 11. The Choctaw and Chickasaw tribes of Indians expressly agree that any amendment to this treaty which the Senate of the United States may make shall be taken and held as a part of the same and as

binding in every respect as if it had, after being made, been formally su
mitted to and ratified by such parties."

(Laws of the Choctaw Nation, p. 410 et seq.)

The council adjourned subject to the call of the Secretary of the Interi

Although the foregoing treaty was never ultimately executed, it w
reported by the Indian Commissioner to have been agreed upon, subje
to approval of the Choctaw and Chickasaw councils, and then to be sign
in Washington. (Rep. of Sec. of Int. for 1865, p. 204.) The volume
the testimony shows, however, that it was not agreed upon. The India
present disclaimed any authority to enter into formal agreement about an
thing but the termination of hostilities, and asked time to report to th
people, stating that when they did so commissioners would be appointed
make further treaty. That was the final understanding, probably for t
reason given by the president of the commission that there could be
satisfactory representation of the Indians until the differences between t
loyal and disloyal members were healed. (Rep. of Commrs., p. 35.)

The draft of the unsigned treaty and the ultimatum contained in t
seven propositions submitted by the commissioners were given to the repr
sentatives of the petitioners to be submitted to their people. It was stat
at the close of the address of President Cooley, on the day that the prop
sitions were made known, that the agents would be supplied with print
copies of the address and would be requested to go with an interpreter to th
respective tribes for the purpose of fully explaining what was said there
This language evidently contemplated that the commissioners themselv
did not expect to conclude any agreement at that time respecting the la
of the Choctaws and Chickasaws. From all that was said and done it
clear then that no absolute agreement was entered into between the parti
respecting the land, but every suggestion made contemplated the acquir
ment of land at some future early date for one and the same purpose, a
that purpose was the settlement of Indians on the lands to be acquir
without opening any of it to white occupation under the general land la
of the United States, but giving the Choctaw and Chickasaw Indian free
men the privilege of locating there also, and leaving the Choctaw a
Chickasaw interest in the land otherwise unimpaired. The differenc
between the respective parties related only to the provisions respecti
freedmen and not to the nature of the title to be granted or acquired.

Respecting the fifth of the seven propositions first submitted, the arg
ments of counsel proceed upon different versions of its language. A
examination shows the following form to have been stated by D. N. Coole
Commissioner of Indian Affairs, as follows:

"A part of the Indian country to be set apart to be purchased for th
use of such Indians, from Kansas or elsewhere, as the Government ma
desire to colonize therein." (Annual Rep., 1865, p. 34; House Ex. Do
1, 39th Cong., 1st sess., vol. 2, p. 202.)

898 Accompanying the report of the Indian Commissioner is th
report of D. N. Cooley, as president of the Southern Treaty Com
mission, and also an official report of the proceedings of the council, i
both of which appears the statement that "the treaties must contain sub
stantially the following stipulations." The form of the fifth is then give
as follows:

"A portion of the lands hitherto owned and occupied by you must b
set apart for the friendly tribes now in Kansas and elsewhere, on suc

terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government." (Rep. president Southern Treaty Com., pp. 298, 319.)

The language of the report would imply that no stenographic notes were taken during the sitting of the council.

The draft of the unsigned treaty followed the submission of the seven propositions. In that the commissioners for the United States evidently undertook to express their meaning of the propositions previously submitted. If the contention of the defendants be correct as to the precise language used, the fifth proposition was a demand that the treaty was to be so framed with regaad to the lands that a portion of them "must be set apart for friendly tribes." The fifth article of the unsigned treaty provides that all the lands of the leased district may be used by the United States, "without exception or restriction as to the character of the tribes." Out of the fifth proposition or demand then grew the treaty of the next season, and as the commissioners submitting the ultimatum understood it, doubtless the Choctaws and Chickasaws also understood it.

Commissioners were appointed by the Choctaw and Chickasaw legislatures to proceed to Washington, the two acts of the Choctaw government having been approved October 17 and 18, 1865, respectively, and the one act for the same purpose passed by the Chickasaw legislature was approved November 18, 1865. (Cons. and Laws Choc. Nat., 1869, p. 420; Cons., Laws, and Treaties Chicks., Fort Smith, Ark., 1867, p. 100.) The authority of the five Choctaw commissioners was limited to "the purpose of completing negotiations with the Government of the United States, commenced at Fort Smith, Arkansas, on the 15th September, A. D. 1865, and any agreement or stipulation which the commissioners should enter into with the United States was not to be binding until ratified by the general council of the Choctaw Nation." The authority of the three Chickasaw commissioners was declared to be "with full and efficient powers to reconstruct or enter into new treaties or conveyances with the United States of America, or any authorized agents thereof, necessary, in their judgment, to obtain full guaranties and securities of all the rights, interests, or claims held by the Chickasaw Nation, or any individual member thereof, under former treaty stipulations with the Government of the United States, whereby the happiness and interests of the Chickasaw people may be advanced." Some months after the treaty was executed the two Indian governments qualified their ratification as hereinafter shown.

Between the adjournment of the council assembled at Fort Smith and the consummation of the agreement at Washington nothing relating to the terms of the treaty is disclosed. In the negotiations preliminary to the signing of the treaty John H. B. Latrobe, of Baltimore, represented the commissioners of the two Indian governments, and his name appears a subscribing witness to the document.

899 There is nothing in the record to indicate that the Choctaws and Chickasaws had any information as to the purpose of the Government except as embraced in the fifth proposition and the fifth article of the unsigned treaty submitted at Fort Smith. These gave the Indians to understand that the purpose was only to extend the rights of the United States in the land beyond the treaty of 1855, and this purpose was also understood by the United States.

Passing the question of the right of the Government as the guardian to change its purpose and take the land for such consideration as it saw fit to give, the record discloses nothing to show the exercise of the power of the Government to acquire the land upon terms different from those first submitted except such as may be derived from the ceding clause of the treaty itself. Every presumption, then, must be indulged in case of doubt that in consummating the treaty the original purpose was intended to be carried out, and that when the treaty was actually executed the agents of the Government supposed they were embodying in the agreement the objects announced by the commissioners at Fort Smith for the cession of the land.

It is certain that the delegates who signed the treaty on the part of the nations came to Washington to give effect to the ultimatum previously submitted to the Choctaws and Chickasaws, and that the legislatures which clothed them with authority to act were without knowledge of any change of purpose on the part of the United States.

Three of the same commissioners who submitted the seven propositions at Fort Smith and prepared the unsigned treaty for the United States also framed the treaty of 1866. D. N. Cooley, president of the council and the head of the Bureau of Indian Affairs, who had been active in arranging the preliminary terms of the treaty, consummated the agreement, and did so not merely with one tribe, but with all who had lands which the Government desired to use for the purpose stated to the nations whose interests are now before us. Mr. Cooley reported that the first treaty was made with the Seminoles and that the next treaty in this series was made with the confederate nations of Choctaws and Chickasaws, stating that in all of them "four principal points came up for settlement, to wit, * * * (fourth) cession of lands by the several tribes, to be used for the settlement thereon of Indians whom it is in contemplation to remove from Kansas." All were based on the same points of settlement and treated as a series of treaties. (Annual Rep. Com. Ind. Affrs., 1866.)

The Choctaw council, by an act approved December 21, 1866, enacted "that the propositions contained in the third and eighth articles of said treaty are hereby deferred until the next regular session of the general council." (Laws Choc. Na., ed. 1869, p. 450.) The Chickasaw legislature confirmed the treaty and consented to sectionizing the land and alloting the same in severalty, by an act approved November 9, 1866, but provided:

"SEC. 3. Be it further enacted, That the provisions contained in article 3 of the said treaty, giving the Chickasaw legislature the choice of receiving and appropriating the three hundred thousand dollars therein named for the use and benefit of the Chickasaws, or passing such laws, rules, and regulations as will give all persons of African descent certain rights and privileges, be, and it is hereby, declared to be the unanimous consent of the Chickasaw legislature, that the United States shall
900 keep and hold said sum of three hundred thousand dollars for the benefit of the said negroes. And the governor of the Chickasaw Nation is hereby requested to notify the Government of the United States that it is the wish of the legislature of the Chickasaw Nation that the Government of the United States remove the said negroes beyond the limits of the Chickasaw Nation, according to the requirements of the third article of the treaty of April 28, 1866." (Cons. Laws and Tr. of Chickasaws, 1876.)

For conferring the privileges and rights of property mentioned in article 3 on some 4,500 blacks, 10,000 Choctaws would have received $225,000; but for doing the same thing for 3,700 black residents among them, the Chickasaws would have got only $75,000. This was a minority of black population in the one case and a majority in the other, but whatever the motive underlying the action of the nations, neither passed the necessary laws to receive the consideration within the two years.

The Chickasaws have never attempted to pass any such laws. Neither have their freedmen been removed. But on May 21, 1883, the Choctaws passed laws in regard to their freedmen (Choc. Laws, 1894, p. 335), following which an act of Congress approved March 3, 1885 (23 Stats., 366), appropriated to them $52,125, net balance estimated to be due them as their proportional part of the money named in the treaty of 1866. All sums paid to the Choctaws and to the Chickasaws were received under article 46, being made, according to an official report, "to the Choctaw Nation or the Chickasaw Nation, or to persons of African descent formerly held in slavery among said nations or their descendants." (Rept. Comr. of Ind. Affrs., 1897, Rec., 763; House Rept. 3147, 51st Cong., 1st sess., p. 14.) Payments to the Choctaw Nation were as follows:

Appropriation of July 26, 1866 (14 Stats., 259) under forty-sixth article of the treaty		$150,000.00
Appropriation of July 26, 1866, for interest (14 Stats., 259) under same article		11,250.00
Appropriation of April 10, 1869, for interest (16 Stats., 39) under same article		11,250.00
Appropriation of May 17, 1882, for education of freedmen (22 Stats., 72)		7,500.00
Appropriation of March 3, 1885 (23 Stats., 366) to be placed to the credit of the Choctaws on the books of the Treasury, computed as follows:		
Balance of principle due Choctaws	$67,500	
Deduct overpayment of interest, 1867, amounting to	$7,500	
Deduct from same in 1868	7,875	
	15,375	52,125.00
		232,125.00

And to the Chickasaw Nation as follows:

Appropriation of July 26, 1866 (14 Stats., 259), under forty-sixth article of the treaty	$50,000.00
Appropriation of July 26, 1866, for interest (14 Stats., 259), under same article	3,750.00
Appropriation of April 10, 1869, for interest (16 Stats., 39) under same article	3,750.00
Appropriation of May 17, 1882, for education of freedmen (22 Stats., 72)	2,500.00
	60,000.00

In 1888 and subsequent years the Choctaw Nation paid to the Choctaw freedmen, out of the general trust fund of the nation, the sum of $7,300, at the rate of $100 per capita, to those who desired to remove from the Choctaw Reservation.

If the transaction had been between individuals, and especially between guardian and ward, inquiry would at once arise how it came that
901 one of the parties, and that party the ward, should for a consideration of $300,000 part with all interest in nearly 8,000,000 acres of land worth about $8,000,000 (according to the value put by the grantee at the time upon land adjoining the ceded territory) and at the same time bargain to give from other possessions tracts of more than 300,000 acres to get the money, or, failing to yield these tracts to the third persons who by the arrangement were to become the beneficiaries, leave themselves in position to surrender indefinitely land enough for 8,000 people to cultivate besides conferring upon them other rights. But under this treaty neither the integrity of the sovereign nor the good faith of the guardian can be questioned. In looking for the proper objects, then, which we must suppose actuated the sovereign as guardian, the statements and situation of the parties, the amount and value of the grant considered with reference to the consideration, the benefits to be conferred and where they were to go, and the ends sought to be accomplished from all the parties possessed of land, may be considered in determining whether the cession was or was not attended with any underlying trusts or uses.

The cardinal rule for all agreements, whether of private contract or of public treaty, is that the full extent properly implied in the terms used should be given a disposition or the signification thereof be restrained, if it be probable that the parties at the time so understood the language embodied in the written agreement.

The general principle is that treaties shall be liberally construed so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. Thus, under a provision in a treaty between France and the United States which gave to the French the right to hold property in all those States of the Union permitted by the existing laws of the States, it was held that the District of Columbia was one of the "States of the Union" within the meaning of the treaty. (Geoffroy v. Riggs, 133 U. S., 258.)

Again, "subjects" of Spain, as used in a treaty between that country and the United States, has been held to be not merely persons who, by birth or naturalization, owed permanent allegiance to the Spanish Government, but as used in the same sense as the term "citizens" and "inhabitants" when applied to persons owing allegiance to the United States. (The Pizarro, Wheat., 227.)

The familiar rule that treaties between the United States and the Indian tribes must be liberally construed in favor of the Indians was early declared, and all such agreements are attended with this guide for their proper interpretation: That "the language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be considered as used only in the latter sense. How the words of the treaty were understood by this unlettered people, rather than their crit-

ical meaning, should form the rule of construction." (Worcester v. Georgia, 6 Pet., 515.)

It is thought by counsel for the defense that the rule quoted is one of relative application, and, although referred to in a late case involving the Choctaw and Chickasaw treaty of 1855, the rule is not at all as applicable to those comparatively educated people as to the totally
902 illiterate Cherokees of 1800. Counsel for the defendant Indians think the analogies of the rule are qualified by certain conditions existing at the time of the execution of the treaty, the two most essential of which, besides the nations being no longer unlettered, being acts of hostility to the Government out of which and because of which existing obligations could be declared forfeited, and next, the relations of the Indians to their former slaves.

Advances in education and learning had undoubtedly been made by the civilized Indians, and they were not so unlettered a people as the Cherokees of 1800. Complainant nations had governments and institutions of their own, and these were carried on with sufficient intelligence to serve the purpose of their creation, in part at least. But though, by these governments, the public peace was fairly well secured, agencies from our own Government were maintained among the nations with power that restricted them to a degree, and our courts exercised jurisdiction over their persons. As nations and as people they were dependent communities at last. Illiteracy largely prevailed, if history be written from truthful sources; and the demoralization incident to the close of a great war must have had its effect upon people who by its results were made more deeply sensible than ever before that they were dependent upon the United States for every personal and political right that they might thereafter enjoy.

If any one thing has been settled in our judicial history, it is that the Indians are the wards of the nation. The relation of guardian and ward between the United States and the Choctaws and Chickasaws existed when their last treaty was executed, and there must be "such an interpretation of their acts as justice and reason demand where power is exerted by the strong over those to whom they owe care and protection."

The language of Chief Justice Marshall in Worcester v. Georgia has been so often and lately applied the rule can not be ignored in the construction of a treaty executed by the claimants a generation ago, whether their acts be considered as the acts of an ignorant people or those of a people helpless and otherwise at a disadvantage. (See The Kansas Indians, 5 Wall., 737, 760; U. S. v. Kagama, 118 ib., 375, 383; Choctaw Nat. v. U. S., 119 ib., 1, 28.)

It is urged that the plain language of the instrument cedes the land for a specific consideration, and the court can not look beyond this language. This would restrict the meaning of the parties to the ceding clause entirely. The intention as gathered from the words must control, and the entire instrument must be examined in order that the real intention may be ascertained. (1 Kent's Com., 174; In re Ross, 140 U. S., 453; U. S. v. Texas, 162 ib., 36.)

Aside from the act which requires that everything deemed necessary by the court to aid it in determining the questions presented and tending to shed light on the claims and equities of the parties, the intent must

be gathered not only from the language of the instrument, but attendant and surrounding circumstances may be resorted to as aids to the ascertainment of the meaning and intent of the parties. Thus, as in the case of the interpretation of a statute the history of the times may be resorted to in aid of the true construction (U. S. v. Union Pacific R. R. Co., 91 U. S., 79), we think for similar causes contemporaneous events
903 may be examined in aid of the interpretation of an Indian treaty as in any law. (Holy Trinity Church v. United States, 143 U. S., 463.)

It is objected generally (1) that propositions (even though conceded to be substantially definite) leading up to the treaty can not be considered to determine the intent, and specially (2) because the objects of the fifth stipulation referring to land for the colonization of Indians were amply provided for in the treaty outside of the clause which cedes the land.

The special objection is not tenable, because the court can not determine whether the fifth stipulation and its objects found expression in the treaty without considering it as evidence for that purpose; but as to the general objection difficulty arises, because we are considering a public treaty and not a private contract.

The rule that courts of equity will open the written contract to let in an equity arising from facts perfectly distinct from the sense and construction of the instrument itself is clear in its application to matters arising out of contract between persons. Pursuant to that rule relief can be had against any deed founded on mistake, and that mistake may be shown by parol proof. (Walden v. Skinner, 101 U. S., 577.)

A deed absolute on its face may be shown to be a mortgage by evidence aliunde the instrument, or an absolute conveyance may be shown to be a conditional deed. (Babcock v. Wyman, 19 How., 289; Boyd v. McLean, 1 John., ch. 582.) In a question where the transaction to be determined was whether it was a sale or a mortgage, and oral evidence was objected to as inadmissible to contradict, vary, or add to the contents of the writing, extraneous evidence has been held admissible upon principle and authority. The language used by the parties can not be qualified or varied; but where the instrument is in form a conveyance but was in fact intended to be a security, it is competent to show by parol evidence what the real transaction was; the object of the parties in giving and receiving the instrument may be considered; and when courts of equity, looking beyond the terms of the instrument, find the real transaction to be one of security and not of sale, effect will be given to the actual contract to prevent fraud or oppression and to promote justice. (Russell v. Southard, 12 How., 139; Hughes v. Edwards, 9 Wheat., 489; Peugh v. Davis, 96 U. S., 336; Brick v. Brick, 98 U. S., 514.)

That the cession under consideration was by treaty does not exclude those means of ascertaining the intention of the parties which have the effect of informing the court of every material fact supposed to govern them when the treaty was executed, if, as appears here, the ceding clause be followed by language embodying such terms and conditions as to raise reasonable doubt of what the parties really intended. The terms submitted by the commissioners for the United States at Fort Smith, showing the qualified character of the title proposed to be acquired, and which the delegates to whom the terms were submitted

were willing to grant, if such terms do show any such thing, are therefore competent to be considered. They are a part of the res gestæ of the transaction which, if explanatory of the objects of the treaty, ought to be considered in common justice, as well as in obedience to the plain command of the statute in this behalf. The act conferring jurisdiction is misleading and delusive if, without the power to direct the court to consider the treaty as a contract and apply the rules which
904 obtain in equity to ascertain its meaning, Congress has shifted the responsibility of reaching the intent of the treaty upon the court. The inquiry being always open to the Indians how they understood their treaty as a contract, it was competent for Congress to direct the consideration of extrinsic facts in explanation of the intent. This includes the examination of matters historically true and all circumstances throwing light upon the intent and the reason and justice of the matter and the uses in this case to which the small consideration was to be put upon its ultimate payment, so that the treaty should not lead to injustice, oppression, or absurd consequence. (Holy Trinity Church v. The United States, supra.)

It is not within the province of a court, either of law or of equity, to consider allegations of fraud or duress in procuring the treaty (Western Cherokees v. United States, 27 C. Cls. R., 1; United States v. Old Settlers, 148 U. S., 466).

But this is not a case involving the good faith of the action of the Government, or of those officials who procured the treaty, nor within the principle of the case just cited, where both parties were entitled to have and receive by virtue of the act conferring jurisdiction only those things to which they were entitled under the stipulations of a treaty plain upon its face, concerning which there was but little or no controversy, but one where the instrument, being ambiguously expressed, left room for doubt as to the intention of the parties. The jurisdictional act following the rule in equity in such cases admits proof of matter underlying the instrument as an aid in expounding the ambiguity. It was competent for Congress to direct this method of arriving at the doubtful intent in the matter of an agreement with one of the domestic tribes, not to found an implied trust of that character known to equity jurisdiction as one independent of express intent forced upon the conscience by operation of law, but to ascertain whether a trust arose upon the presumed intention of the parties.

The court can not undertake to do what the parties on the face of the agreement have stipulated they only should do, as shown in the case of "The Amiable Isabella" (6 Wheat., 1). There it appears the parties to the Spanish treaty of 1795 had clearly provided that the form of the passport agreed to be annexed to the treaty was to be fixed by themselves, and it was accordingly held that the court could not annex the form upon the failure of the parties so to do. Here, if the United States have clearly taken the leased land, then they have the possession of whatever they intended to take, and moral obligations are to be excluded, as in all other cases of clearly expressed intent and understanding. But unless it is manifest from the instrument that the United States, for the small consideration named, have the absolute title of these millions of acres for public purposes, and not for mere purposes of Indian settlement as

provided by the treaty of 1855, then the environments of the parties must be taken into account in determining the purpose of the cession. If the parties ceding the land in such case understood the proposition to which they were invited to assent as one not designed to take the land from them absolutely, it is not probable they scanned the agreement with the same degree of care and vigilance as the proposition itself. This proposition tended to prevent such scrutiny, and, if it were necessary, throw them off their guard, and in this respect the case is not unlike that of Insurance Company v. Hearne (20th Wall., 494).

905 The question resolves itself at last into the understanding of the parties and especially the understanding of the Indians with respect to the meaning of an uncertain agreement arising out of the transfer of an immense domain for a nominal consideration, the incorporation of a large body of Indians as well as freedmen into the body politic of the plaintiff nations, and the receipt by them of a small sum stipulated to be paid for uses not necessarily relating to the advantage of the parties, but for those whom the treaty provided were to be incorporated. The rules to be applied in arriving at the understanding of the parties are those which relate to a treaty between the Government as a superior and a domestic tribe as an inferior, and the presumption of fact and of right presupposed from the relation existing between the said parties and the rights and conduct of each under the agreement. The use of evidence aliunde the instrument showing or tending to show the avowed objects in view does not necessarily imply that the language of the treaty is to be amended by the extrinsic matter, or that the treaty executed by the parties is to be displaced for one to be made by the court (which, of course, can not be done), but that the doubtful instrument as it appears to have been written is to be interpreted in the light of the occurrences which explain the intent and the reasons for the different understanding. So that, if the treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred. (Hauenstein v. Lynham, 100 U.S., 483.) This view is not inconsistent with the argument for the United States in the construction of the Choctaw treaty of 1820, where a map not a part of the agreement is yet sought to be incorporated within its terms upon the mere statement of the commissioners for the Government in transmitting the treaty that Little River, "from an examination of the map," would be found at a certain place.

The acts and declarations of executive officers of the two Indian governments and of the United States are competent, whether viewed as admissions on the part of the nations as an absolute cession or as admissions of a trust on the part of the United States, but such acts and declarations are not binding. Contemporaneous construction, however, by those called upon to act under the law where the matter is ambiguous or doubtful ought not to be overruled without cogent reasons. (Brown v. United States, 113 U. S., 571, and authorities cited.)

Concerning any legislative acts, the importance of these must be measured by their relation to the subject, the language used with respect to the character of the cession, and the circumstances under which they were made.

As the national governments of the two nations never made any express acknowledgment of the absoluteness of the cession of any land, and the Congress of the United States did pass an act fixing in express words the trust character of other lands ceded by the same language by which the lands in suit were ceded, the effect of this act will be considered. (Act of 1891, § 15, 26 Stats., 989, 1025.)

The lands mentioned in this act were a part of the leased district, and the statute was passed on the memorial of the Choctaws and Chickasaws to compensate them for precisely the same kind of an equitable or reversionary interest claimed here. The lands now in controversy had
906 not then been appropriated, but the lands paid for under the act mentioned had been seized under an Executive order, which was subsequently approved, and the Cheyenne and Arapahoe Indians had been placed thereon.

The act is urged by the claimants as a legislative determination in favor of claimants conclusive upon two theories: First, that the act is in pari materia with article 3 of the treaty of 1866, and, second, that it is a legislative construction which of itself must be obeyed by the courts as the law of the case. It is assailed by the defendants as an act based on erroneous statements contained in the memorial of the claimants, annexed to a report of a committee of Congress (H. R. 3147, 51st Cong., 1st sess., and Sen. Mis. Doc., 107, ib.), whereby Congress was misinformed and its members misled, and also because the provision appropriating $2,991,450 for the payment of the Choctaw and Chickasaw beneficiaries was inserted as an amendment to a general bill in the last days of the Congress which passed the law, and that in spite of House opposition to the Senate amendments the amended bill was passed, as Congress was nearly ready to adjourn. It is finally questioned as not covering the precise land in controversy here.

Respect for a coordinate branch of the Government forbids the courts to assume legislation to be the result of fraud or misinformation, or that Congress acted hastily or improvidently.

That dangers exist and injustice sometimes results from appropriations in settlement of private claims in all legislative bodies is recognized, and by none more sensibly, perhaps, than by those most responsible; but in all cases it must be taken for granted that those who seek relief state their case most strongly for their interests and draw inferences not calculated in every case to stand the test of careful investigation. While the friends which such a measure secures may even be imposed upon in occasional instances, we can not suppose any act of Congress to be the result of misconception or imposition.

But the entire history of the legislation now assailed refutes the defense. President Harrison withheld his veto to the act in question, though he believed the cession made by the treaty of 1866 was absolute, on the ground that the Executive veto would defeat the entire bill carrying appropriations for other objects. This fact subsequently appeared in a special message from the President to Congress, in which he also stated his belief that the lands for which the money was to be paid were not ceded in trust. This message was first considered by the two Committees on Indian Affairs and afterwards in the Senate and House, and again the matter was discussed in the light of the views submitted by the President, and again Congress affirmed its declaration of the trust character of

the estate conveyed by the treaty and directed the payment of the money covered by the appropriation.

The debates in Congress are not evidence for the purpose of interpreting a law or treaty. Upon a question of information, or want of it, in the legislative body concerning a measure that becomes enacted into law, if such an issue could be raised, debates are admissible to show the fact of discussion, but nothing more.

The action of the Fifty-second Congress affirming their declaration of the trust was qualified by a proviso to the resolution declaring that neither the passage of the original act carrying the appropriation to pay
907 the Choctaws and Chickasaws for their interest in the lands of the Cheyenne and Arapahoe Reservation, nor of the resolution affirming the act, should be held in any way to commit the Government to the payment of any further sum for any interest alleged by the claimants in the remaining lands of the leased district. (Joint Res., Jan. 18, 1893, 27 Stats., 753.) Following this came the jurisdictional act in the Fifty-third Congress, that as to these lands nothing contained in the jurisdictional act shall be construed as a confession that the United States admit that the Choctaw and Chickasaw nations have any claim to or interest in said lands. (28 Stats., 898.) Thus Congress was tenacious of the legislative interpretation of the treaty and unwilling to recede from that view as it related to the lands seized, but for any lands thereafter claimed to be taken in violation of the trust the claimants were to be held in abeyance, according to circumstances. The agreement between the United States and the defendant Indians raised the issue in such form Congress chose to send the whole matter here for investigation in connection with the claim of the Wichitas as first occupants.

The jurisdictional act eliminates the binding character of the previous legislative construction, and to that extent is a repeal of the act of 1891. In any event the act of 1891 can not be accepted as binding on the court, but is chiefly valuable, as showing by way of argument that a trust in favor of the claimants was created by the treaty of 1866 on all the lands included in the cession, and as showing that if Congress regarded the matter in that light the claimants probably understood the matter the same way when they executed it.

Article three cedes the land in the following language: "The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the ninety-eighth degree of west longitude known as the Leased District: Provided, etc."

The claimants contend that even this clause of article three standing alone did not transfer or divest the property of the members of the Choctaw and Chickasaw nations in the lands, because it was not competent for their governments, except in the exercise of the right of eminent domain, to transfer the title owned and enjoyed by the individuals of the nations.

Private ownership of property in territory ceded by one State or nation to another generally remains unimpaired by the terms of treaties which transfer dominion of the ceded country, but how such a question can be put into this case for purposes of practical relief is not clear. It is true the nations in their sovereign capacity have preferred their claim as such

and have filed their petition in the name of and for the benefit of the members and citizens of the nations also, but the act conferring jurisdiction directs the court to determine the rights of the nations. No mention is made of the claims of individuals in the jurisdictional statute, and no claims of a private character seem to have ever been preferred by any of the members of these nations in memorializing Congress on the subject of their rights.

The first grant of lands from the United States, which included those in controversy, was made to the Choctaw Nation. (Treaty of 1820, art. 2.) Under the provisions of the treaty of 1830 and of the
908 patent thereunder title was vested in "the Choctaw Nation" and their descendants in fee simple, to inure to them while they shall exist as a nation and live upon it. (Treaty of 1830, art. 2.) The treaty of 1855 by its first article provided:

"And, pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal undivided interest in the whole: Provided, however, No part thereof shall ever be sold without the consent of both tribes, and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same." (11 Stats., 612.)

This guaranty, being pursuant to the act of May 28, 1830 (4 Stats., 411), must necessarily be such a guaranty as that act authorized in the following section:

"SEC. 3. And be it further enacted, That in the making of any such exchange or exchanges it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange was made that the United States will forever secure and guarantee to them, and their heirs and successors, the country so exchanged with them; and, if they prefer it, the United States will cause a patent or grant to be made and executed to them for the same: Provided always, That such lands shall revert to the United States if the Indians become extinct or abandon the same."

It was not the object of the treaty of 1855 to recognize rights of private ownership or change the nature of the Indian title of occupancy into one of different character. That treaty on its face shows it was in settlement of the claims of the Chickasaws as against the Choctaws, and the lands covered by the guaranty were to be held in common thereafter by the two tribes instead of one; that is, each member of each tribe was to have the same rights in the country of the two nations that the members of one tribe formerly had under the treaty of 1830, before the convention of 1837 between the two nations. The guaranty was intended to secure to two tribes in common what one tribe had before then enjoyed to itself alone. The land continued to be tribal land after this treaty as much as it had been before, in the sense that when it again became the subject of treaty with the United States the nations could only deal with it, and when they ceded it such cession by them extinguished the claims of the members absolutely.

The nature of the Indian holding was something like the base or qualified fee defined to be such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. (2 Blacks., 109.) Defining a qualified base or determinable fee, Chancellor Kent says it is an interest which may continue forever, but the estate is liable to be determined, without the aid of a conveyance, by some act or event circumscribing its continuance or extent. It is the uncertainty of the event and the possibility that the fee may last forever that renders the estate a fee and not merely a freehold. If the condition attached to the fee is one which is certain to happen, then there is a reversion. If such condition is one which may never happen there is not a reversion, but only a possibility of a reversion. (4 Kent Com., 9; 1 Washburn on Real Prop., 90.)

The individuals of these nations had no such estate by any treaty as upon the death of any member descended to his immediate heirs. The land was communal property, which upon the death of any mem-
909 ber descended, as to his interest, to all the surviving members of the tribe alike.

The United States already had sovereignty over the land, subject to the uses of the two nations under the treaties. If by article three of the last treaty the nations made an absolute cession, the act of the body politic disposed of whatever private interest the members had in the land, as well as the dominion of the tribes in their corporate capacity.

Subtle and plausible as the argument seems to be as a piece of judicial literature, it is not tenable upon its merits. As the controversy here does not relate to the character of the title as between the members and the nations in their corporate capacity, we could not entertain claims of private ownership on the merits if established.

Following the cession is a proviso relating to the disposition and uses of the fund. Then come numerous articles covering many subjects with much circumstantiality of detail. Prominent features in the treaty which manifest the purposes of the Government are those provisions relating to (1) the admission of persons of African descent resident in the country to certain rights and privileges then possessed by the Choctaws and Chickasaws and securing to the descendants of the former the same rights and privileges, including rights of property, and (2) those providing for the admission of certain Indians into the country and (3) the continuation of that condition of affairs which would keep the country for the use of Indians exclusively.

The stipulations announced by the commissioners at the Fort Smith council were manifestly attempted to be carried out, but the manner and form of doing so, and whether accurately and fully embodied in the treaty, afford room for controversy, especially as to the fifth stipulation.

Conspicuously apparent are the provisions establishing an Indian territorial government in the Indian Territory, and excluding white men, and confirming to the Choctaw and Chickasaw nations all the rights, privileges, and immunities theretofore possessed by the said nations, or the individuals thereof, to which they were entitled under previous treaties not inconsistent with the one then executed.

Twenty-seven articles are devoted to a scheme for the survey of the lands of the nations east of the ninety-eighth degree of west longitude, and a division of the lands into severalty with a right of selection, first,

by the Choctaws and Chickasaws, and then by Indians known and designated as Kansas Indians, not exceeding 10,000 in number, and then by the persons of African descent named in the third article of the treaty. There was, by the provisions of the treaty in regard to the selections of the land in the order named, a chance for a part of the agreement to become ineffective, and this part did very soon come to naught by the refusal of the two nations to approve the same.

Why so many things should be annexed to a simple cession of land if the transfer was meant to become absolute does not appear. Enough does appear to make an unqualified transfer seem inconsistent and repugnant, and though some of the conditions and qualifying words leave room to suppose that no reservation as to title or an interest in the land was intended to be made, taken as a whole the language following the cession is inconsistent with the absoluteness of the transfer and
910 offers a glaring want of reciprocity and equality between the parties. There is at least enough of contradiction and inequality to create the belief that, as the parties did not see fit to make the cession for so much money to be paid and stop at that, something else was intended by one party or the other, or by both.

The first and second stipulations announced by those negotiating the matter for the United States are embodied in article 1 of the treaty as it was actually executed. The third and fourth of these stipulations appear in articles 2, 3, and 4. The sixth stipulation is in article 8 and the seventh in article 43.

The third article relates to the cession of the leased district for Indian purposes, and the third and fourth articles to the provisions to be made for freedmen of African descent. The fifth article relates to a general amnesty for past offenses as therein stated. The sixth article relates to granting the right of way to railroads which may be authorized to be constructed through the Territory. Article 8 relates to the establishment of an Indian territorial government in the Indian Territory, as provided for in the sixth stipulation at Fort Smith. Article 9 relates to educational purposes. Articles 10 and 45 relate to the reaffirmance by the United States of all their former obligations to the Choctaws and Chickasaws.

Commencing with article 11 and ending with article 37, both inclusive, and including all intervening articles, provision is made for a survey of all the Choctaw and Chickasaw lands east of the ninety-eighth degree, and division of the lands into severalty. This is the scheme which fell through because it was made dependent upon the will of the Choctaw and Chickasaw legislatures, as provided in the eleventh article, the first of the articles relating to the scheme. It has no apparent connection with the fifth stipulation at Fort Smith, because that was an absolute requirement, and this scheme was conditional, and because no such scheme was suggested in the fifth stipulation.

Article 38 defines who are members of the Choctaw and Chickasaw nations. Articles 39 and 40 refer to trading purposes. Article 41 relates to the competency of Choctaws and Chickasaws as witnesses. Article 42 relates to the delivering up of criminals. Article 43 relates to the exclusion of white men from the Indian Territory. Article 44 to the establishment of post-offices. Article 45 is to be read in connection with

article 10. Article 46 relates to an advance of money to Choctaws and Chickasaws. Article 47 relates to certain provisions concerning funds and annuities, effective upon request, after lands had been assigned in severalty. Article 48 relates to payment of the Choctaw and Chickasaw commissioners. Article 49 relates to awards to loyal Choctaws and Chickasaws. Article 50 relates to payments to loyal citizens of the United States for losses. Article 51 provided for an abrogation of all inconsistent treaties and parts of treaties.

Taking the form given by the secretary of the council as to the fifth stipulation, we find that a portion of the lands were required to be set apart for two distinct classes of Indians—(1) friendly tribes then in Kansas, and (2) friendly tribes then located elsewhere.

The following articles of the treaty must be considered to determine the value of the contentions of the defendants with respect to the
911 omission or embodiment of the vital terms of the unsigned treaty and the ultimatum submitted at the outset, to wit:

"ART. 3. * * * Until the legislatures of the Choctaw and Chickasaw nations, respectively, shall have made such laws, rules, and regulations as may be necessary to * * * give such persons who were residents as aforesaid, and their descendants, 40 acres each of the land of said nations, on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections, as herein provided; * * *

"ART. 11. * * * Should the Choctaw and Chickasaw people, through their respective legislative councils, agree to the survey and dividing their land on the system of the United States, the land aforesaid, east of the ninety-eighth degree of west longitude, shall be, in view of the arrangements hereinafter mentioned, surveyed and laid off in ranges, townships, sections, and parts of sections; * * *

"ART. 12. The maps of said surveys shall exhibit, as far as practicable, the outlines of the actual occupancy of members of the said nations, respectively, and, when they are completed, shall be returned to the said land office at Boggy Depot for inspection by all parties interested, when notice for ninety days shall be given of such return. * * *

"ART. 15. At the expiration of the ninety days' notice aforesaid, the selection, which is to change the tenure of land in the Choctaw and Chickasaw nations from a holding in common to a holding in severalty shall take place, when every Choctaw and Chickasaw shall have the right to one quarter section of land. * * *

"ART. 25. During ninety days from the expiration of ninety days' notice aforesaid the Choctaws and Chickasaws shall have the exclusive right to make selections as aforesaid. * * *

"ART. 30. The Choctaw and Chickasaw nations shall receive into their respective districts, east of the ninety-eighth degree of west longitude, in the proportion of one-fourth in the Chickasaw and three-fourths in the Choctaw Nation, civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory, not exceeding 10,000 in number, who shall have in the Choctaw and Chickasaw nations the same rights as the Choctaws and Chickasaws, of whom they shall be the fellow-citizens, governed by the same

laws and enjoying the same privileges, with the exception of the right to participate in the Choctaw and Chickasaw annuities and other moneys and in the public domain, should the same, or the proceeds thereof, be divided per capita among the Choctaws and Chickasaws, and, among others, the right to select land, as herein provided for Choctaws and Chickasaws, after the expiration of the ninety days, during which the selections of land are to be made, as aforesaid, by said Choctaws and Chickasaws. * * *

"ART. 31. And whereas some time must necessarily elapse before the surveys, maps, and selections herein provided for can be completed so as to permit the said Kansas Indians to make their selections in their order, during which time the United States may desire to remove the said Indians from their present abiding places, it is hereby agreed that the said Indians may at once come into the Choctaw and Chickasaw nations, settling themselves temporarily as citizens of the said nations, respectively, upon such land as suits them and is not already occupied.

"ART. 37. In consideration of the right of selection, hereinbefore accorded to certain Indians other than the Choctaws and Chickasaws, the United States agree to pay to the Choctaw and Chickasaw nations, out of the funds of Indians removing into said nations, respectively, under the provisions of this treaty, such sum as may be fixed by the legislatures of said nations, not exceeding $1 per acre." * * *

We think the fifth stipulation meant tribal occupancy and a future agreement with reference to this kind of an occupancy, and there is no such agreement to be found in article 30.

The term "elsewhere," appearing in the fifth stipulation, embraced any and all country in which such tribes were located at that time except the State of Kansas. As it appears in the fifth stipulation it is clearly not embodied in the said article. Its provisions can not apply to tribes not located either in Kansas or north of the Indian Territory. The word "elsewhere" can not be ignored, nor can it be assumed that it only embraces localities north of the Indian Territory and that all tribes are covered by that part of article 30 referring to "civilized Indians, from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory." The term must
912 be taken to mean what the president of the council stated when he informed the Indians that the commissioners were empowered to treat with the delegates of the tribes located within the Indian Territory and others living west and north of it. The propositions were addressed to seventeen tribes, living in various places.

The proposition that the leased district could not have been embraced within the land required by the fifth stipulation to be set apart for friendly Indians is sought to be maintained upon the theory that the stipulation required "a portion of the lands hitherto owned and occupied" by those to whom the stipulations were submitted, and the Choctaws and Chickasaws it is known were not then in the occupancy of the leased district. This argument is tantamount to saying that the fifth stipulation meant that the lands to be set apart should not only be owned but actually occupied by the owners at the same time, and that the portion to be set apart for friendly Indians was not to come from the large portion

owned but constructively occupied. As the land west of the ninety-eighth meridian was still owned by the claimants and the lease did not terminate their rights as owners, and as article 3 of the treaty of 1855 provided that the land in suit should be a part of the Choctaw district, and by article 9 of the same treaty it was to remain open to settlement by Choctaws and Chickasaws, as it had been, we think the commissioners did not mean to exclude the leased land from that required to be set apart. The claimants were as much the actual occupants of that part of the leased district not used by the Wichitas as they were of the major portion of their domain east of the ninety-eighth meridian.

Articles 30, 31, and 37 presented a general scheme for a survey and division of the lands in severalty east of the ninety-eighth degree, the whole thing being elaborated in articles 11 and 12 to 37, inclusive. The scheme of the treaty outside of tribal occupancy is disclosed in article 11, where provision is made for allotting lands among the people of the two nations so that the lands would be held in severalty instead of in common, and for that purpose to survey it into ranges, townships, and sections and parts of sections. Then came the series of articles providing for the manner of making selections. This scheme failed for want of Choctaw and Chickasaw consent, as stated. So everything contained in the articles beginning with 11 and ending with 37 may be considered out of the treaty. The commissioners of the United States would most probably not have made a demand for a portion of the lands of these claimants and then put it in their power to completely nullify the demand unless it was intended to give effect to the fifth stipulation somewhere else.

Article 30 does not mean the admission of tribes as such, but individual civilized Indians from tribes who upon their admission might become citizens of the Choctaw and Chickasaw nations.

Article 31 provides that they might come at once, settling themselves temporarily as citizens on lands not occupied.

Article 37 provides that the United States should pay the Choctaws and Chickasaws such sums as the legislatures might fix, not exceeding $1 per acre, for the lands taken by those coming in as citizens. These were provisions for individuals to become citizens and take special allotments of sections and to hold the surplus or unallotted lands in common
913 by all the Choctaws and Chickasaws and the new citizens together, who, by the act of coming in and taking a part of the land, become Choctaws and Chickasaws to all intents and purposes.

This scheme was not a setting apart of a portion of the lands owned and occupied for the friendly Indians in Kansas and elsewhere.

The fifth stipulation is either implied from the language of the third article or omitted altogether from the treaty. The fourth article of the unsigned treaty contemplated a definitive agreement by the Choctaws and Chickasaws to admit friendly Indians to their country east of the ninety-eighth degree. The agreement as actually made was a conditional one for the admission of friendly Indians, limited to a certain number to come in as citizens. Their occupancy was not to be a tribal occupancy.

Article 31 can not be construed to mean that the United States possessed the right to settle Indians east of the ninety-eighth degree until the Choctaw and Chickasaw legislatures should decide to survey and

divide their lands east of that degree. In stipulating that the Kansas Indians might come into the Choctaw and Chickasaw country at once without waiting for the surveys and maps, the agreement must be read with other articles on this subject and interpreted to mean that when the legislatures approved the plan of making the surveys and maps for the division of the lands the Kansas Indians might then come at once. The survey was never begun, none of the Kansas Indians ever came east of the ninety-eighth degree, and the United States has never attempted to put any of them there. The terms prescribed in article 37 have reference to the Kansas Indians and the terms of their admission, if they were to be admitted by the action of the legislatures of the Choctaws and Chickasaws within the limits prescribed by the treaty. The fifth stipulation contemplated the terms to be fixed either by the parties with the approval of the Government or by the Government itself. The difference is apparent enough to lead to the conclusion that article 37 does not embody the fifth stipulation.

For the reasons set forth, articles 30, 31, and 37 do not satisfy the requirements of the ultimatum presented at Fort Smith.

The fifth stipulation is implied from the language of the cession, because as to the land west of the ninety-eighth degree it was to be set apart and presumably conveyed to carry out the purpose resting unmistakably in writing in the statement of the president of the council at Fort Smith and in the unsigned treaty offered by the commissioners of the United States before the adjournment of the council. If the purpose of the cession was not explicitly stated in the treaty, the conditions were present upon which it was demanded and acceded to, and, having been acted on under these circumstances, the cession and the demand for it must be construed together as the thing the parties intended to consummate.

The proviso to article 3 relates to the disposition and uses of the fund when the grantors should, within two years after the ratification of the treaty, make laws, rules, and regulations conferring on persons of African descent resident among them all the rights, privileges, and immunities of said nation, including the right of suffrage, together with 40 acres of land to be assigned to each of them. On the enactment of the necessary laws providing for these people the consideration was to
914 be paid to the claimants, less such sum at $100 per capita as should be sufficient to pay those persons of African descent actually removing. If these laws were not made within the two years then the money was to by held by the United States for the use and benefit of such of those freedmen as the Government should remove, the United States agreeing within ninety days from the expiration of two years to remove all those willing to go, but the freedmen remaining or returning to have no benefit of the $300,000, but to be upon the same footing as other citizens of the United States in said nations. The express language is, that the consideration shall cease to be held in trust for the Choctaws and Chickasaws should the laws of the nations necessary to give the privileges and rights of property named not be passed within the two years. And to guard against the contingency of the failure of the nations to pass the laws necessary to invest the freedmen with the certain rights stipulated for their benefit in the third article, it was provided by article 4 that—

"The said nations further agree that all negroes, not otherwise disqualified or disabled, shall be competent witnesses in all civil and criminal suits and proceedings in the the Choctaw and Chickasaw courts, any law to the contrary notwithstanding; and they fully recognize the right of the freedmen to a fair remuneration on reasonable and equitable contracts for their labor, which the law should aid them to enforce. And they agree, on the part of their respective nations, that all laws shall be equal in their operation upon Choctaws, Chickasaws, and negroes, and that no distinction affecting the latter shall at any time be made, and that they shall be treated with kindness and protected against injury; and they further agree that while the said freedmen now in the Choctaw and Chickasaw nations remain in said nations, respectively, they shall be entitled to as much land as they may cultivate for the support of themselves and families, in cases where they do not support themselves by hiring, not interfering with the existing improvements without the consent of the occupant, it being understood that, in the event of the making of the laws, rules, and regulations aforesaid, the forty acres aforesaid shall stand in place of the land cultivated as last aforesaid."

Thus article 4 substitutes immediate actual but temporary civil and property rights to be enjoyed by the freedmen until the permanent scheme of the treaty was worked out.

Article 46 is as follows:

"Of the money stipulated to be paid to the Choctaws and Chickasaws under this treaty for the cession of the leased district, and the admission of the Kansas Indians among them, the sum of one hundred and fifty thousand dollars shall be advanced and paid to the Choctaws and fifty thousand dollars to the Chickasaws through their respective treasurers, as soon as practicable after the ratification of this treaty, to be repaid out of said moneys or any other moneys of said nations in the hands of the United States; the residue, not affected by any provision of this treaty, to remain in the Treasury of the United States at an annual interest of five per cent, no part of which shall be paid out as an annuity, but shall be annually paid to the treasurer of said nations, respectively, to be regularly and judiciously applied, under the direction of their respective legislative councils, to the support of their Government, the purposes of education, and such other objects as may be calculated to promote and advance the welfare and happiness of said nations and their people, respectively."

Stripped of all technical considerations, the practical effect of the claim for the absoluteness of the cession is such as to involve the taking by the white man, for a consideration, to be applied to the benefit of the black man, some millions of acres of land belonging to the red man, the transfer so operating as to enable the whites to keep the land and the red people to get the consideration only by surrendering its equivalent to the blacks. That the Government took the land ceded, followed by some sort of a use in the grant in those making the cession, seems probable, unless the intention existed to wrong the grantors, and that we can not
915 any more believe than we can to entertain the suggestion that it was the policy of the United States to take this land from the claimants because of their participation in the rebellion.

The theory that the cession became absolute involves the United States in the plan of deliberately abandoning the original lease of the

ceded territory. By that lease the Government already had all the rights it wanted in the land except the privilege of putting Indians there not named in the lease. The effect of the abandonment of the lease would include an abandonment of the very purpose for which the lease was taken, for if the leased land was to become a part of the public domain it ceased to be Indian country. Every stipulation that the country should be kept intact as Indian country would thus be violated as well as every policy of the Government reversed.

Article 43 expressly prohibits white intruders. Taken in connection with the establishment of an Indian territorial government in the Indian Territory, as provided in article 8 of the treaty, the sixth stipulation presented at Fort Smith is made to appear, and additional emphasis is given to the guaranty of the Dancing Rabbit Creek treaty under which the Choctaws left Mississippi to live upon this land. Article 43 is as follows:

"ART. 43. The United States promise and agree that no white person, except officers, agents, and employees of the Government, and of any internal improvement company, or persons traveling through or temporarily sojourning in the said nations, or either of them, shall be permitted to go into said Territory, unless formally incorporated and naturalized by the joint action of the authorities of both nations into one of the said nations of Choctaws and Chickasaws, according to their laws, customs, or usages; but this article is not to be construed to affect parties heretofore adopted, or to prevent the employment temporarily of white persons who are teachers, mechanics, or skilled in agriculture, or to prevent the legislative authorities of the respective nations from authorizing such works of internal improvement as they may deem essential to the welfare and prosperity of the community, or be taken to interfere with or invalidate any action which has heretofore been had in this connection by either of the said nations."

Article 4 of the treaty of 1830 says:

"The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants."

Articles 10 and 45 reaffirmed the obligations of the Government with respect to all rights to which the nations were entitled by former treaties and the legislation thereunder as far as consistent with the new treaty. These articles are consistent with the cession for Indian purposes and in harmony with the recitals which, providing for the repayment of a part of the money after the admission of the Kansas Indians and the application of the other part of the consideration to the support of a government which included the new population proposed to be incorporated, continued the country for the use of the Indians.

That a use should have been retained to the Seminoles, the Creeks, and the Cherokees in the lands ceded by them while an implied trust did not result to the Choctaws and Chickasaws is incredible when we consider the purposes for which all the lands were wanted under the ultimatum addressed to all alike.

The grant in the Seminole treaty of March 11, 1866, was made "in compliance with the desire of the United States to locate other
916 Indians and freedmen thereon." (14 Stats., 755.) It was an unlimited grant and the Seminoles ceded and conveyed their entire domain of 2,169,080 acres for $325,362, being about 15 cents an acre. When these lands were sought to be diverted from the purposes for which they were set apart the question arose as to the measure of Seminole right therein, with the result that Congress appropriated $1,912,942.02 for their reversionary interest. (Ex. Doc., 50th Cong., 2d sess.; 25 Stats., 1004.)

The grant of lands in the Creek treaty of June 14, 1866, was made "in compliance with the desire of the United States to locate other Indians and freedmen thereon." The Creeks ceded the west half of their entire domain "to be sold and used as homes for such other civilized Indians as the United States may desire to settle thereon." (14 Stats., 785.) This was a cession, with limitations, of 3,250,560 acres for $975,168, or about 30 cents an acre. When the Creek lands were sought to be opened for public settlement Congress appropriated $2,280,857.10 for the equity of the Creeks in the lands, being at the rate of $1.25 per acre, deducting the 30 cents per acre paid under the treaty of 1866 as to unassigned lands and 20 cents per acre to cover expenses on lands which had been assigned to other Indians and occupied by them. (Ex. Doc. 98, 50th Cong., 2d sess.; 25 Stats., 759.)

The treaty with the Cherokees of July 19, 1866, was dissimilar from all the other treaties. The Cherokees agreed to sell to the United States, at a price to be agreed on, the territory west of the ninety-sixth degree of west longitude, for the settlement of friendly Indians, as wanted. By the failure to agree on terms the President of the United States was to fix the price of the land, and in the meantime the Cherokees were to have exclusive jurisdiction of all the unoccupied lands, so that no white man should come in. (Stats., .)

The suggestion appears that the lands which formed the subject of these different treaties were not held by the same kind of a title, and that the terms are unlike in all the agreements.

The existing circumstances were not precisely alike, and there were different conditions of estate held by the different tribes, and different subjects were necessary to be treated. This state of affairs accounts for the use of different phraseology in making each treaty. Pervading each agreement is the purpose to continue to hold all the lands for Indians alone. Nowhere does the suggestion appear to have lands ceded to be added to the public domain.

No reason existed for discrimination against the Choctaws and Cickasaws, except that the United States held a lease on some of their land. But it was only a lease for purposes quite restricted—a permit to the Government to put certain Indians there. The Government not only could not sell the land, but it could not go upon it. The lease itself stood in the way of the enlarged policy suggested in 1864, but with some provision admitting Indians from country not named in the treaty of 1855; or with a cession having in view those objects we think the Government got all it intended to get. Under its terms the Choctaws and Chickasaws might have occupied its unsettled portion by abandoning every other

acre of land then occupied by them not embraced in the lease, thus frustrating the purpose of getting more settlements on the leased territory.

The treaty which finally defined the title and tenure of the Creeks and Seminoles to their lands was entered into August 7, 1856. (11 917 Stats., 699.) In article 3 of that agreement the same title by which the lands were held by the Creek Nation by the fourteenth article of the treaty of 1832, the third of the treaty of 1833, and by the letters patent of 1852 were guaranteed to the Seminoles and to the Creeks. (11 Stats., 699.) Those agreements conferred the fee to continue to said Indians so long as they existed as nations and occupied the country. This was substantially what was done for the Choctaws by the treaty of 1830.

It would be against the history of our dealings with nearly every other tribe at the close of the war to say that the civilized tribes were singled out because of their acts of hostility during the strife as special objects of punishment, and that because of their participation in the struggle it was the policy of the Government to inflict punishment upon them either by the deprivation of any of their funds or by the forfeiture of their lands. It would also be in the face of the treaties with the other three civilized nations and the acts of the Government under these now to insist that the Choctaws and Chickasaws were intentionally deprived of any part of their lands as the penalty of their hostility, while the Creeks, the Seminoles, and the Cherokees were not. If any such purpose had existed, Congress, no doubt, would have manifested it as they did do in the only case of the kind, where, for an unprovoked attack on the settlements of Minnesota, the Sioux were deprived of their annuities. (12 Stats., 652.)

It was an era of reconciliation and restoration, and while it is true the Indians assembled at Fort Smith in September, 1865, were informed that they were at the mercy of the Government, the suggestion was impressed upon the loyal and disloyal alike, with no suggestion, however, that the common property of all was to be taken for the disobedience of those who had not adhered to the cause of the United States. However true it is that the large majority of the claimants had taken up arms against the Government, the fact remains that individual members of the nations did not do so, and the forfeiture of lands would have been the punishment of all.

And that any such intention existed as regards Indians who happened to be possessed of lands and who were not immediately responsible for hostilities is without belief when it is considered that as to the whites who were responsible and possessed of similar property no suggestion of confiscation was anywhere made. The purpose to take property as a penalty from Indians who could not commit treason, and not take the equivalent from white citizens who could, can not be attributed to the Government without reflecting upon its generosity and justice and contradicting all history.

When the peace demanded was secured from these tribes, the conqueror disappeared, and the public guardian took the place of the agencies of force. Then began in earnest the efforts of the commissioners to secure land for the colonization of other Indians and at the same time to protect as far as practicable the freedmen in the nations,

whose situation at that time was peculiar and regarded so to such an extent their removal was deemed especially desirable by the Government.

There is no evidence that it was the understanding that white people were to be excluded merely from the home country of the Choctaws and Chickasaws. What evidence we have points to the conclusion that the parties supposed the guaranty on this subject related to the exclu-
918 sion of the whites from all Choctaw and Chickasaw territory.

The unsigned treaty asked for a modification of the terms of the ninth article of the treaty of 1855, under which Indians were admitted and whites excluded. The modification sought the admission of other Indians only. Everything suggested in the negotiations related to the freedmen who happened to be in the country and to Indians who did not happen to be there; but all propositions were in line with previous treaties, which guaranteed the exclusion of white men and white men's government, with absolutely nothing to apprise the Choctaws and Chickasaws that the guaranties were meant for a part only of their territory.

The Choctaw and Chickasaw treaty came next after the Seminole treaty. Seeing the Seminoles cede over 2,000,000 acres of land for about $325,000 for a specific purpose—named, it is true, but with no limitation upon the grant, and yet one thought at that time, and conceded now, to leave a reversionary interest to the grantors—the Choctaws and Chickasaws had a right to understand, and we think did understand, that when they were required to cede nearly 8,000,000 acres of their land at $300,000 they were not surrendering all their interest in it. While the Seminoles got 15 cents an acre, the Choctaws and Chickasaws got about 4 cents an acre, if we assume they got anything at all. The lease which the United States already had on the land diminished the interest of the Choctaws and Chickasaws to the extent of the rights granted by the lease, and herein we find the reason which probably accounts for the estimate of 4 cents an acre on their land.

On July 4, 1866, the United States made a treaty with the Delawares. (Stats., .) In its preamble it was recited that the United States had made treaties with the Choctaws and Chickasaws, the Creeks, and the Seminoles, whereby the Government had "acquired the right to locate other Indians within" the Indian country. Under article 4 the United States agreed to sell to the Delaware Indians a tract of land in the Indian country ceded by the Choctaws and Chickasaws, the Creeks, or the Seminoles, or which thereafter might be ceded by the Cherokees, the land to be selected by the Delawares. This language implied that the Government got as much of a title from one tribe as from another, no more and no less, and all for the same purpose. The agreement with the Delawares was in line with and pursuant to the previously announced policy of obtaining land upon which other Indians might be located.

In 1871 Congress passed an act prohibiting the further colonization of Indians on unoccupied lands in the Indian Territory, except with its consent. (Stats., .)

In 1879 the question was raised as to the right of the Government to remove persons from the unoccupied lands who, in apparent violation of the treaties, had gone there. The Secretary of the Interior, in reply to

an inquiry from the Secretary of War on this subject, after reciting the lease of 1855 and the effect of article 9 thereof, stated "that the treaty of 1866 substituted a direct purchase for the lease, but did not extinguish or alter the trust." This statement is inaccurate as a legal proposition. If the direct purchase become the substitute of the lease which originated the trust, on its face there could be no trust. A direct purchase would supersede the trust outright. Secretary Schurz seems to have confused the matter of an express trust with a trust implied by law.

919 None, however, can doubt that the idea intended to be conveyed was that, despite the direct cession, the Government conceded the reversionary interest of the claimants. And who else could he have meant but the claimants when the Secretary said the purchase did not alter the trust, after referring to the lease which created it in favor of the Choctaws and Chickasaws, and in them alone? The theory that the trust was for somebody else is not only without support in the proof, but against every conceivable reason for taking a trust for other tribes. If the Government took the land in trust for the benefit of other Indians who had no interest in the ceded territory, it accomplished by indirection what it could better have done upon the claim of absolute ownership and with much less inconvenience to itself.

In response to a resolution of the Senate, adopted February 17, 1882, calling for information concerning the rights of settlers, another Secretary of the Interior went into the history of these lands and informed the Senate that the cession of the treaty of April 28, 1866, with the claimants was, by its tenth article, "made subject to the conditions of the compact of June 22, 1855," in the ninth article thereof. (Secretary Kirkwood's letters.) President Hayes had, in the meantime, issued his proclamation warning white intruders off these lands, on the ground that they constituted Indian country, for Indians only. President Arthur followed with his proclamation to the same effect. (H. R. 3147, 51st Cong., 1st sess., 19, 25.) These proclamations originated before any questions had been sprung from the claimants or in their behalf. The Government was interpreting its own treaty. After the controversy was on and the issue had been made in Congress President Cleveland issued his proclamation on the same subject, thus keeping in line with his predecessors, until the courts overthrew the Executive and legislative view of the purposes for which the lands had been ceded. (Proc. March 16, 1896.)

As far back as 1881 the Land Office did not regard the leased district as the absolute property of the United States, but "subject to specific trusts," set forth in detail. Acting Commissioner Holcomb conceded the assumption of trusts under the several treaties which included the Choctaw and Chickasaw agreement. (Rep., Apr. 25, 1881.)

Secretary Teller, in a communication to the Senate concerning lands in the Indian Territory not claimed and occupied by the Five Tribes, said in 1884 that "these lands were acquired by treaties with the various Indian nations or tribes in that Territory in 1866, to be held for Indian purposes, and to some extent for the settlement of the former slaves of some of said nations, or portions thereof." (Com. Sec. of Int., Feb. 14, 1884.) The status of the ceded lands was again considered by the same

Secretary the following year, and the first opinion elaborated to the general conclusion that there was a direct trust. (Secretary Teller's Com. to Senate, Jan. 26, 1885.)

The trust character of the estate acquired by the United States was referred to from time to time by other officials connected with the administration of the public lands and of the affairs of the Indians. (Repts. Comm'r Price, 1885, and Acting Comm'r Belt, 1890.) And in 1889, construing the analogous treaty with the Seminoles, Secretary Vilas said it was claimed, "perhaps with force," that the unconditional ces-
920 sion by the Seminoles was, in fact, made upon the same understanding as the cession by the Creeks. In the clear absence of any stipulation in the Seminole agreement that the lands would be used according to the expectation the Secretary did not recognize the demand of the Seminoles made at that time, but when Congress considered the matter, at the instance of the Secretary, an appropriation was made in recognition of the implied trust (25 Stats., 1004, supra). This legislation was by the Congress preceding that which recognized the Choctaw and Chickasaw claim.

The persuasive character of the construction given by officials so intimately connected with the proper disposition of the public lands, and so intent upon procuring lands for nonreservation tribes, becomes of great value when it is considered that such departmental construction was nearly contemporaneous with the execution of the treaty itself. Secretary Noble took a different view of the matter long after, when it came to the question of compensating the claimants for lands taken by Executive order for the Cheyennes and Arapahoes with a result not accepted by Congress, but his dissent is all the more conspicuous by the comparison of his view with that of every other official and department of the Government until the special message of the President adopting the view of Secretary Noble.

By the side of this continuous Executive and legislative construction of the objects of the treaty we must, in justice, notice the only act of the claimants which implies, or seems to imply, that they had a different understanding of the intent.

In an act of the Choctaw council, approved November 20, 1867, entitled "An act to authorize the national attorney to attend to the claims set up against the nation under the forty-ninth and fiftieth articles of the treaty of April 28, 1866, and for other purposes," section 3 provides:

"SEC. 3. Be it further enacted, That the national attorney be, and he is hereby, instructed to respectfully bring to the notice of the Commissioner of Indian Affairs that this nation will not consent to give the freedmen residing among them the 40-acre lots of land, including the right of suffrage, mentioned in the third article of the treaty of April 28, 1866, where they have humbly to submit to the forced sale of the leased district, lying west of ninety-eight degrees west longitude, for about $2\frac{1}{2}$ cents per acre, for objects of negro colonization upon their borders; and he shall also request the said Commissioner of Indian Affairs to provide in due time for said freedmen, for their removal to some country, and remove Kansas Indians here in their stead, if they are willing to be removed."

This recital came a year after the Choctaws had failed by act of their council to ratify that part of the treaty which secured, if ratified, the

assignment of 40 acres each of land east of the ninety-eighth meridian to several thousand freedmen. In the meantime the United States had made no effort to remove the freedmen. They were still there, in a state of uncertainty as to their future and a source of apprehension to their late masters. Under these circumstances it may well be supposed the Choctaws, having refused to admit Kansas Indians, or settle freedmen either, reasonably apprehended the appropriation of other lands for that purpose. Though they had not received the consideration and had put themselves in a situation where it was not likely they would ever receive it, who doubts that under these circumstances they did not feel the power of the United States and had reason to apprehend the colonization of their former slaves on land west of the ninety-eighth meridian with the price of the cession of the land still in the hands of the United States to accomplish it?

921 The inconsistency of this act with any other understanding is diminished by time of its passage and the previous and subsequent conduct of the Choctaws. It is completely contradicted by the conduct of their immediate neighbors and coadjutors, the Chickasaws; and being enacted with reference to exigencies and the probable removal of freedmen to the land, either threatened or supposed to be, we attach no necessary importance to it. And being in the face of what we believe was the understanding as to the uses to which the lands were to be put when they were called on to make the cession, the departmental construction must be held to be what the Government intended, and with that kind of an understanding by able and conscientious officials of the Government the Indians likewise must have understood their act as they allege.

We hold the cession in the treaty of 1866 was not intended to divest the Choctaws and Chickasaws of all their interest in the leased district, but was intended to enlarge the scope of the ninth article of the treaty of 1855. Hence, a trust must be implied in favor of the claimants under the terms of the grant.

And when, after refusing to ratify the full treaty, Congress appropriated sums sufficient to cover the amounts to be paid under article 46 of the agreement and the Choctaws and Chickasaws took the money, the character of the transaction could not be changed by their acceptance of the consideration. If the cession was not absolute, but one in trust, the payments could not operate as an estoppel. If any part of the consideration provided for in article 3 was received as an advance not in payment for the land, but for another purpose, whether for the benefit of freedmen or for securing a government into which large numbers of other Indians were to come and to share, the Choctaws and Chickasaws can not be held to be estopped by receiving the consideration. And, finally, if they received the consideration upon the same understanding that every administrative officer of the Government had proclaimed as to the character of the transaction, their act can not be held to estop them from asserting its true character. The joint resolution of the Fifty-second Congress establishing the trusts in the lands allotted to the Cheyennes and Arapahoes is a recognition, as far as that resolution can affect this case, that no payments had ever been made for any part of the leased district. The act of 1895 ratifying the agreement of 1891 with the defendant Indians is a violation of the trust. The Government had the

right to settle Indians permanently on the lands mentioned in the agreement, but not to divert the proceeds of the sale of the lands from the Choctaw and Chickasaw nations to other Indians. We can not say that the allotment of 160 acres to each one of the defendant Indians is unreasonable in the establishment of Wichitas and the affiliated bands as permanent settlers, but beyond this the agreement violates the trust. A decree will therefore be entered in conformity with this opinion, following as far as the same may be applicable the form of the decree in the case of The Western Cherokee Indians (27 C. Cls. R., 1) and Journeycake v. The Cherokee Nation (28 C. Cls. R., 281; 30 ibid., 172).

922 PEELLE, J., dissents:

In respect of the claim of the Wichitas, codefendants herein, to the title to the land in dispute by right of original occupancy or "pristine habitat," I concur in the conclusion of the majority of the court, but my view of the case as to the claimants' rights under the treaty of 1866 leads me to dissent from the conclusions reached by the court in their case.

The controversy is as to whether the cession of land by them to the United States under the treaty of 1866, absolute in terms, can be construed by the court, under the special act of our jurisdiction, from external facts and circumstances as a cession in trust.

There are, however, some preliminary questions which I will first notice, though not material in the view I take of the case.

Prior to 1855 the Choctaw and Chickasaw nations of Indians had acquired by treaties in fee simple, subject to occupancy, certain lands west of the Mississippi River, lying between the Red and Canadian rivers, in exchange for certain lands belonging to them east of the Mississippi River. (7 Stat. L., 210, 333–605.)

June 22, 1855, a treaty was entered into between them and the United States (11 Stat. L., 611), by the first article of which the Choctaw and Chickasaw country was defined by certain boundaries east of the one-hundredth degree of west longitude, and pursuant to the act of May 28, 1830 (4 Stat. L., 411), the lands embraced within the limits so described were guaranteed to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common, "so that each and every member of either tribe shall have an equal, undivided interest in the whole," with the proviso that the land shall not "be sold without the consent of both tribes," and that in case "the Indians and their heirs shall become extinct or abandon the same" it should revert to the United States.

By article 9 the Choctaws quitclaimed and relinquished "to the United States all their right, title, and interest in and to any and all land west of the one-hundredth degree of west longitude," and by the same article the Choctaws and Chickasaws leased "to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein, excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas River and whose permanent localities are north of the Canadian River, but includ-

ng those bands whose permanent ranges are south of the Canadian, or
etween it and the Arkansas, which Indians shall be subject to the exclu-
ive control of the United States, under such rules and regulations, not
nconsistent with the rights and interests of the Choctaws and Chicka-
saws, as may from time to time be prescribed by the President for their
overnment: Provided, however, The territory so leased shall remain
pen to settlement by the Choctaws and Chickasaws, as heretofore."

In consideration of the foregoing relinquishment and lease, the United States, by the provision of article 10, paid to the Choctaws $600,000 and to the Chickasaws $200,000, that being their proportionate interest in the territory leased, as then and thereafter by certain treaties
923 fixed; but what portion of the sums so paid, if any, about which there is a controversy, was in consideration of the relinquishment of the lands west of the one-hundredth degree of west longitude by the Choctaws alone does not appear.

By the treaty of October 18, 1820 (7 Stat. L., 211), the United States had ceded to the Choctaw Nation lands west of the Mississippi River described as follows:

"ART. 2. For and in consideration of the foregoing cession on the part of the Choctaw Nation, and in part satisfaction for the same, the commissioner of the United States, in behalf of said States, do hereby cede to said nation a tract of country west of the Mississippi River, situate between the Arkansas and Red rivers, and bounded as follows: Beginning on the Arkansas River where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian Fork, and up the same to its source; thence due south to the Red River; thence down Red River three miles below the mouth of Little River, which empties itself into Red River on the north side; thence a direct line to the beginning."

The controversy grows out of the language of the description—i. e., "thence up the Arkansas to the Canadian Fork, and up the same to its source; thence due south to the Red River."

The source of the Canadian Fork at that time was supposed, from the maps theretofore made, to be at or east of the one hundredth degree west longitude, and therefore the cession by that treaty could hardly have been intended by the parties to include any land west of that line, and, besides, at that time the western boundary of the United States was the one hundredth degree west longitude.

Later maps show the source of the Canadian Fork to be far west of the one hundredth degree west longitude, while the westernmost point of the Red River is about 2 degrees east thereof, so that the line from the source of the Canadian Fork "thence due south to the Red River" could not be run. Hence, it is evident that the parties understood the source of the Canadian Fork to be at or east of the one hundredth degree west longitude, as shown by the maps as they existed in 1820; and inasmuch as subsequent to the treaty of 1820 the United States acquired from Spain the territory west of the one hundredth degree west longitude (8 Stat. L., 251), and thereafter by treaty 1830 (7 Stat. L., 333) the lands so ceded were restricted east of the one hundredth degree west longitude and the provisions of all prior treaties "declared null and void," the

quitclaim and relinquishment of the territory west of that line was evi-
diently to correct or restrict the boundaries thus shown by the maps a
that time.

In transmitting the treaty of 1820 the commissioners appointed t
negotiate it said, among other things, "from an examination of the map
you will find that Little River is about 60 miles above the Great Raft o
Red River, and that we have located the Choctaws as high up the sam
as practicable." From this it is safe to assume that the commissioners
had before them a map at the time of the treaty; and as there is no evi-
dence showing or tending to show that the Choctaws at that time ha
any other or different knowledge on the subject than that shown by th
maps of that day, in evidence I conclude that the western boundary o
the land ceded was understood by the parties to the treaty to be as indi-
cated on said maps. Therefore the relinquishment by the Choctaws o
all their right, title, and interest in and to the lands west of the one
hundredth degree of west longitude was but a correction of the
924 cession of 1820 in conformity with the intention of the parties;
and hence that no part of the $800,000 paid was in consideration
of the relinquishment; and such seems to have been the understanding
of the parties at the time, judging from the proportionate amounts received
for their respective interest in the lands east of the 100° west longitude;
and it also seems to have been the understanding of the Commissioner of
Indian Affairs, as expressed in 1880. (House Ex. Doc., No. 82, Thirty-
sixth Congress, first session, page 3.)

But I do not regard this as material, as it only goes to the question of
the adequacy of the consideration for the leased district, or rather to the
good faith of the United States in thus procuring the relinquishment and
lease, neither of which questions are within the province of judicial inves-
tigation. The good faith of the United States must not only be presumed,
but must be assumed, in all treaty stipulations.

The United States having acquired the leased district for the perma-
nent settlement of the Wichita and other Indians, as specified in article
9 of the treaty of 1855, "subject to the exclusive control of the United
States, under such rules and regulations not inconsistent with the rights
and interests of the Choctaws and Chickasaws as may from time to time
be prescribed by the President for their government," a trust was thereby
created in the United States for the purposes therein set forth.

No term for the leased district was fixed, but as the purpose of the
lease was for "the permanent settlement of the Wichita" and other
Indians as therein provided, the presumption may fairly be indulged
that the Choctaw and Chickasaw tribes parted with their interest in the
lands perpetually, except as to the right reserved under the proviso, i. e.,
"the territory so leased shall remain open to settlement by the Choctaws
and Chickasaws, as heretofore." But this right they had not exercised
up to the time of the treaty of 1866.

Upon the lands thus acquired, and in conformity with the treaty, the
United States located, among others, the Wichita Indians in 1859. They
were located in the northeast corner of the leased district, and while the
boundaries of their reservation were never legally fixed, still the bound-
aries specified in the unratified agreement between them and the Commis-
sioner of Indian Affairs have been accepted as showing the extent of

their reservation, thus allowing them for a permanent settlement and to hunt over about 743,257.19 acres of land, being the lands covered by the agreement of 1891 between the United States and the Wichitas, which is the immediate subject of this litigation.

The district leased, thus held by the United States, containing about 7,713,239 acres, was treated as held in trust for the use and purpose of settling friendly Indians therein, as provided by the treaty of 1855, at least until 1861, when the Choctaws and Chickasaws, doubtless because of their being slaveholders, early declared through their respective legislatures their purpose by resolution (Reb. Rec., vol. 1, p. 682, and vol. 3, p. 585, 587), and soon thereafter allied themselves to the Southern Confederacy by treaty (Conf. Stat. L., pp. 311, 331), and took up arms against the United States (Reb. Rec., vol. 3, pp. 593, 648), and thereby forfeited their rights to annuities and protection from the Government, and also to their lands, and were "considered as at the mercy of the Government," as they were informed at the council at Fort Smith in 1865. (Rep. Commr. Ind. Affs., 1865, p. 34.)

925 However, at the close of the war, slavery having been abolished in the slave States, the United States were desirous of renewing friendly relations with their late rebellious wards, and to this end treaties were entered upon for the purpose of modifying and fixing their rights in respect of the lands ceded to them prior to the civil war, and also of making provision for those persons who had been held by them in slavery.

Preliminary to the treaty of April 28, 1866 (14 Stat. L., 769), a council was held September, 1865, at Fort Smith, Ark., between representatives of the various Indian tribes, including the Choctaws and Chickasaws, and the commissioners on the part of the United States, at which the Indians were informed that new treaties would have to be made, embodying substantially the following propositions:

"1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.

"2. Those settled in the Indian Territory must bind themselves, when called upon by the Government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory, and with the United States.

"3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes on an equal footing with the original members, or suitably provided for.

"4. A stipulation in the treaties that slavery or involuntary servitude shall never exist in the tribe or nation, except in punishment of crime.

"5. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by Government, or such as may be fixed by the Government.

"6. It is the policy of the Government, unless other arrangements be made, that all the nations and tribes in the Indian Territory be formed into one consolidated government after the plan proposed by the Senate of the United States for organizing the Indian Territory.

"7. No white person, except officers, agents, and employees of the Government, or of any internal improvement authorized by the Government, will be permitted to reside in the Territory unless formally incorporated with some tribe according to the usages of the land." (Report of Secretary of Interior, 1865, 482.)

There is a controversy between counsel as to the precise language of the fifth proposition. The defendants contend that the language is as given above, while the claimants contend that it was as follows:

Fifth. "A part of the Indian country to be set apart and purchased for the use of such Indians from Kansas or elsewhere as the Government may desire to colonize therein."

The claimants' counsel (Mr. Wilson) says: "That the Commissioner of Indian Affairs, in elucidation of the provisions contained therein with regard to the said fifth provision, addressed them as follows: 'A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government.'"

In the above proposition it will be noticed that the lands to be "set apart" were for the Kansas and other Indians; and while in the first the language is that "a portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government," in the other the language is, "a part of the Indian country to be set apart and purchased for the use of such Indians."

926 So that in either case the lands "to be set apart" were to be purchased for the use of such Indians, and whatever doubt may have existed as to who was to pay therefor, as well as what lands were to be thus set apart, was removed when the treaty of April 28, 1866 (14 Stat. L., p. 769), was entered into. Hence to get a correct understanding of the parties we must look to that treaty.

By articles 30, 31, 37 of the treaty last named it is provided that the Choctaw and Chickasaw nations will receive, even before a survey of the lands has been made, "civilized Indians from the tribes known by the general name of the Kansas Indians, being to the north of the Indian Territory, not exceeding 10,000 in number, into their respective districts east of the ninety-eighth degree of west longitude" with "the same rights as the Choctaws and Chickasaws," including the right to select land the same as they—i. e., one quarter section for each person in severalty, in consideration of such sum, not exceeding $1 per acre, as the legislatures of the respective nations may fix, to be paid by the United States out of the funds of such Indians as may remove into said nations.

Those provisions are in accord with the fifth proposition, as contended for by the defendants, and in harmony with the elucidation given thereto by the Commissioner of Indian Affairs at the time as aforesaid. Hence the lands to be so set apart and purchased were designated in article 30 as lands "east of the ninety-eighth degree of west longitude," as the claimants had not "hitherto owned and occupied" lands west of that line; and, besides, the lands so set apart to them east of the ninety-eighth degree of west longitude were equally "Indian country" with those west thereof.

The seventh proposition, to exclude white persons from residing in the Territory "unless formally incorporated with some tribe," is embodied in article 43, which clearly shows that the prohibition is against white persons residing within the Choctaw and Chickasaw nations, which are east of the ninety-eighth degree, west longitude. But as it is averred in paragraph 13 of the petition that all seven of the propositions, except the fifth, are embodied in the treaty of 1866, nothing further need be said with reference to them.

By article 9 of the treaty of 1855, as before stated, the Choctaws and Chickasaws had by lease to the United States parted with their interest in the lands west of the ninety-eighth degree of west longitude, except as stated in the proviso thereto, i. e., "the territory so leased shall remain open to settlement by the Choctaws and Chickasaws as heretofore."

But even this right, as well as any other right or title to lands so leased, they were informed by the commissioners, as hereinbefore stated, they had forfeited by reason of their treaties with the Confederacy and their participation in the rebellion; and upon this theory, whether right or wrong, the treaty of 1866 was entered upon and finally executed.

So that by article 5, treaty 1866, "a general amnesty of all past offenses against the laws of the United States" was declared, while by article 10 it is provided that "the United States reaffirms all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw nations, entered into prior to the late rebellion, and in force at that time, not inconsistent herewith."

927 By the same article the portion of annuities which had been withheld by reason of their participation in the late rebellion was renewed, to begin July 1, 1866.

Subsequent sections provided for a survey at the expense of the Government and division of their lands into severalty; the establishment of a land office, giving to each the right to select 160 acres and provide for the settlement of disputes in respect of such selections, thus showing that the purpose of the Government in relation to these Indians was to limit their right of absolute control, even though prior to the rebellion they held the lands in fee simple subject to occupancy.

Hence the language in article 10 in respect of the reaffirmance by the Government of all claims arising out of treaty stipulations or acts of legislation, "entered into prior to the late rebellion and in force at that time," is limited by the words, "not inconsistent herewith."

The "rights, privileges, and immunities" theretofore possessed by the claimants, as nations and as individuals, under former treaties and acts of Congress were, by article 45, treaty 1866, declared to be in full force only "so far as they were consistent with the provisions" of that treaty. And by article 51 it was provided "that all treaties and parts of treaties inconsistent herewith be, and the same are hereby, declared null and void." Therefore the rights of the claimants as they existed prior to the late civil war were modified and fixed by the treaty of 1866; and by that treaty, which is clear and harmonious, their rights must be determined.

Has a treaty with an Indian tribe or nation the sanctity of an act of Congress, or is it simply an ordinary contract as between individuals?

The Constitution of the United States, article 6, section 2, provides—

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

No distinction is there made between a treaty with a foreign nation and an Indian tribe, and I am aware of none having been made in adjudged cases. On the contrary, in the case of Fellows v. Blacksmith (19 How., 366, 372), in speaking of the objection therein raised to the validity of the treaty with the Tonawanda Band of Indians, because the band was not represented by their chiefs and headmen in the negotiation and execution of the treaty, the court said: "But the answer to this is, that the treaty after executed and ratified by the proper authorities of the Government becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation than they can go behind an act of Congress (1 Cr., 103; 6 Pet., 735; 10 How., 442; 2 Pet., 307, 309, 314; 3 Story Const. Law, p. 695)." And such has been the holding of this court. (Leighton Case, 29 C. Cls. R., 288, 322.)

Up to the time of our revolution Great Britain recognized the Indians in this country "as nations capable of maintaining the relations of peace and war; of governing themselves under her protection; and she made treaties with them, the obligations of which she acknowledged." (Worcester v. The State of Georgia, 6 Pet., 515, 548.)

928 That policy, inherited from Great Britain, was continued by the United States from the time of the first treaty made with the Delawares, September, 1778 (7 Stat. L., 13), until March 3, 1871, now Revised Statutes, section 2079, when for the first time the Congress declared that thereafter a different policy should prevail.

In respect of the right of suffrage under the fourteenth amendment to the Constitution, the Indians have been regarded as foreigners and not entitled to vote unless naturalized, and such has been the action of the political departments of the Government as well as the holding of the courts. (Elk v. Wilkins, 112 U. S., 94–103.)

The Congress, by the Indian depredation act, March 3, 1891 (26 Stat. L., 851), recognize the Indians "as capable of maintaining the relations of peace and war" by making the question of the amity of the tribe, band, or nation to which the depredating Indians belong a jurisdictional fact.

The Congress regard treaties made with the Indian tribes as of equal solemnity with those made with foreign nations, for by Revised Statutes, section 1066, they exclude from the jurisdiction of this court claims against the Government "growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes."

In construing that section of the statute in the case of Great Western Ins. Co. v. United States (112 U. S., 193, 197), affirming the judgment of this court (19 C. Cls. R., 206) in dismissing the petition for want of jurisdiction, the court, by Mr. Justice Miller, said: "This language is comprehensive and explicit. If the cause of action grows out of a treaty stipulation the court can not entertain it. If it is dependent on any such stipulation the same result follows."

Thus the Indians have been recognized as a treaty-making power; and a treaty, therefore, with an Indian tribe is a law of the land, and its provisions, when in controversy in the courts, should be determined by the same rules of interpretation that apply in the construction of acts of Congress. True, by the act of March 3, 1871, now Revised Statutes, section 2079, before referred to, it is provided that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." * * *

But the same section as clearly sanctions all former treaties made therewith by declaring that "no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

Inasmuch as the claim in suit grows out of and is dependent on a treaty stipulation entered into with the claimants in 1866, the court's jurisdiction is limited by the special act referring the case to the court, and beyond that the court can not go.

If, therefore, the relief sought in this suit depends upon a modification or reformation of the treaty, the authority therefore must be found in the special act, and such authority should not be inferred, for the reason that, if the treaty itself s a law of the land, then it has equal sanctity with an act of Congress, at least in respect of the rules which should govern in its interpretation, and hence to take it out of the application of such rules, so as to modify or reform the treaty, the authority therefor should expressly appear. (Ex parte Atocha, 17 Wall., 439.)

929 Keeping in view what has been said, let us first look at article 3 of the treaty of 1866 (14 Stat. L., 769), which, as to the cession of the land, is as follows:

"ART. 3. The Choctaws and Chicasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the ninety-eighth degree west longitude, known as the leased district. * * *"

That language is clear and explicit, about which there can be no doubt, and I fail to find any other provision or article in the treaty in conflict therewith or in any way modifying or limiting the cession thus made, or even referring thereto, except in article 46, wherein it is stipulated that of the money to be paid "for the cession of the leased district and the admission of Kansas Indians" certain sums were to be advanced to each nation, to be repaid out of any money due the Indians.

The consideration for the cession has been fully paid to the Choctaws, and there only remains $17,375 due the Chickasaws, dependent on their nation enacting the required legislation in behalf of their freedmen, which has not yet been done.

The claimants herein are in advance of their race in civilization, self-dependent, and self-governing, and many of them are highly educated, and were when the treaty of 1866 was entered into. Therefore, conceding the rule contended for by their counsel, that "the language used in treaties with the Indians should never be construed to their prejudice" (Choctaw Nation v. United States, 118 U. S., 127), still it has no application in this case. Besides, the language used is free from doubt and ambiguity, and not, therefore, "susceptible of a more extended meaning

than their plain import as connected with the tenor of the treaty," and hence needs no interpretation.

Nor is there any need to resort to departmental construction, for, as said by Mr. Justice Brown in the case of United States v. Tanner (147 U. S. R., 661, 663), "it is only in cases of doubt that the construction given to an act by the Department charged with the duty of enforcing it becomes material."

Again, in the case of United States v. Graham (110 U. S. R., 219-221) it was said:

"Such being the case, it matters not what the practice of the Departments may have been or how long continued, for it can only be resorted to in aid of interpretation, and 'it is not allowable to interpret what has no need of interpretation.' If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling, in its effect. But with language clear and precise and with its meaning evident there is no room for construction, and consequently no need of anything to give it aid. The cases this affect' are numerous. (Edwards' Lessee v. Darby, 12 Wheat., 206; United States v. Temple, supra; Swift Co. v. United States, 105 U. S., 691; Ruggles v. Illinois, 108 U. S., 526.)"

Could language be more explicit?

Following the cession of the leased district and in the same article is a proviso to the effect that the United States will invest at interest and hold in trust for the claimants the consideration of $300,000, so expressed to be given for the cession (in the proportion of three-fourths to the Choctaws and one-fourth to the Chickasaws), "until the legislatures of the Choctaw and Chickasaw nations, respectively, shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in said nations at the date of the treaty of Fort
930 Smith, and their descendants heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage of citizens of said nations, except in the annuities, moneys, and public domain claimed by or belonging to said nations respectively; and also to give to such persons who were residents as aforesaid and their descendants forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land after the Choctaws and Chickasaws and Kansas Indians have made their selection as herein provided."

That done, the money, as in said article provided, was to be paid to the claimants, and if not done within two years from the ratification of the treaty, "then the said sum of $300,000 shall cease to be held in trust for the said Choctaw and Chickasaw nations and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the Territory."

Here is a provision for changing the ceste que trust, but whether the money was paid in the one way or the other no restriction, limitation, or qualification is thereby placed on the cession made and none can be inferred. Whether the same was to be paid to the claimants for the cession, as the language imports, or whether it was intended as a fund to provide for their former slaves, seems to me immaterial, as the purpose and intention of the parties to the treaty in respect of the cession is

clear from the language used, and nothing said before, at the time, or subsequent thereto, can change or add to the meaning anything different from what the language imports any more than an act of the Congress can be so changed.

Nor can the court, in the absence of doubt, look to the language of contemporaneous treaties made with other tribes similarly situated in respect of their alliance with the Confederacy, even though the terms of such treaties be more advantageous, as the court can not inquire into the motives that influenced the treaty-making power any more than it can the motives that influence members of Congress in the enactment of laws. The Choctaws and Chickasaws may have been and perhaps were the most active and influential leaders among the civilized Indians to form an alliance, offensive and defensive, with the Confederacy, and, while "a general amnesty of all past offenses against the laws of the United States" was declared by the treaty of 1866, their rights in and to the lands in question were modified and fixed by the same treaty. Whether it was wise for the treaty-making power so to do is not for the court to determine.

The material language of the special act of Congress of March 2, 1895 (28 Stat. L., 876, 898), referring the claim to the court, is:

"That as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, which claim is controverted by the United States, jurisdiction be, and is hereby, conferred upon the Court of Claims to hear and determine the said claim of the Choctaws and Chickasaws and to render judgment thereon, it being the intention of this act to allow said Court of Claims jurisdiction, so that the rights, legal and equitable, of the United States and the Choctaw and Chickasaw nations and the Wichita and affiliated bands of Indians in the premises shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party in the hearing of said claim. * * * And provided further, That nothing in this act shall be accepted or construed as a confession that the United States admit that the Choctaw and Chickasaw nations have any claim to or interest in said lands or any part thereof."

931 That language falls far short of the language used in the special act referring the claim of the Old Settlers (Western Cherokees) to this court. (25 Stat. L., 694.) In that case, reported (148 U. S., 427), the language of the act is "that the claim be referred to the Court of Claims for adjudication; and jurisdiction is hereby conferred on said court to try said claim and determine what sum or sums of money, if any, are justly due from the United States to said Indians, arising from or growing out of treaty stipulations or acts of Congress relating thereto * * * it being the intention of this act to allow the said Court of Claims unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of said Indians, may be fully considered and determined, and to try and determine all questions that may arise in such cause on behalf of either party thereto and to render final judgment thereon."

The claimants in that case had acquired, by treaty of 1828 and 1833, lands in the Indian Territory, and the United States thereafter, by treaty of 1835, conveyed the same lands to the Eastern Cherokees, which

caused the Western Cherokees to protest against the invasion of their rights, and thereafter they entered into the treaty of 1846, ceding all their right, title, and interest in and to the lands in dispute; but they claimed that the lands so ceded were procured for a grossly inadequate consideration through fraud and duress.

In their suit in that case they ask, among other things, a decree relieving them from the treaty of 1846 and requiring the United States to compensate them for the value of the lands obtained from the United States notwithstanding the treaty.

Although the provisions of the act, as was said by this court (27 C. Cls. R., 1, 35), "are as broad as language can make them," the statute exceeding "in the measure of its liberality any which was ever enacted for the judicial redress of citizens of the United States," still the court held that it was not thereby authorized to go behind the treaty of 1846 and declare it to have been procured by fraud or duress.

That holding was referred to in the case on appeal (148 U. S. R., 427, 466), and several authorities were cited, among which were those of Fletcher v. Peck (6 Cranch, 87, 130) and Ex parte McCardle (7 Wall., 506, 514), in support of the proposition that the motives which influenced members of the legislative branch of the Government in the enactment of laws are not within the scope of judicial cognizance.

If not, then it follows that the court can not inquire into the motives or acts which may have influenced the commissioners, who were acting for the President on behalf of the United States, in negotiating the treaty they did.

I think the above reference with the authorities cited significant, even though the court held that the proposition "that a court may be clothed with power to annul a treaty on the ground of fraud or duress in its execution" did not arise in the case before them.

The court in substance held that the contention of the Western Cherokees as to their ownership of the lands by virtue of the treaties of 1828 and 1833 was put at rest by the treaty of 1846, that while a treaty might be modified or abrogated by an act of Congress, the "power to make and unmake is essentially political and not judicial."

932 In that same connection the court further said: "The presumption is wholly inadmissible that Congress sought in this instance to submit the good faith of its own action or the action of the Government to judicial decision, authorizing the stipulations in question to be overthrown upon an inquiry of the character suggested, and the act does not in the least degree justify any such inference."

Under the act in that case the court was to have "unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of the said Indians, may be fully considered and determined." But this, the court says, "did not mean that either party was entitled to have or receive by virtue of the act anything more than each was entitled to under existing stipulations, or to bring supposed moral obligations into play for the disposal of the case;" that, "if conflict existed between treaty provisions, or between any of them and subsequent acts of Congress, such provisions might necessarily give way and be held invalid; but the language used did not involve a confusion of the respective powers of the departments

of the Government, nor furnish a basis for an external attack upon the validity of an executive or legislative action."

If, under the language of the special act in that case, the court, as was held by this court and sanctioned by the Supreme Court, had no power to annul a treaty on the ground of fraud or duress in its execution, or submit the good faith of the Government to judicial decision, certainly this court, under the act of our jurisdiction, less broad, has no power to correct a mistake not apparent on the face of the treaty, or to change or alter the apparent meaning of the language therein by resorting to extraneous facts. Nor can the act be held as conferring on the court extrajudicial power, since it is provided that either party may appeal to the Supreme Court, whose jurisdiction as defined by the Constitution is strictly judicial. (Gordon v. The United States, 2 Wall., 561; Taney, Ch. J., 117 U. S. R., 697, Appx.; In re Sanborn, 148 U. S. R., 222; Western Cherokee Indians' Case, 27 C. Cls. R., 1, 36.)

The special act of our jurisdiction provides, "that as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the land ceded by the foregoing agreement, which claim is controverted by the United States, jurisdiction is hereby conferred upon the Court of Claims to hear and determine," and, furthermore, it is provided, "that nothing in this act shall be accepted or construed as a confession that the United States admit that the Choctaw and Chickasaw nations have any claim to or interest in said lands or any part thereof." The agreement referred to is the one made by the United States with the Wichita and affiliated bands of Indians codefendants herein, who are also contesting the claimants' rights.

No reference is made in the act to the treaty of 1866 or to any other treaty, nor is it stated therein, as was done in the Western Cherokee Case (supra), that the claim referred to the court was one growing out of or dependent on treaty stipulations.

It is therefore questionable whether the language of the special act is sufficiently comprehensive to remove the prohibition contained in R. S., section 1066. But considering the act as conferring jurisdiction, the naked question for the court to determine is, whether or not the
933 claimants have, as claimed, "any right, title, and interest in and to the lands ceded" by that agreement.

They claim they have, and base their contention on the theory that notwithstanding they ceded the lands to the United States, absolute in terms, by the treaty of 1866, the same was intended by the parties thereto as a cession in trust for the use of Indians only, and that when the Government ceased to use the land for that exclusive purpose the same reverted to the claimants.

Therefore the claim they assert under the act, though not disclosed therein, grows out of and is dependent on treaty stipulations.

To establish such a trust necessarily involves going behind the treaty of 1866 for the purpose of considering the facts and circumstances which led up to it, as no such conclusion can be reached from the language of the treaty itself. In case of doubt it is permissible for the court to consider the history of the times, but that is not this case. It is not a question of construction, for, as before said, the language of the cession is free from doubt and ambiguity, and therefore needs no interpretation.

The claimants are seeking an interpretation of the treaty from external facts which question the good faith and acts of the treaty-making power. That, I contend, the Congress have not committed to judicial scrutiny or action. Besides, the construction they contend for would amount to a re-formation of the treaty, and that can only be done by applying the rule in equity as between individuals to ordinary contracts in the conveyance of lands—i. e., that a deed conveying a fee may nevertheless be declared a conveyance in trust.

Tested by the rules of law applicable to the case, the claimants have no "right, title, and interest" in and to the lands in controversy, for the reason that by the treaty of 1866 they made, in language importing but one meaning, an absolute cession thereof to the Government; and their rights being fixed by that law, equity will not intervene to relieve them from the consequences of their own act.

We can not presume that Congress intended by the act to confer on the court a jurisdiction broader or different from that expressed therein, and in the absence of conflict between the act and the treaty the latter must stand without amendment or alteration.

In the case of The Amiable Isabella (6 Wheat., 1, 71), the court, by Mr. Justice Story, says:

"In the first place, this court does not possess any treaty-making power. That power belongs, by the Constitution, to another department of the Government, and to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an assumption of power, and not an exercise of judicial functions. It would be to make and not to construe a treaty. Neither can this court supply a casus omissus in a treaty any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject-matter, and having found that, our duty is to follow it as far as it goes, and to stop where that stops, whatever may be the imperfections or difficulties which it leaves behind."

Could language be more explicit? Is it within the power of the court under the act of our jurisdiction to "alter, amend, or add to" the treaty by inserting therein words, however "important or trivial," that would change the meaning and purpose of the cession? And, too, by accepting as evidence therefor admissions made before and after the execu-
934 tion and ratification of the treaty by the agents and officers of the Government against its interest?

Waters Case (4 C. Cls. R., 390, 391). Whiteside et. al. v. United States (93 U. S., 247).

To do so would be "an assumption of power and not an exercise of judicial functions."

If the treaty referred to were an act of Congress, would there be any controversy about the position stated?

Nor is the language of the special act enlarged by reason of the provision concerning the admissibility of evidence. It is provided therein that the "court shall receive and consider as evidence in the suit everything which shall be deemed by said court necessary to aid it in determining the questions presented and tending to shed light on the claim, rights, and equities of the parties litigant." That language is limited by the words "which shall be deemed by said court necessary to aid it in

etermining the questions presented," etc. Of course the court, in the bsence of any specified class of evidence in the act, must be bound by he ordinary rules of evidence, so that the general provision can not be onstrued to enlarge the scope of evidence nor to confer on the court xtrajudicial power. (Moore v. United States, 91 U. S., 270.)

Therefore, for the reasons stated, I conclude that the Congress have ot, by the special act, conferred upon this court jurisdiction to re-form, lter, amend, add to, or go behind the treaty of 1866, or to change the meaning of the language evident on its face.

It may be that the claimants were wronged by the cession of the land under the treaty of 1866, but, if so, their remedy is with the political departments of the Government and not with the judiciary, at least not until the Congress by definite and unmistakable language shall authorize the court to enter that field.

True, by the appropriation act of March 3, 1891, section 15 (26 Stat. L., 989, 1025), the Congress, in making appropriations to pay the Choctaws and Chickasaws for land similarly occupied by the Cheyenne and Arapahoe Indians within the district of lands so ceded by the claimants to the United States, did declare that the lands so occupied by the Cheyenne and Arapahoe Indians had "been ceded in trust by article 3 of the treaty between the United States and said Choctaw and Chickasaw nations." But thereafter, and before the passage of the act of our jurisdiction, by joint resolution, January 18, 1893 (27 Stat. L., 753), to correct an error in the amount so appropriated, before payment, Congress added the proviso thereto as follows:

"Provided, however, That neither the passage of the original act of appropriation to pay the Choctaw and Chickasaw tribes of Indians for their interest in the lands of the Cheyenne and Arapahoe Reservation, dated March third, eighteen hundred and ninety-one, nor of this resolution, shall be held in any way to commit the Government to the payment of any further sum to the Choctaw and Chickasaw Indians for any alleged interest in the remainder of the land situated in what is commonly known and called the 'leased district.'" (Joint Res. of Jan. 18, 1893, 27 Stats., 753.)

So that whatever effect the appropriation act may have had by way of legislative construction of the treaty of 1866 was taken away by the joint resolution in respect of any further payment to the claimants for the remainder of the lands, and is not therefore a construction
935 obligatory on the court or even persuasive; and such was manifestly the purpose of Congress by the proviso in the joint resolution, otherwise they would doubtless have adhered to and followed the precedent established by their own action and made an appropriation of a sum adequate, in their judgment, to compensate the claimants for the lands in dispute, instead of referring the claim to this court by an act in which they expressly say that nothing therein "shall be accepted or construed as a confession that the United States admit that the Choctaw and Chickasaw nations have any claim to or interest in said lands or any part thereof."

That language, in connection with the language in the proviso quoted above, makes it clear that what Congress intended was that this court should determine the rights of the claimants in and to the lands in dispute, untrammeled by their declaration that the cession under the treaty

of 1866 was a trust, and I have so considered the case, and reached the conclusion that the claimants' petition should be dismissed.

It follows that the agreement entered into between the United States and the Wichita and affiliated bands of Indians set forth in the act March 2, 1895 (28 Stat. L., 895, 897), ratifying said agreement, should be carried out as therein provided, aided by said act.

936 *Decree of the Court.—Filed March 21, 1899.*

THE CHOCTAW NATION AND THE CHICKASAW Nation, claimants,
v.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

This cause coming on to be heard upon the petition, answers, proofs, and arguments submitted by the parties respectively, and the court having heard the same and duly considered the rights, legal and equitable, of the respective parties in and to the lands in controversy herein described as follows, to wit:

"Commencing at a point in the middle of the main channel of the Washita River where the ninety-eighth meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the line of 98° 40′ west longitude, thence on said line of 98° 40′ due north to the middle of the channel of the main Canadian River, thence down the middle of said main Canadian River to where it crosses the ninety-eighth meridian, thence due south to the place of beginning."

And it appearing to the court that by the treaties between the
937 United States and the Choctaw Nation or tribe of Indians, and the treaties between the United States and the Choctaw and Chickasaw nations or tribes of Indians, the lands above described were acquired by the United States in trust for the settlement of Indians thereon, and in trust and for the benefit of said claimant Indians when the trust aforesaid shall cease, and it further appearing to the court that the said Wichita and affiliated bands of Indians were by the United States located within the boundaries of the lands hereinbefore described, and that they, the said Wichitas and affiliated bands, now number not more than one thousand and sixty persons; and it further appearing to the court that the said location of said Wichitas and affiliated bands within said boundaries was for the purpose of affording them permanent settlement therein, it is ordered, adjudged, and decreed that the lands hereinbefore described were acquired and are now held by the United States in trust for the purpose of settling Indians thereon; that they are held by the United States subject to the purposes and conditions
938 of such trust, and that whenever such purpose shall be abandoned, as to the whole or any part of such lands, then as to all the lands not so devoted to Indian settlement that they be held in trust by the United States for the said Choctaw and Chickasaw Indians exclusively.

And it is further adjudged and decreed that the members of said Wichita and affiliated bands, not exceeding one thousand and sixty, are equitably entitled to one hundred and sixty acres of land each out of the

ands hereinbefore described, and that the same shall be set apart to them
y the defendants, the United States, having due regard to any improve-
ents made thereon by them, respectively, for their permanent settlement.

And it is further adjudged and decreed that the said Choctaw and Chick-
saw nations are in law and equity entitled to and are the owners of the
remainder of said above-described lands, after satisfying the provisions
herein for the Wichitas and affiliated bands, and, in the event of the sale
thereof by the United States, that they shall be entitled to and shall receive
from the United States the proceeds of such sale.

BY THE COURT.

939 *Application of the defendants, the United States, for, and allowance of, appeal.*

THE CHOCTAW NATION AND THE CHICKASAW Nation
vs.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians.
No. 18932.

From the decree rendered in the above-entitled cause on the 21st day of March, 1899, in favor of claimants, the United States, by their Attorney-General, on the 5th day of April, 1899, make application for, and give notice of, an appeal to the Supreme Court of the United States.

L. A. PRADT,
Assistant Attorney-General.

Filed April 5, 1899.

And now, May 22, 1899, on the motion of L. A. Pradt, Assistant Attorney-General, on behalf of the United States, the foregoing application for appeal is allowed as prayed for.

BY THE COURT.

940 *Application of the defendants, the Wichita and affiliated bands of Indians, for, and allowance of, appeal.*

THE CHOCTAW NATION AND THE CHICKASAW Nation,
vs.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians.
18932.

From the decree rendered in the above-entitled cause on the 21 day of March, 1899, in favor of the claimants, the defendants, the Wichita and affiliated bands of Indians, by their attorneys, Josiah M. Vale and Andrew A. Lipscomb, on the 8th day of May, 1899, make application for, and give notice of, an appeal to the Supreme Court of the United States.

J. M. VALE,
ANDREW A. LIPSCOMB,
Attorneys for said defendants.

PHILIP WALKER,
W. C. SHELLEY,
Counsel.

Filed May 8, 1899.

And now, May 22, 1899, on the motion of Andrew A. Lipscomb, esq., attorney for the defendant Indians, the foregoing application for appeal is allowed as prayed for.

BY THE COURT.

941 *Application of the claimants, the Choctaw Nation and the Chickasaw Nation, for, and the allowance of, appeal.*

THE CHOCTAW AND CHICKASAW NATIONS, claimants,
vs.
THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians, defendants. } No. 18932.

From so much of the judgment rendered in the above-entitled cause on the 21st day of March, 1899, as found in favor of the defendants, the claimants, by their attorneys, on the 19th day of May, 1899, make application for, and give notice of, an appeal to the Supreme Court of the United States.

J. M. WILSON,
Attorney for the Choctaw Nation.
H. E. PAINE,
Attorney for the Chickasaw Nation.

Filed May 19, 1899.

And now, May 22, 1899, on the motion of J. M. Wilson, esq., and H. E. Paine, esq., attorneys for the claimants, the foregoing application for appeal is allowed as prayed for.

BY THE COURT.

942 In the Court of Claims.

THE CHOCTAW NATION AND THE CHICKASAW NATION, claimants,
vs.
THE UNITED STATES AND THE WICHITA and affiliated bands of Indians, defendants. } No. 18932. In equity.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of evidence, of the opinion of the court, of the dissenting opinion, of the application of the several parties for appeal to the Supreme Court of the United States, and of the allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of the Court of Claims at Washington City, this 13th day of June, A. D. 1899.

[SEAL.]

JOHN RANDOLPH,
Asst. clerk Court of Claims.

943 In the Supreme Court of the United States.

October term, 1899.

THE UNITED STATES, APPELLANT,
v.
THE CHOCTAW NATION AND THE CHICKASAW NATION. } No.

To JAMES H. MCKENNEY, Esq.,
Clerk of the Supreme Court of the United States.

SIR: In accordance with rule 10, section 9, I beg to submit herewith a statement of the errors upon which the United States intends to rely on its appeal, and of the parts of the record which I think necessary for the consideration thereof, to wit:

Assignments of error.

The Court of Claims erred—

1. In assuming jurisdiction to go behind the plain and ambiguous words of cession in Article III of the treaty of April 28, 1866, and to inquire whether the cession, absolute on its face, was intended to establish a trust, as to the lands ceded, in favor of the parties ceding them.

2. In holding that the country ceded by the Quapaws to the United States by the treaty of August 24, 1818, extended west of the one hundredth meridian.

3. In holding that the country ceded by the United States to the Choctaws by the treaty of October 18, 1820, extended west of the one hundredth meridian.

4. In holding that the treaty of September 27, 1830, between the United States and the Choctaws, did not annul any cession of lands
944 west of the one hundredth meridian, supposing such cession to have been made by the treaty of October 18, 1820.

5. In holding that the United States by the treaty of June 22, 1855, recognized that the Choctaws had any real right, title, or interest in lands west of the one hundredth meridian, and that the sum of $800,000 paid by the United States to the Choctaws and Chickasaws under that treaty, was not paid exclusively for the lease of the country between the ninety-eighth and one hundredth meridians.

6. In holding that the fifth stipulation, announced by the commissioners at the Fort Smith council in 1865, was not embodied in Articles XXX, XXXI, and XXXVII of the treaty of April 28, 1866, with the Choctaws and Chickasaws.

7. In holding that the cession of the territory west of the ninety-eighth meridian, known as the leased district, by the Choctaws and Chickasaws, made by the said treaty of April 28, 1866, was not absolute.

8. In holding that the cession of the said territory, made by the said treaty, was made upon a trust of such a character that the sale of the unallotted portion of the Wichita Reservation would constitute a breach of the trust, even though such sale should be made for the benefit of the Wichita and affiliated bands of Indians located upon the said reservation.

9. In entering a decree that the Choctaw and Chickasaw nations are in law and equity entitled to and are the owners of the unallotted portion of the Wichita Reservation, and that in the event of the sale of such unallotted portion by the United States, they shall be entitled to, and shall receive from the United States, the proceeds of such sale.

945 PORTIONS OF RECORD TO BE PRINTED.

The portions of the record which should be printed for the consideration of the above errors are as follows:

The petition; the answer of the Wichita and affiliated bands; and the answer of the United States.

Evidence introduced by the Choctaw and Chickasaw nations.

Deposition of Cyrus Bussey.

Claimants' exhibits:

No. 28. Map 38 in volume 2 of De l'Isle's Atlas Nouveau.

No. 29. Map No. 5 of volume 1 of De l'Isle.

No. 30. Map 39 of volume 2 of De l'Isle.

No. 34. Map No. 28 of volume 2 of De l'Isle.

No. 35. Boelme's map, being map No. 18 of volume 1 of Old American Maps.

No. 40. Extracts from the deposition of Clous.

Claimants' exhibits in rebuttal:

No. 28. Bowen's map.

No. 31. Jefferys' map, No. 5, of Jefferys' American Maps.

Nos. 32 and 53. Le Rouge's map, No. 3.

No. 125. Papers relating to the Fort Smith council of 1865, with the objections filed in regard thereto by counsel for the United States and by counsel for defendant Indians.

Evidence introduced by the Wichita and affiliated bands:

Extract (translated) from Le Page du Pratz's History of Louisiana.

The extracts (translated) from Volume III of Margry's Decouvertes, etc.

Clark's report of the names and number of the Indians in Missouri Territory, November 4, 1816.

Chouteau's Notes of the Indians of North America, February 21, 1816, with accompanying map.

Major S. H. Long's report of January 30, 1818.

Letter of J. H. B. Latrobe to the Commissioner of Indian Affairs, April 4, 1866.

946 Extracts from the laws of the Choctaw Nation, containing the unsigned treaty of 1865, and the statute authorizing the appointment of commissioners to treat with the United States in 1866.

Evidence introduced by the United States:

Call on the War Department of April 17, 1897, with the endorsements on the same, and Major Long's report of September 14, 1820.

Call on the War Department of May 1, 1897, with endorsements on the same, and Secretary Calhoun's letter of December 12, 1820.

Call on the War Department, May 24, 1897, with the endorsements on the same, and the first and last paragraphs, and the statement as to the discovery of the Canadian in Major S. H. Long's report of February 20, 1821.

The Commissioner of Indian Affairs' report of September 28, 1897, in regard to payments to the Choctaw and Chickasaw nations.

Humboldt's Carte Géneralé du Royaume de la Nouvelle Espagne, Paris, 1811.

Pike's chart of the internal part of Louisiana, plates 1 and 2.

Arrowsmith's map of Louisiana, 1816.

Pinkerton's map of the Spanish possessions in North America, Philadelphia, 1818.

Melish's map of the United States, 1818.

Paul's map of the Quapaw cession on the Quapaw treaty, 1818.

Darby's map of the United States, including Louisiana, 1818.

(N. B. In reproducing (to scale) the maps of Humboldt, Melish, Arrowsmith, Pinkerton, and, perhaps, Darby, it will only be necessary to reproduce that portion of the map which was shown in the photographs filed as exhibits in this case.)

Copies of this statement have been served upon J. M. Wilson, esq., counsel for the Choctaw Indians, etc., and A. A. Lipscomb, esq., counsel for the Wichita Indians, etc., whose appearance in the cases I understand has been entered.

Respectfully,

CHARLES C. BINNEY,
Special Attorney.

JUNE 30, 1899.

947 (Indorsed:) File No., 17451. Supreme Court U. S. October term, 1899. Term No., 337. The United States, appt., vs. The Choctaw Nation & the Chickasaw Nation. Statement of errors & designation by appellant of parts of record to be printed. Filed June 30, 1899.

948 Supreme Court of the United States.

October term, 1899.

THE UNITED STATES, APPELLANT, *vs.* THE CHOCTAW NATION AND THE CHICKASAW Nation. } No. 337.

To JAMES H. MCKENNEY,
Clerk Supreme Court of the United States.

SIR: In response to the assignment of errors and designation by counsel for the United States of the parts of the transcript of record to be printed for the hearing, I, as counsel for the Choctaw Nation, and on behalf of counsel for the Chickasaw Nation, designate to be printed those parts of said transcript not designated by said counsel for the United States, so that the entire transcript as filed may be printed.

And in respect of the appeal by the Choctaw and Chickasaw nations (No. 339) assigned for error the following, to wit:

The court erred in decreeing one hundred and sixty acres of the land to each member of the Wichitas and affiliated bands of Indians.

Resp'y,

J. M. WILSON,
Atty. of the Choctaws.
H. E. PAINE,
Atty. of the Chickasaws.
By J. M. WILSON, *Atty.*

949 (Indorsed:) File No., 17451, &c. Supreme Court U. S. October term, 1899. Term Nos., 337, 338, 339. The United States, appt., v. The Choctaw Nation et al. The Wichita and affiliated bands of Indians, appts., vs. The Choctaw Nation et al. The Choctaw Nation et al., appts., v. The United States et al. Designation by the Choctaw and Chickasaw nations of parts of record to be printed and assignment of error in No. 339. Filed August 23, 1899.

950 In the Supreme Court of the United States.

October term, 1899.

THE UNITED STATES, APPELLANT, *vs.* THE CHOCTAW NATION AND THE CHICKASAW NATION.	No. 337.
THE WICHITA AND AFFILIATED BANDS OF Indians, appellants, *vs.* THE CHOCTAW NATION AND THE CHICKASAW Nation and the United States.	No. 338.
THE CHOCTAW NATION AND THE CHICKASAW Nation, appellants, *vs.* THE UNITED STATES AND THE WICHITA AND affiliated bands of Indians.	No. 339.

Stipulation.

It is hereby stipulated and agreed by and between the counsel representing the parties to the above appeals, and in behalf of said parties, that in the printing of the record on file in these appeals the title pages, or covers, of the various exhibits of the claimants and of the defendant Indians shall be omitted.

951 The following exhibits of the defendant Indians shall also be omitted, being all the subject of judicial notice, as contained in official publications, and having been inadvertently included in the record:

No. 4, being found in American State Papers, Indian Affairs, Vol. I, pp. 721–730.

No. 24, being extracts from Indian treaties made in 1866.

The certified copies of the letters of William Clark to the Secretary of War, dated February 6, 1818, and of William Clark and Auguste Chouteau to the same, dated September 6, 1818, being found in American State Papers, Ind. Affs., Vol. II, pp. 173, 177.

Exhibit No. 7 shall be printed from an electrotype to be furnished by counsel for the Wichita and affiliated bands.

Exhibit No. 17 shall be omitted, being covered by claimants' Exhibit No. 23.

Of the evidence for the United States the printed extracts from the port of Major S. H. Long to the Secretary of War, dated February 20, 21, shall also be omitted, as the entire report is in the record and will printed.

CHARLES C. BINNEY,
Special Attorney for the United States.
J. M. WILSON,
Attorney for the Choctaw Nation.
H. E. PAINE,
Attorney for the Chickasaw Nation.
A. A. LIPSCOMB,
Attorney for the Wichita and Affiliated Bands.

52 (Indorsed:) File No., 17451, &c. Supreme Court U. S. October term, 1899. Term Nos., 337, 338, 339. U. S. v. hoctaw Nation; Wichita, &c., Indians vs. same, and U. S. v. Wichita ndians. Stipulation to omit certain parts of record in printing. Filed ct. 10, 1899.

(Indorsement on cover:) File No., 17451. Court of Claims. Term o., 337. The United States, appellant, vs. The Choctaw Nation and he Chickasaw Nation. File No., 17452. Term No., 338. The Wichita nd affiliated bands of Indians, appellants, vs. The Choctaw Nation and he Chickasaw Nation and the United States. File No., 17453. Term o., 339. The Choctaw Nation and the Chickasaw Nation, appellants, s. The United States and the Wichita and affiliated bands of Indians. iled June 30, 1899.

614 (EXHIBIT .)

EXTRACTS FROM CONSTITUTION AND LAWS OF THE CHOCTAW NATION, TOGETHER WITH THE TREATIES OF 1855, 1865, AND 1866.—New York City, 1869.

[In the library of the Office of Indian Affairs.]

(pp. 407–413:)

Articles of agreement entered into this 13th day of September, 1865, between the commissioners designated by the President of the United States and the persons here present representing or connected with the following-named nations and tribes of Indians, viz: Cherokees, Creeks, Choctaws, Chickasaws, Osages, Seminoles, Senecas, Senecas and Shawnees, and Quapaws.

Whereas the aforesaid nations and tribes, or bands of Indians or portions thereof, were induced by the machinations of the emissaries of the so-called Confederate States to throw off allegiance to the Government of the United States, and to enter into treaty stipulations with the said so-called Confederate States, whereby they have made themselves liable to a forfeiture of all rights of every kind, character, and description, which had been promised and guaranteed to them by the United States; and whereas the Government of the United States has maintained its supremacy and authority within its limits; and whereas it is the desire of the Government to act with magnanimity with all parties deserving its clemency, and to reestablish order and legitimate authority among the Indian tribes; and whereas the undersigned representatives or parties connected with said nations and tribes of Indians have been satisfied that it is for the general good of the people to reunite with and be restored to the relations which formerly existed between them and
615 the United States, and as indicative of our personal feelings in the premises, and of our several nations and tribes, so far as we are authorized and empowered to speak for them; and whereas questions have arisen as to the status of the nations, tribes, and bands that have made treaties with the enemies of the United States, which are now being discussed, and our relations settled by treaty with the U. S. commissioners now at Fort Smith, Ark., for that purpose:

The undersigned do hereby acknowledge themselves to be under the protection of the United States of America, and covenant and agree that hereafter they will, in all things, recognize the Government of the United States as exercising exclusive jurisdiction over them, and will not enter into any allegiance or conventional arrangement with any State, nation, power, or sovereign whatsoever; that any treaty of alliance for cession of land or any act heretofore done by them or any of their people by which they renounce their allegiance to the United States is hereby revoked, cancelled, and repudiated. In consideration of the foregoing stipulations made by the members of the respective nations and tribes of Indians present, the United States, through its commissioners, promises: That it will reestablish peace and friendship with all the nations and tribes of Indians within the limits of the so-called Indian country; that it will afford ample protection for the security of the persons and property of the respective nations or tribes, and declares its willingness to

enter into treaties to arrange and settle all questions relating to and growing out of former treaties with said nations, as affected by any treaty made by said nations with the so-called Confederate States, at this council now convened for that purpose, or at such time in the future as may be appointed.

616 In testimony whereof the commissioners, on the part of the United States, and the said Indians of the several nations and tribes, as respectively hereafter enumerated, have hereunto subscribed their names and affixed their seals on the day and year first above written.

AN ACT entitled "An act approving the action of the Choctaw commissioners in signing a preliminary treaty with the commissioners of the United States."

Whereas articles of agreement, as contained in the foregoing articles, were entered into between D. N. Cooley, Eli S. Parker, Elijah Sells, and Thomas Wister, on the part of the United States, and R. M. Jones, Sampson Folsom, F. Battiest, Wm. Roebuck, Forbis Leflore, A. Wright, P. Folsom, John Page, James Riley, Wm. B. Pitchlynn, Samuel Garland, A. Wade, D. F. Harkin, and Coleman Cole, Choctaw commissioners, at the day and year therein named, with the explanation, on the part of the United States commissioners, that the United States Government did not claim, by the words "exclusive jurisdiction in all things," the right to interfere with the local or tribal regulations of the Choctaw and Chickasaw nations, except as to the subject of slavery:

Now, therefore, be it known that the Choctaws, in general council assembled, having duly considered said articles of agreement and convention and each and every clause thereof, and being satisfied therewith, together with the explanations attached thereto by the United States commissioners, do, upon their part, hereby assent to, ratify, and confirm the same as stipulated and required.

Approved, October 7, 1865.

617 *Resolutions approving the action of the commissioners appointed to negotiate with the U. S. commissioners at Fort Smith, Arkansas.*

Be it resolved by the general council of the Choctaw Nation assembled, That the report of the proceedings of the Choctaw and Chickasaw commissioners at Fort Smith, Arkansas, in reference to their negotiations with the United States commissioners, having been fully examined, the same be, and is hereby, approved.

Draft of treaty submitted by the United States commissioners at Fort Smith. (*Not signed.*)

Articles of agreement and convention between the United States and the Choctaw and Chickasaw tribes of Indians, made and concluded at Fort Smith, Arkansas, the day of September, A. D. 1865, by D. N. Cooley, Elijah Sells, Eli S. Parker, and Thomas Wistar, commissioners on the part of the United States, and the delegates of the Choctaw and Chickasaw tribes of Indians, signing this instrument.

ART. 1. Peace and friendship are hereby firmly established between all the citizens of the United States and all the individuals composing the

foresaid tribes; and all the friendly relations that existed between them before the rebellion shall be, and the same are hereby, renewed.

518 ART. 2. The Choctaw and Chickasaw tribes of Indians do hereby bind themselves to use their influence, and whenever called upon by the Government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians of the Territory, and with the United States.

ART. 3. The Choctaw and Chickasaw tribes of Indians hereby admit that the institution of slavery is abolished, and that slavery or involuntary servitude shall never hereafter exist in either tribe, except in punishment of crime, whereof the party shall have been duly convicted, and they promise and agree that measures shall be immediately taken by their respective national councils to properly provide for such emancipated slaves as may have belonged to the members of the respective tribes; such provision to be subject to the approval of the President of the United States.

ART. 4. The Choctaw and Chickasaw tribes of Indians hereby agree to open their country to the settlement of friendly Indians from Kansas and elsewhere, upon such terms as may hereafter be agreed upon by the respective parties and approved by the Government, and the Government may settle such friendly Indians on a portion of said Territory east of the ninety-eighth degree west longitude, not necessary for the use of said Choctaw and Chickasaw tribes, as it may desire, not exceeding one-third of the whole remaining Territory, for a fair and equitable consideration, to be fixed by the Government.

519 ART. 5. The Choctaw and Chickasaw tribes agree to a modification of the 9th article of the treaty concluded at the city of Washington the 22d day of June, A. D. 1855, by which they agree that all that portion of their common territory west of the ninety-eighth degree west longitude, leased to the United States, may be used for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate thereon, without exception or restriction as to the character of the tribes.

ART. 6. The Choctaw and Chickasaw tribes of Indians promise and agree to submit and recommend, at the first meeting of their respective general councils, the adoption of the plan proposed in Senate bill 459, 38th Congress, 2d session, to provide for the consolidation of the Indian tribes, and to establish civil government in the Indian Territory; it being understood to be the settled policy of the Government of the United States that all the nations and tribes in the Indian Territory be formed into one consolidated government, after the plan proposed in the bill above referred to, adopted by the United States Senate 1865, the Government of the United States reserving said right.

ART. 7. The United States, in the event of the adoption by the Choctaw, Chickasaw, and other Indian tribes of the government proposed to be established in the Indian Territory referred to in the preceding article, promise and agree that no white person, except officers, agents, and employes of the Government, and of any internal improvement authorized by the Government, will be permitted to go into and settle in said Territory, unless formally incorporated and naturalized into one of the resident tribes, according to their laws, customs, and usages.

620 ART. 8. The Choctaw and Chickasaw tribes of Indians, anxious for the restoration and preservation of kind and friendly feelings among themselves, do hereby declare a general amnesty of all past offenses, either against their government or the Government of the United States, and no Indian or Indians shall be proscribed, or any act of forfeiture or confiscation passed against those who may have remained friendly and loyal to the United States, but they shall all enjoy equal privileges with other members of said tribes.

ART. 9. The United States hereby promise and agree to restore the Choctaw and Chickasaw tribes of Indians to all their rights and privileges in lands and annuities that they were possessed of and entitled to, and they shall be applicable to the same objects as existed at the breaking out of the rebellion, except such part or parts of annuities and moneys as have been expended by the President in providing for the relief of destitute Indians who were reduced to want on account of their friendship to the Government of the United States, which shall not be refunded.

ART. 10. It is hereby mutually agreed that all of the provisions of the treaty of June 22d, 1855, between the United States and the Choctaw and Chickasaw tribes of Indians not inconsistent with the foregoing articles are hereby adopted and made a part of this instrument.

ART. 11. The Choctaw and Chickasaw tribes of Indians expressly agree that any amendment to this treaty which the Senate of the United States may make shall be taken and held as a part of the same, and as binding in every respect as if it had, after being made, been formally submitted to and ratified by such parties.

621 (p. 450):

Whereas the Senate of the United States did on the 28th day of June, A. D. 1866, advise and consent to the ratification of the articles of agreement and convention between the United States and the Choctaw and Chickasaw commissioners, and the same having been confirmed by the President of the United States on the 10th day of July following; and whereas the same having been submitted to the general council of the Choctaw Nation and having been interpreted and fully explained: Therefore,

SEC. 1. Be it enacted by the general council of the Choctaw Nation assembled, That the report of Choctaw Commissioners and all their acts respecting the negotiations of the late treaty, made and concluded at Washington City between the United States and the Choctaw and Chickasaw nations of Indians be, and the same is hereby, received and approved.

SEC. 2. Be it further enacted, That the propositions contained in the 3d and 8th articles of the treaty are hereby deferred until the next regular session of the general council, and the 11th and 47th articles are hereby referred to the people at large to be declared through their legal representatives in council at the October session, A. D. 1867, and the principal chief is hereby required to issue his proclamation when he shall think expedient, calling the votes of the people, the specified articles above.

SEC. 3. Be it further enacted, That this act take effect and be in force rom and after its passage.

Approved, December 21, 1866.

622 (pp. 478–480:)

AN ACT entitled "An act to authorize the national attorney to attend to the claims set up against the nation under 49th and 50th articles of the treaty of April 28th, 1866, and for other purposes."

SEC. 1. Be it enacted by the general council of the Choctaw Nation assembled, That the present national attorney be, and is hereby, required to proceed to Washington City as soon as possible and appear before his honor the Secretary of the Interior, and file such arguments as he may deem essential to make touching the origin and present of the claims awarded by Messrs. Rice and Jackson, under the 49th and 50th articles of the treaty of April 28th, 1866, and insist upon the importance of having a new commission raised to investigate the said claims, in order to enable this nation to introduce rebutting testimony.

SEC. 2. Be it further enacted, That if in the opinion of the said Secretary of the Interior that a new commission to investigate the claims aforesaid can not be ordered without the action of Congress, or by consent of parties to the case, then, in that event, the national attorney shall exercise his best judgment and discretion in the premises, and report the facts to the principal chief.

SEC. 3. Be it further enacted, That the national attorney be, and is hereby, instructed to respectfully bring to the notice of the Commissioner of Indian Affairs at Washington City that this nation will not consent to give the freedmen residing among them the forty-acre lots of land,
623 including the right of suffrage mentioned in the 3d article of the treaty of April 28th, 1866, when they have submit' humbly to the forced sale of the "leased district" lying west of 98th degree west longitude, for about two and a half cents per acre, for objects of negro colonization upon their borders; and he shall also request the said Commissioner of Indian Affairs to provide in due time for said freedmen for their removal to some country, and remove Kansas Indians here in their stead, if they are willing to be removed.

SEC. 4. Be it further enacted, That said attorney shall use his best endeavors to delay and defer the Territorial organization contemplated under article 8th of treaty of April 28th, 1866, until such time as the several nations composing the Indian country shall become more friendly and more disposed to unite and come under one head, or, in other words, under one form of government, to be controlled by the Congress of the United States, and shall have become more qualified to take good care of their landed interest than the present state of feeling seems to exist between the citizens of each nation in regard to the whole policy of coming under a Territorial government. The Government at Washington must understand that the habits and customs of Indian nation can not be easily changed, whether for weal or woe, without their consent.

SEC. 5. Be it further enacted, That in order to provide against contingencies that might occur during the prosecution of the duties herein required of the national attorney, there shall be elected by joint ballot of both houses of the present session of the general council an assistant attorney, whose duty shall be to aid and assist the principal
624 attorney in all matters touching the interest and welfare of this nation, specially the claim set up by "Loyal Indians" under 49th

and 50th articles of said treaty, and whose terms of service shall expire with the adjustment of all the claims herein specified, and who shall act as principal attorney when so required by the principal national attorney. It is agreed and understood by this act that the nation will only defray actual expenses of traveling and other incidental expenses to and from Washington City, for each of the attorneys mentioned in this act, at three dollars per day each and expenses paid, and hereby agree to give them one-half of the amount that they may recover or save for the nation upon the claims arising under 49th and 50th articles of the treaty of April 28th, 1866, other than the "net proceed question;" and it is also understood that should they employ claim agent or counsel to answer for them in any given case, it shall be done at their own expense and responsibility.

SEC. 6. Be it further enacted, That a correct statement of all the acts, proceedings, accounts, and correspondences had upon the business herein intrusted to the national attorney shall be kept by his assistant, and who shall make his report upon the same to the principal chief of this nation.

SEC. 7. Be it further enacted, That the principal chief is hereby requested to authenticate the credentials of each of the national attorneys herein mentioned to the Commissioner of Indian Affairs at Washington City.

SEC. 8. Be it further enacted, That this act take effect and be in force from and after its passage.

Repassed the senate by two-thirds vote.

November 20th, 1867.

Repassed the house of representatives by two-thirds vote.

November 20th, 1867.

625 "EXTRACTS FROM CONSTITUTION, LAWS, AND TREATIES OF THE CHICKASAWS."—Fort Smith, 1867.

(pp. 100–101:)

AN ACT appointing delegates to Washington.

SEC. 1. Be it enacted by the legislature of the Chickasaw Nation, That the governor of the Chickasaw Nation be, and he is hereby, requested and authorized to appoint and commission three competent persons, by and with the advice and consent of the senate, as delegates, to visit Washington City during the next session of Congress, with full and efficient powers to reconstruct or enter into new treaties or conventions with the United States of America, or any authorized agents thereof, necessary and proper in their judgment to obtain full guarantees and securities of all the rights, interests, or claims held by the Chickasaw Nation, or any individual member thereof, under former treaty stipulations with the Government of the United States, whereby the happiness and interests of the Chickasaw people may be advanced.

SEC. 2. Be it further enacted, That the governor of the Chickasaw Nation be, and he is hereby, requested to accompany said delegation, to render all the assistance and advice necessary in the prosecution of their negotiations, and be entitled to the same pay as hereinafter provided for said delegation.

SEC. 3. Be it further enacted, That the delegates shall be entitled each to the sum of twelve hundred dollars out of any money that may be due

now or may hereafter be due the Chickasaw Nation, and five
626 hundred dollars each to defray the expenses in going to and returning from Washington, and during their stay there, as full compensation for their services as delegates.

SEC. 4. Be it further enacted, That the governor of the Chickasaw Nation be, and he is hereby, authorized and empowered to raise, upon the faith and credit of the Chickasaw Nation, a sufficient amount of money to defray the expenses of the delegation to Washington City; said amount to be refunded out of the first monies due the nation.

SEC. 5. Be it further enacted, That in case of death, resignation, or inability of either of said delegates to attend to the requirements of the above act, the governor of the Chickasaw Nation shall have the power to fill such vacancies.

SEC. 6. Be it further enacted, That the governor be, and he is hereby, authorized and requested to appoint and commission an additional delegate, who shall be entitled to the same pay as provided above for other delegates. And the said delegates are hereby instructed to report their proceedings to the next session of the legislature.

Approved, November 18, 1865.

WINCHESTER COLBERT, *Governor.*

627 (p. 102:)

AN ACT appointing commissioners, Holmes Colbert and Geo. D. James, to Washington, &c.

SEC. 1. Be it enacted by the legislature of the Chickasaw Nation, That the contract entered into between the Chickasaw commissioners, representing the interests of the Chickasaw people at Washington, District of Columbia, in negotiating the "treaty of 1866," be, and the same is hereby, agreed to and confirmed.

SEC. 2. Be it further enacted, That whereas, in consequence of the announcement made to the Chickasaw commissioners, on the part of the United States, who assembled at Fort Smith, Arkansas, in the month of September, 1865, for the purpose of "negotiating a treaty of peace and friendship" with the southwestern Indians, who have been in alliance with the so-called "Confederate States," that the Chickasaws, with others, had, by reason of said "alliance," made themselves liable to a forfeiture of all rights of every kind, character, and description which had been promised and guaranteed to them by the United States, commissioners were sent by the legislature of the Chickasaw Nation to the city of Washington to negotiate a treaty and enter into any arrangements necessary and proper to secure the Chickasaws in their country, and all other interests, and to effect a permanent settlement of their tribe, as contemplated and provided for in the treaties of 1834 and 1852 between the Chickasaw Nation and the United States;

SEC. 3. And whereas, in consequence of the necessity of send-
628 ing said commissioners to Washington, for the purpose of making a treaty, as aforesaid, the Chickasaw Nation has been subjected to heavy expenses on account of the personal expenses of said commissioners and obligations entered into by them, and other incidental expenses, for the purpose of more effectually accomplishing the object of their mission; and whereas it may, and probably will, be necessary that the Chickasaw

Nation should continue commissioners at Washington City, in order more effectually to secure the permanent settlement of the tribe and other important interests; and whereas, by the provisions of the "treaty of 1852," so much of the national funds as the Chickasaw may require for such purpose is subject to the control of their national council or legislature:

Therefore, be it enacted, That the sum of one hundred thousand dollars be, and the same is hereby, withdrawn from the Chickasaw national fund, held in trust by the United States Treasurer for the Chickasaws. And the President of the United States is hereby requested to cause so much of the said stocks as may be necessary to raise said sum of money to be converted into cash and paid over to the commissioners appointed for the purpose of defraying the obligations incurred, or which may hereafter be incurred, by the Chickasaw commissioners in securing the permanent settlement and other important interests of the tribe, as contemplated under the treaties of 1834 and 1852.

SEC. 4. And whereas the Government of the United States has obligated itself under treaty stipulations to keep the Chickasaw national funds invested in safe and profitable "stocks," and pay the interest thereon to the Chickasaw people annually, and believing that the Government of the United States has failed to do so according to
629 "treaty stipulations," and it is important and necessary to the interest of the Chickasaw people that some persons should represent their interests in Washington, to investigate and find out in what manner the Government of the United States has managed our national funds:

Therefore, be it enacted, That Holmes Colbert and Geo. D. James are hereby appointed and continued as commissioners, with full powers to represent the interest of the Chickasaw people in all things touching their interests and welfare under any treaties existing between the United States and the Chickasaw people.

Approved, November 14, 1867.

C. HARRIS, *Governor.*

(p. 104:)

AN ACT confirming the treaty of 1866.

SECTION 1. Be it enacted by the legislature of the Chickasaw Nation, That whereas a treaty was concluded at Washington City the 28th day of April, 1866, by commissioners duly appointed on the part of the Chickasaws, Choctaws, and the United States Government, which treaty was ratified with amendments by the United States Senate and confirmed by the President: The Chickasaw legislature does hereby give its assent and confirm the said treaty and amendments made by the Senate of the United States.

SEC. 2. Be it further enacted, That the Chickasaw legislature does hereby give its assent to the sectionizing and allotment of the lands in severalty, under the system of the United States, as is provided for in the treaty of April, 1866, and the President of the United
630 States is hereby requested to cause the same to be done as soon as may be practicable.

SEC. 3. Be it further enacted, That the provisions contained in article 3d of the said treaty, giving the Chickasaw legislature the choice of

receiving and appropriating the three hundred thousand dollars therein named for the use and benefit of the Chickasaws, or passing such laws, rules, and regulations as will give all persons of African descent certain rights and privileges, be, and it is hereby declared to be, the *the* unanimous consent of the Chickasaw legislature that the United States shall keep and hold said sum of three hundred thousand dollars for the benefit of the said negroes. And the governor of the Chickasaw Nation is hereby requested to notify the Government of the United States that it is the wish of the legislature of the Chickasaw Nation that the Government of the United States remove the said negroes beyond the limits of the Chickasaw Nation, according to the requirement of the 3d article of the treaty of April 28th, 1866.

Approved, November 9, 1866.

C. HARRIS, *Governor.*

631 (Indorsed:) U. S. Court of Claims. No. 18932. The Choctaw Nation and the Chickasaw Nation v. The United States and the Wichita and Affiliated Bands of Indians. Evidence on behalf of defendant Indians. Exhibit No. 24. Extracts from the laws of the Choctaw and Chickasaw nations. Filed, Court of Claims, Jun. 30, 1896. Josiah M. Vale and Andrew A. Lipscomb, attorneys for said defendants; Philip Walker and William C. Shelley, counsel.

88 89 90 11419

No. 337, 338 and 339.

Motion to advance.

SUPREME COURT U. S.
FILED
NOV 6 1899
JAMES H. McKENNEY,
Clerk.

Filed Nov. 6, 1899.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, APPELLANT,
v.
THE CHOCTAW NATION AND THE CHICKASAW NATION. } No. 337.

THE WICHITA AND AFFILIATED BANDS OF INDIANS, appellants,
v.
THE CHOCTAW NATION AND THE CHICKASAW NATION and the UNITED STATES. } No. 338.

THE CHOCTAW NATION AND THE CHICKASAW NATION, appellants,
v.
THE UNITED STATES AND THE WICHITA and affiliated bands of Indians. } No. 339.

MOTION TO ADVANCE.

JOHN K. RICHARDS,
Solicitor-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, APPELLANT, *v.* THE CHOCTAW NATION AND THE CHICKASAW NATION.	No. 337.
THE WICHITA AND AFFILIATED BANDS OF INDIANS, appellants, *v.* THE CHOCTAW NATION AND THE CHICKASAW NATION and the United States.	No. 338.
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MOTION TO ADVANCE.

Now comes the Solicitor-General, in behalf of the United States, and moves the court to advance the above-entitled causes upon the docket, and to set them down for hearing at as early a date in the present term as may

suit the convenience of the court, for the following reasons:

(1) The above appeals have been taken from a decree of the Court of Claims entered on March 21, 1899, in a suit in equity brought under the act of March 2, 1895 (28 Stats., 876, 898), wherein the Choctaw Nation and the Chickasaw Nation were claimants, and the United States and the Wichita and Affiliated Bands of Indians were defendants. The object of this suit was to settle the respective rights of three parties, viz, the claimants, the United States, and the defendant Indians, in a tract of 743,610 acres in the Indian Territory known as the Wichita Reservation. By the agreement of June 4, 1891, between the United States and the defendant Indians, a portion of this reservation is to be allotted among the defendant Indians in severalty, but the disposition of the balance of the reservation is not provided for in this agreement, and depends upon the ultimate decision of these appeals. Moreover, the Choctaws and Chickasaws having laid claim to the entire reservation, no allotment of any of the land can be made until these appeals are finally decided.

(2) By the act of June 28, 1898, § 28 (30 Stats., 495, 513), it is provided that "the final decision of the courts of the United States in the case of the *Choctaw Nation and the Chickasaw Nation* v. *United States and the Wichita and Affiliated Bands of Indians*, now pending, when made, shall be conclusive as the basis of the settlement as between the United States and said Choctaw and Chickasaw nations for the remaining lands in what is

known as the 'leased district,'" viz., the Kiowa, Comanche and Apache Reservation of 2,968,839 acres, and the district known as Greer County, containing 1,511,958 acres. It is desired to allot a portion of the Kiowa, Comanche and Apache Reservation among the Indians now living thereon in severalty as soon as possible, and also to dispose of any unallotted balance of said reservation, as well as of the district known as Greer County, but none of these things can be done until the above appeals are decided.

(3) The present uncertainty as to the title of the three tracts of land above mentioned, aggregating 5,224,461 acres, prevents the United States from making any final disposition of them, thereby seriously interfering with the prosperity of a large number of Indians who are kept on their old reservations without any permanent individual ownership in the lands that they occupy, and consequently without those inducements to industry and progress which are furnished by the system of allotments of land in severalty—the system which the Government is trying, wherever practicable, to substitute for the old reservation system.

(4) In view of the serious injury which a delay in the hearing of these causes must have upon the Indians living on the land in controversy, the jurisdictional act of March 2, 1895, has provided that the Court of Claims and this court "shall give such causes precedence." (28 Stats., 898.) Owing to the magnitude of the interests involved and the somewhat complicated nature of the case, much time has already been spent in

preparing for the argument in the court below and in the consideration of the case by that court. While unavoidable, this delay has been a very serious one to the Indians living on the lands in controversy, and it is earnestly hoped that this court may find itself in a position to hear the above appeals at an early date.

JOHN K. RICHARDS,
Solicitor-General.

We concur in the above motion.

J. M. VALE,
ANDREW A. LIPSCOMB,
Attorneys for the Wichita and Affiliated Bands.

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FILED
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JAMES H. McKENNEY,
Clerk.

otion to advance.

Filed Nov. 6, 1899.

upreme Court of the United States.

OCTOBER TERM, 1899.

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MOTION TO ADVANCE.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 11-2-'99

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, *Appellant*, *vs.* THE CHOCTAW NATION and THE CHICKASAW NATION.	No. 337.
THE WICHITA AND AFFILIATED BANDS OF INDIANS, *Appellants*, *vs.* THE CHOCTAW NATION and THE CHICKASAW NATION and THE UNITED STATES.	No. 338.
THE CHOCTAW NATION and THE CHICKASAW NATION, *Appellants*, *vs.* THE UNITED STATES and THE WICHITA AND AFFILIATED BANDS OF INDIANS.	No. 339.

Come now The Choctaw Nation and Chickasaw Nation, parties in the above-entitled causes, and move the court to advance the same on the docket for hearing, and in that behalf say:

First. That the controversy involved in the said causes is one that affects the general public interest in this, to wit, that it involves about seven hundred and forty-two thousand acres of land in the Indian Territory, which it is proposed by the United States to open to public settlement in connection with other lands similarly conditioned. The

Choctaws and Chickasaws claim that the said lands are held by the United States in trust for a certain specific purpose, namely, the settlement of friendly Indians thereon, and that upon the opening of the lands to public settlement the trust ceases and the United States are obligated to pay to the said Choctaws and Chickasaws the value of the said lands.

Second. The question as to whether this claim of the Choctaws and Chickasaws is a valid one was referred by the act of Congress approved March second, A. D. eighteen hundred and ninety-five, to the Court of Claims, with jurisdiction to determine all the rights, legal and equitable, of the United States and the Choctaw and Chickasaw nations and to render judgment thereon.

Third. The Wichitas and Affiliated Bands of Indians are claiming rights in the same lands by reason of the fact, among others, that they have been located there by the United States, and the Court of Claims was likewise authorized to determine the rights of the said Wichitas and Affiliated Bands and "to try and determine all questions that may arise on behalf of either party in the hearing of said claim."

Fourth. The act further provides that either of the parties to said action shall have the right of appeal to the Supreme Court of the United States, and further provides that the said courts (the Court of Claims and the Supreme Court of the United States) shall give such causes precedence.

Respectfully submitted.

J. M. Wilson,
Counsel for the Choctaws.

H. E. Paine,
Counsel for Chickasaws.

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APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This case arises under the act of March 3, 1895, § 1 (28 Stats., 876, 894–899), referring to the Court of Claims the claim of the Choctaws and Chickasaws to a

certain tract of land known as the Wichita Reservation, and also the claim of the Wichita and affiliated bands of Indians to compensation in the event of the sale, by the United States, of the balance of the land in the said reservation, over and above a certain area to be allotted to the Indians of the Wichita and affiliated bands in severalty. This Wichita Reservation is a portion of a larger district, commonly known as the Leased District, which was first leased and afterwards ceded to the United States by certain treaty provisions.

The lease, made in 1855, was as follows:

> The Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein, excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas River, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas, which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the President for their government: *Provided, however,* the territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore. (Treaty of June 22, 1855, art. 9; 11 Stats., 613.)

This lease was coupled with a relinquishment, by the Choctaws alone, of all their right, title, and interest in

any and all lands west of the one-hundredth meridian, and the consideration named for the relinquishment and the lease was $800,000, of which $600,000 were paid to the Choctaws and the balance to the Chickasaws.

The cession, made in 1866, was as follows:

> The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district. (Treaty of April 28, 1866, Art. III; 14 Stats., 769.)

This cession was coupled with certain provisions for the disposition of the consideration, which provisions have been fully complied with as regards the Choctaws, but there has as yet been no final disposition of the Chickasaws' share, owing to their not having yet made provision for their freedmen in accordance with this article of the treaty.

The court below has held that this cession, though absolute on its face, was really in trust for the permanent settlement of friendly tribes of Indians on the land ceded, and that the Choctaws and Chickasaws have a reversionary interest in so much of the land as is not actually used for Indian settlement or allotted to Indians in severalty. The existence of this trust is held to result from various facts and circumstances leading up to the cession of 1866, and also to be shown by subsequent facts and circumstances. These facts and circumstances are the following:

By the treaty of August 24, 1818 (7 Stats., 176), the Quapaw tribe of Indians ceded to the United States a

certain tract of country in the Arkansas Territory, the western bounds of the cession being thus described:

> Beginning at the mouth of the Arkansaw river; thence, extending up the Arkansaw, to the Canadian fork, and up the Canadian fork to its source; thence south, to Big Red river, and down the middle of that river, to the Big Raft.

When this treaty was made the real source of the Canadian fork of the Arkansas, or, as it is now called, the Canadian River, was universally believed to be the source of the Red River (called in the treaty, "Big Red river"), and the Canadian was itself universally supposed to be a comparatively short stream rising at or slightly east of the one hundredth meridian. (U. S. Exhibits, Nos. 1, 2, 3, 5, 6, 11, 12, *infra*.)

On the face of the treaty itself is a map of the Quapaw cession (U. S. Exhibit No. 10, *infra*), without indications of latitude or longitude, but drawn to the same scale as, and manifestly based on, Plate I of Pike's "Chart of the Internal Parts of Louisiana" (U. S. Exhibit No. 2), which latter shows the Canadian as rising at the one hundredth meridian. Melish's map of 1818 (U. S. Exhibit No. 6) puts the source of the Canadian just east of the one hundredth meridian. The opinion of the court below (Rec., 392) states that certain maps "did in fact delineate the stream subsequently known as the Canadian, with its source west of the one hundredth meridian." This statement, which, it is submitted, is erroneous, will be discussed in the argument. From the source of the Canadian, as shown by the maps of 1818, a line could be drawn south to the Red River, and the

treaty map itself shows such a line drawn due south; but the true source of the Canadian being considerably west of that of the Red River, no line could actually be drawn south from the former to the Red River, and in point of fact a line drawn from the source of the Canadian to the nearest point of the Red River (i. e., to the latter's source) would cross the Canadian itself several times, so that, even if the word "south" be not regarded as essential, the description "up the Canadian fork to its source, thence south to Big Red river," is an impossible description if used with reference to the actual geography. If the western boundary of the land between the Canadian and Red rivers were on a line drawn from the source of the former to the nearest point of the latter, the land itself could not run to the source of the Canadian, and its western boundary would have to be the lower portion only of such a line, the portion beginning where such a line last crosses the Canadian.

The French treaty of 1803, ceding Louisiana, did not define its western boundary, but on February 22, 1819, a treaty with Spain (8 Stats., 252) was signed, establishing the boundary between the United States and the Spanish dominions in that region, in these words:

> The boundary line between the two countries, west of the Mississippi, shall begin on the Gulf of Mexico, on the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river, to the thirty-second degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo of Nachitoches, or *Red River;* then following the course of the Rio Roxo westward to the degree of longitude 100 west

> from London and 23 from Washington; then crossing the said Red River and running thence, by a line due north, to the river Arkansas.

This treaty was ratified by the President on February 24, 1819, but was not ratified by the King of Spain within the period of six months fixed for the exchange of ratifications. The Spanish minister having asked for an extension of the time, the President's message of May 9, 1820 (Messages, Vol. II, p. 72), suggested to Congress the propriety of postponing any decision adverse to the treaty, while the message of November 14, 1820 (id. 75), stated that the Spanish ratification was daily expected. The treaty had actually been ratified on October 24, but the Spanish minister did not receive the ratification until early in 1821. The exchange of ratifications was authorized anew by the Senate February 19, 1821, and took place shortly thereafter. (Am. State Papers, For. Relns., Vol. IV, pp. 650–703.)

On July 12, 1820, Generals Jackson and Hinds were commissioned to treat with the Choctaws for a part of their lands in Mississippi, and were instructed to offer the Indians in exchange "a portion of the Quapaw cession in the Arkansas Territory" (Am. State Papers, Ind. Affs., Vol. II, p. 231), and on October 18, 1820, a treaty was executed (7 Stats., 211) ceding to the Choctaws the western part of the Quapaw cession, the western bounds being described as follows:

> Up the Arkansas to the Canadian Fork, and up the same to its source; thence due South to the Red River; thence down Red River, three miles below the mouth of Little River.

This treaty was received in Washington in December, 1820 (Rec., 268), sent to the Senate, along with other Indian treaties, on December 14, and ratified without amendment on December 21. (3 Sen. Ex. Jour., 227, 229, 230.)

At the time this treaty was made and ratified, the general belief as to the position of the source of the Canadian was the same as in 1818, but on September 13, 1820, Maj. S. H. Long, who, on his return from a long tour of exploration, had followed down the Canadian from its source (believing it to be the Red River), reached its junction with the Arkansas and discovered that the maps were at fault. (Rec., 266.) His brief report stating the fact (the last of a series of reports transmitted during his journeys) reached the War Department in November, 1820 (Rec., 266), and he himself reached Washington the latter part of the same month, when he was ordered to Philadelphia to prepare a complete report of the country traversed by his expedition (Rec., 267), which report he ultimately completed in February, 1821 (Rec., 272). There is no evidence that the treaty commissioners, the Secretary of War, the President, or any members of the Senate, had actual knowledge of Long's discovery before his complete report was written.

The Choctaw treaty of September 26, 1830 (7 Stats., 333), contained the following provisions:

> ARTICLE I. * * * and that this may be considered the Treaty existing between the parties, all other Treaties heretofore existing and inconsistent with the provisions of this are hereby declared null and void.

ARTICLE II. The United States under a grant specially made by the President of the U. S., shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, * * * beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. * * *

ARTICLE III. In consideration of the provisions contained in the several articles of this treaty, the Choctaw Nation of Indians consent and hereby cede to the United States the entire country they own and possess east of the Mississippi River. * * *

[The succeeding articles contain various provisions for the benefit of the Choctaws.]

Under an agreement made January 17, 1837 (7 Stats., 605), the Chickasaws settled on a part of the Choctaw country, but afterwards various controversies arose between the two tribes, and in 1854 their delegates came to Washington to settle all matters in dispute by means of a treaty with the United States. During the negotiations the Choctaw delegates asserted that their country extended westward to the actual source of the Canadian. (Senate Misc. Doc. No. 31, Thirty-fourth Congress, first session, 42.) This claim was never recognized by the United States, but as the latter wished to purchase the right to settle other Indians on a part of the Choctaw and Chickasaw lands, and also to put an end to the Choctaw claim to land west of the one hundredth meridian, the treaty of June 22, 1855 (11 Stats., 611), besides de-

fining the Choctaw and Chickasaw districts, provided as follows:

ART. 9. The Choctaw Indians do hereby absolutely and forever quitclaim and relinquish to the United States all their right, title, and interest in and to any and all lands west of the one hundredth degree of west longitude; and the Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein, excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas River, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas, which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the President for their government: *Provided, however*, the territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore.

ART. 10. In consideration of the foregoing relinquishment and lease, and as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct.

The population of the Choctaws at that time was a little more than three times that of the Chickasaws.

(House Ex. Doc. No. 1, Thirty-fourth Congress, first session, 575.)

In 1859 the United States settled the Wichita and affiliated bands of Indians in the leased district, upon a portion of the land now in dispute. (Sec. of Inter. Rept., 1859, pp. 382–383, 533, 633).

Both the Choctaws and Chickasaws were slaveholding tribes, and in sympathy with the secession movement. On February 7, 1861, the general council of the Choctaws declared that they would go with the Southern States, and on May 25, 1861, the Chickasaw legislature did the same. (Reb. Rec., Vol. I, 682; Vol. III, 585-587.) On July 12, 1861, the two tribes entered into a treaty of alliance, offensive and defensive, with the Confederate States, and thereafter engaged in active hostilities against the United States. (Reb. Rec., Vol. VIII, pp. 1–33, 194–5, 206–8, 235–6, 534, 697–8, 709, 712–13, 715, 719–21; Vol. XIII, pp. 297–304, 333–6, 820, 831, 859, 892–6, 944–948, 952, 955–6; Vol. XXII, pt. 1, pp. 28–36, 457–462; pt. 2, p. 1118; Vol. XXXIV, pt. 1, pp. 107–112, 849, 888, 1011–13; pt. 2, pp. 875, 882, 959, 994, 1084; pt. 3, pp. 746, 824; pt. 4, pp. 694–5; Vol. XLI, pt. 1, pp. 31–6; pt. 3, pp. 982–4; pt. 4, pp. 1086–96; Vol. XLVIII, pt. 1, p. 456; pt. 2, pp. 911, 1302–4, 1311, 1315.)

A council of the Indian tribes of the Southwest was convened to meet at Fort Smith, Ark., September 8, 1865, to renew allegiance with the United States. The commissioners of the United States informed the assembled delegates of the tribes that they had broken their former treaties, and that new treaties between them and the

United States would have to be entered into, to contain substantially the following stipulations:

1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.

2. Those settled in the Indian Territory must bind themselves, when called upon by the Government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory, and with the United States.

3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes, on an equal footing with the original members, or suitably provided for.

4. A stipulation in the treaties that slavery or involuntary servitude shall never exist in the tribe or nation, except in punishment of crime.

5. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government.

6. It is the policy of the Government, unless other arrangements be made, that all the nations and tribes in the Indian Territory be formed into one consolidated government, after the plan proposed by the Senate of the United States for organizing the Indian Territory.

7. No white person, except officers, agents, and employees of the Government, or of any internal improvement authorized by the Government, will

be permitted to reside in the Territory, unless formally incorporated with some tribe, according to the usages of the band.

(Report of Secretary of the Interior, 1865, pp. 480–483, 496–503.)

In pursuance of this plan, the commissioners proposed a treaty with the Choctaws and Chickasaws, covering all the seven stipulations and containing also the following article:

> ARTICLE 5. The Choctaw and Chickasaw tribes agree to a modification of the ninth article of the treaty concluded at the city of Washington the 22d day of June, A. D. 1855, by which they agree that all that portion of their common territory west of the ninety-eighth degree west longitude, leased to the United States, may be used for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate thereon, without exception or restriction as to the character of the tribes. (Rec., 453.)

The Choctaw and Chickasaw delegates agreed to the proposed treaty, but it was never approved by their councils or executed. (Sec. of Int. Rept. 1865, p. 204.) Other delegates were chosen with power to make such a treaty, however, and came to Washington in 1866, employing J. H. B. Latrobe, esq., as their counsel. (Rec., 189.) A treaty was made April 28, 1866 (14 Stat., 769), more elaborated and detailed than that proposed the year before, and providing, *inter alia*, as follows:

Article I provided for peace and friendship, as required by the first two of the stipulations presented at the Fort Smith council.

Article II abolished slavery, as required by the third and fourth stipulations.

Article III was as follows:

> The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent., in trust for the said nations until the legislatures of the Choctaw and Chickasaw nations, respectively, shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter, less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days before the passage of such laws, rules, and regulations,

shall elect to move, and actually remove, from t
said nations respectively. And should the s
laws, rules, and regulations not be made by t
legislatures of said nations, respectively, within t
years from the ratification of this treaty, then t
said sum of three hundred thousand dollars sha
cease to be held in trust for the said Choctaw a
Chickasaw nations, and be held for the use a
benefit of such persons of African descent as th
United States shall remove from the said territo
in such manner as the United States shall dee
proper, the United States agreeing, within ninet
days from the expiration of said two years, to r
move from said nations all such persons of Africa
descent as may be willing to remove; those remain
ing or returning after having been removed fro
said nations to have no benefit of said sum of thre
hundred thousand dollars, or any part thereof, bu
shall be upon the same footing as other citizens o
the United States in the said nations.

Article IV contained further provisions for the civi
rights of the negroes, as required by the third stipula-
tion, and a temporary provision for the cultivation o
land by them, until some permanent provision was made
for them or they removed elsewhere.

Article VIII provided for a consolidated government
for all the tribes in the Indian Territory, as required by
the sixth stipulation.

Article X reaffirmed the obligation of treaties in force
before the rebellion and "not inconsistent herewith."

Articles XXX, XXXI, and XXXVII were as
follows:

ARTICLE XXX. The Choctaw and Chickasaw
nations will receive into their respective districts east

of the ninety-eighth degree of west longitude, in the proportion of one-fourth in the Chickasaw and three-fourths in the Choctaw Nation, civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory, not exceeding ten thousand in number, who shall have in the Choctaw and Chickasaw nations, respectively, the same rights as the Choctaws and Chickasaws, of whom they shall be the fellow-citizens, * * * and among others the right to select land as herein provided for Choctaws and Chickasaws [i. e., one quarter section for each person, male or female, adult or minor, in severalty, see Articles XV, XXXIII].

ARTICLE XXXI. And whereas some time must necessarily elapse before the surveys, maps, and selections herein provided for can be completed so as to permit the said Kansas Indians to make their selections in their order, during which time the United States may desire to remove the said Indians from their present abiding places, it is hereby agreed that the said Indians may at once come into the said Choctaw and Chickasaw nations, settling themselves temporarily as citizens of the said nations, respectively, upon such land as suits them and is not already occupied.

ARTICLE XXXVII. In consideration of the right of selection heretofore accorded to certain Indians other than the Choctaws and Chickasaws, the United States agree to pay to the Choctaw and Chickasaw nations, out of the funds of Indians removing into said nations, respectively, under the provisions of this treaty, such sum as may be fixed by the legislatures of said nations, not exceeding one dollar per acre, to be divided between the said nations in the proportion of one-fourth to the Chickasaw Nation and three-fourths to the Choctaw Nation. * * *

Article XLIII provided for the exclusion of white men, as required by the seventh stipulation.

Article XLV provided that the former rights and immunities of the Indians should remain in force, "so far as they are consistent with the provisions of this treaty."

Article XLVI provided that $150,000 should be advanced and paid to the Choctaws, and $50,000 to the Chickasaws, of the moneys stipulated to be paid for the cession of the leased district (under Article III) and the admission of the Kansas Indians among them (under Article XXXVII), these sums to be repaid out of the said moneys when due, or other moneys of these Indians in the hands of the United States.

On May 21, 1883, the Choctaws enacted the requisite law in regard to their freedmen. (Choc. Laws, 1894, p. 335.) The Chickasaws did the same on January 10, 1873 (H. Ex. Doc. No. 207, Forty-second Congress, third session), but this act was not approved by Congress until August 15, 1894 (28 Stats., 336), and in the meantime the Chickasaws had passed other laws inconsistent with their law of 1873, which they never attempted to carry into effect. (Sen. Mis. Doc. No. 24, Fifty-third Congress, third session, pp. 11, 29.)

The $300,000, the consideration for the cession of the leased district in 1866, have been disposed of as follows:

Payments to the Choctaw Nation.

Appropriation of July 26, 1866 (14 Stats., 259), under 46th article of the treaty	$150,000.00
Appropriation of July 26, 1866, for interest (14 Stats., 259), under same article	11,250.00

Appropriation of April 10, 1869, for interest (16 Stats., 39), under same article		$11,250.00
Appropriation of May 17, 1882, for education of freedmen (22 Stats., 72)		7,500.00
Appropriation of March 3, 1885 (23 Stats., 366), to be placed to the credit of the Choctaws on the books of the Treasury, computed as follows:		
Balance of principal due Choctaws	$67,500	
Deduct overpayment of interest, 1867, amounting to	$7,500	
Deduct for same in 1868	7,875	
	15,375	
		52,125.00
		232,125.00

Payments to the Chickasaw Nation.

Appropriation of July 26, 1866 (14 Stats., 259), under 46th article of the treaty	50,000.00
Appropriation of July 26, 1866, for interest (14 Stats., 259), under same article	3,750.00
Appropriation of April 10, 1869, for interest (16 Stats., 39), under same article	3,750.00
Appropriation of May 17, 1882, for education of freedmen (22 Stats., 72)	2,500.00
	60,000.00

(Rec., 264.)

Under the treaty of October 21, 1867 (15 Stats., 581), the Kiowa and Comanche tribes were settled on a reservation in the so-called "leased district," and by the Executive order of August 10, 1869, the Cheyennes and Arapahoes were settled on another reservation within that district. (Sen. Ex. Doc. No. 13, Forty-eighth Congress, first session, pp. 2–3.) In 1872 certain chiefs and delegates of the Wichita and affiliated bands entered into

the following agreement with the Commissioner of Indian Affairs:

> Articles of agreement made and concluded at Washington City, District of Columbia, this nineteenth day of October, A. D. 1872, by and between Francis A. Walker, Commissioner of Indian Affairs, representing the United States, of the one part, and the undersigned chiefs, head men, and members of the Wichitas and affiliated bands of Indians duly authorized to act for their people, of the other part, witnesseth:
>
> ARTICLE 1. The United States hereby give and grant to the said Wichitas and other affiliated bands, for a home, the tract of country bounded as follows, to wit: Commencing at a point in the middle of the main channel of the Washita River where the 98th meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the line of 98° 40′ W. L., thence on said line of 98° 40′ due north to the middle of the main channel of the main Canadian River, thence down the middle of said main Canadian River to where it crosses the 98th meridian, thence due south to the place of beginning.
>
> ARTICLE 2. In consideration of the reservation provided for in the preceding article the said Wichitas and other affiliated bands hereby cede and relinquish to the United States all right, title, interest, or claim of any nature whatsoever in and to any lands in Texas, Louisiana, Indian Territory, or elsewhere within the limits of the United States.

In his annual report for 1872 the Commissioner of Indian Affairs (p. 101) recommended the ratification of this agreement, but no action was taken by Congress upon this recommendation. Since the date of the agree-

ment, however, the boundaries therein named have been officially maintained as those of the Wichita Reservation, and annual appropriations have been made for the support of the Wichita and affiliated bands, on their reservation. (Sen. Ex. Doc. No. 13, Forty-eighth Congress, first session, pp. 3, 56.)

These three reservations occupied the whole of the so-called "leased district," except the southwestern portion, known as Greer County, upon which no Indians have been settled, the title thereto having been claimed by the State of Texas until the decision of this court in *United States* v. *Texas* (162 U. S., 1) in March, 1896.

In 1890 the United States agreed with the Cheyennes and Arapahoes to give to each member of those tribes, in severalty, 160 acres of the land contained in their reservation, and to pay these tribes $1,500,000 for the cession to the United States of the balance of the reservation. This agreement was approved by Congress March 3, 1891, and at the same time $2,991,450 were appropriated, to be paid to the Choctaws and Chickasaws for their interest in the Cheyenne and Arapahoe reservation. (26 Stats., 1022–1025.)

On February 18, 1892, the President sent a message to Congress stating that he did not believe that the Choctaws and Chickasaws were entitled to be paid for the Cheyenne and Arapahoe Reservation; that at all events a considerable proportion of the $800,000 paid them for the lease in 1855 should have been deducted, and that in any payments to the Choctaws they should be protected against extortion on the part of their agents, who had arranged to receive from them 25 per cent of the amount

appropriated for the tribe. (Sen. Ex. Doc. No. 42, Fifty-second Congress, first session.) Congress ultimately resolved "that there is no sufficient reason for interference in the due execution of the law referred to." (23 Cong. Rec., 4093; 24 id., 178.)

An error of $48,800 having been discovered in the computation of the amount appropriated to pay the Choctaws and Chickasaws for their interest in the Cheyenne and Arapahoe Reservation, Congress directed the retention of the erroneous excess, with this proviso:

> *Provided, however,* That neither the passage of the original act of appropriation to pay the Choctaw and Chickasaw tribes of Indians for their interest in the lands of the Cheyenne and Arapahoe Reservation, dated March third, eighteen hundred and ninety-one, nor of this resolution, shall be held in any way to commit the Government to the payment of any further sum to the Choctaw and Chickasaw Indians for any alleged interest in the remainder of the lands situated in what is commonly known and called the "leased district." (Joint Res. of Jan. 18, 1893, 27 Stats., 753.)

On June 4, 1891, an agreement was made between the United States and the Wichita and affiliated bands of Indians for the allotment to each of the said Indians, in severalty, of 160 acres of a certain tract of land therein described (heretofore known as the Wichita Reservation), and for the sale of the balance thereof subject to the decision of Congress upon the claim of the said Indians for compensation for the said balance. This agreement was submitted to Congress January 6, 1892. (Sen. Ex. Doc. No. 14, Fifty-second Congress, first session.) By the Indian appropriation act of March 2, 1895, § 1 (28

Stats., 876, 894–899), the claim of the Choctaws and Chickasaws to this land, and that of the Wichita and affiliated bands to compensation for the unallotted portion, were referred to the court below for final adjudication, the United States being made a party defendant to the suit.

The case was tried in January, 1898, and on March 21, 1899, the court below entered its decree (Peele, J., dissenting), providing that the proceeds of the sale of the balance of the Wichita Reservation, over and above the allotments made or to be made to the members of the Wichita and affiliated bands, should be paid to the Choctaws and Chickasaws (Rec., 442); whereupon the United States took an appeal, and the Choctaws and Chickasaws took a cross appeal. (Rec., 443.) The Wichita and affiliated bands also appealed (Rec., 443), but as their appeal, in so far as it is against the United States, raises entirely different issues, it will be considered in a separate brief.

ASSIGNMENTS OF ERROR.

The Court of Claims erred:

1. In holding that it had jurisdiction, under the act of March 3, 1895, to go behind the plain and unambiguous words of cession in Article III of the treaty of April 28, 1866, and to inquire whether the cession, absolute on its face, was intended to establish a trust as to the lands ceded in favor of the parties ceding them.

2. In holding that the country ceded by the Quapaws to the United States by the treaty of August 24, 1818, extended west of the one hundredth meridian.

3. In holding that the country ceded by the United States to the Choctaws by the treaty of October 18, 1820, extended west of the one hundredth meridian.

4. In holding that the treaty of September 27, 1830, between the United States and the Choctaws, did not annul any cession of lands west of the one hundredth meridian, supposing such cession to have been made by the treaty of October 18, 1820.

5. In holding that the United States, by the treaty of June 22, 1855, recognized that the Choctaws had any real right, title, or interest in lands west of the one hundredth meridian, and that the sum of $800,000, paid by the United States to the Choctaws and Chickasaws under that treaty, was not paid exclusively for the lease of the country between the ninety-eighth and one hundredth meridians.

6. In holding that the fifth stipulation, announced by the commissioners at the Fort Smith council in 1865, was not embodied in Articles XXX, XXXI, and XXXVII of the treaty of April 28, 1866, with the Choctaws and Chickasaws.

7. In holding that the cession of the territory west of the ninety-eighth meridian, known as the leased district, by the Choctaws and Chickasaws, made by the said treaty of April 28, 1866, was not absolute.

8. In holding that the cession of the said territory, made by the said treaty, was made upon a trust of such a character that the sale of the unallotted portion of the Wichita Reservation would constitute a breach of the trust, even though such sale should be made for the

benefit of the Wichita and affiliated bands of Indians located upon the said reservation.

9. In entering a decree that the Choctaw Nation and the Chickasaw Nation are in law and equity entitled to and are the owners of the unallotted portion of the Wichita Reservation, and that in the event of the sale of such unallotted portion by the United States, they shall be entitled to, and shall receive from the United States, the proceeds of such sale.

BRIEF OF ARGUMENT.

This suit concerns a particular tract of 743,610 acres in the Indian Territory, known as the Wichita Reservation, and practically it also concerns the Kiowa, Comanche, and Apache reservations of 2,968,893 acres, and the district known as Greer County, containing 1,511,958 acres, the act of June 28, 1898, § 29 (30 Stats., 495, 513), having provided as follows:

> It is further agreed that the final decision of the courts of the United States in the case of the Choctaw Nation and the Chickasaw Nation against the United States and the Wichita and affiliated bands of Indians, now pending, when made shall be conclusive as the basis of the settlement as between the United States and said Choctaw and Chickasaw nations for the remaining lands in what is known as the "Leased District," namely, the land lying between the ninety-eighth and one hundredth degrees of west longitude and between the Red and Canadian rivers, leased to the United States by the treaty of eighteen hundred and fifty-five, except that portion called the Cheyenne and Arapahoe country, heretofore acquired by the United States.

The decree of the court below refers only to the Wichita Reservation (although under the above statute it must, if affirmed, be conclusive as to all the rest of the "Leased District"), and it provides that the Wichita and affiliated bands of Indians, numbering 1,060, are entitled to 160 acres of land apiece in that reservation, but that the proceeds of the balance (574,010 acres), when sold, shall be paid to the Choctaws and Chickasaws (Rec., 442). In so far as this decree declares the Wichita and affiliated bands entitled to certain allotments of lands, it sustains the agreement of June 4, 1891 (28 Stats., 895), between the United States Commissioners and those Indians, and is not appealed from by the United States; but in so far as it holds the Choctaws and Chickasaws entitled to the proceeds of the sales of the balance of the land, the United States appeals from the decree on three grounds, viz:

I. The cession of the "leased district" in 1866 being absolute on its face, the court below had no jurisdiction to go behind the plain words of cession and inquire into any supposed intention of the parties to the treaty of 1866 to create a trust in the land ceded.

II. The cession of the "leased district" in 1866 was, as a matter of fact, absolute and not in trust.

III. Supposing the cession of the "leased district" in 1866 to have been in trust, that trust was for the permanent settlement of friendly Indian tribes upon the land within the district, with the same right of perpetual occupancy that has always, as a matter of law, been conceded to Indian tribes in the lands occupied by them either by aboriginal title or under a grant from the United States, or from other Indians with the approval of the

United States. This right of perpetual occupancy, if not parted with by abandonment or a sale or exchange of the land, entitles the occupants, on the termination of the reservation system, to individual allotments of the land in severalty, and to the sale of the unallotted balance for their benefit.

These grounds of appeal will be considered in their order.

I.

THE COURT BELOW HAD NO JURISDICTION TO GO BEHIND THE PLAIN WORDS OF CESSION IN THE TREATY OF 1866, AND TO INQUIRE INTO ANY SUPPOSED INTENTION OF THE PARTIES TO CREATE A TRUST, INSTEAD OF MAKING AN ABSOLUTE CESSION. (See the first assignment of error.)

The right of the United States to dispose of the Wichita Reservation is derived from the following clause of the treaty of April 28, 1866 (14 Stats., 769):

> The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district.

The court below has undertaken to reform the treaty of 1866.

A majority of the court below has stated its understanding of the effect of this cession as follows:

> We hold the cession in the treaty of 1866 was not intended to divest the Choctaws and Chickasaws of all their interest in the leased district, but was

> intended to enlarge the scope of the ninth article of the treaty of 1855. Hence a trust must be implied in favor of the claimants under the terms of the grant. (Rec., 427.)

It is evident that this conclusion involves a reformation of the language of the treaty of 1866, making a trust out of what is on its face an absolute cession.

Practically the court below has made the first clause of Article III of the treaty of 1866 read as follows:

> The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, in trust for the permanent settlement of Indians thereon; and if any portion or portions of the said district be at any time sold by the United States, for any purpose whatever, then three-fourths of all the proceeds of such sale or sales shall be paid to the Choctaws and one-fourth to the Chickasaws.

It is submitted that such a reformation was beyond the jurisdiction of the court below.

That the court below has undertaken to reform the treaty is clear. The word "cede" does not import any trust or condition whatever, nor is it in any sense a word of doubtful meaning, nor one capable of being used in many different senses. The accepted definition is this:

> CEDE. To assign; to transfer. Applied to the act by which one State or nation transfers territory to another. (*Bouvier's Law Dict.*)

There is nothing whatever in the word, when used without other qualifying words, to import that the assignment or transfer can be less than absolute; and there is

nothing in the proviso which follows the words of cession to qualify them in any way. This proviso reads:

> Provided that the said sum shall be invested and held by the United States at an interest not less than five per cent, in trust for the said nations until the legislatures of the Choctaw and Chickasaw nations, respectively, shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter, less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days before the passage of such laws, rules, and regulations, shall elect to move, and actually remove, from the said nations, respectively. And should the said laws, rules, and regulations not be made by the legislatures of said nations, respectively, within two years from the ratification of this treaty, then the

said sum of three hundred thousand dollars s
cease to be held in trust for the said Choctaw
Chickasaw nations, and be held for the use
benefit of such persons of African descent as
United States shall remove from the said terri
in such manner as the United States shall de
proper, the United States agreeing, within nin
days from the expiration of said two years, to
move from said nations all such persons of Afri
descent as may be willing to remove; those rema
ing or returning after having been removed fr
said nations to have no benefit of said sum of th
hundred thousand dollars, or any part thereof, b
shall be upon the same footing as other citizens
the United States in the said nations. (14 Stat
769).

This proviso does not relate to what the United Stat
is to do with the land acquired by this cession, b
exclusively to the disposition and uses of the purcha
money, as the court below admits. (Rec., 414.) Th
proviso does not control in any way the title of th
United States to the ceded territory by way of a cond
tion either precedent or subsequent, and, moreover, th
proviso has been complied with by the payment to th
Choctaws of their entire share of the fund (Rec., 264
while compliance as regards the Chickasaws has bee
merely delayed by their own undecided course of actio
toward their freedmen.

The language of the treaty not doubtful or inconsistent.

The view of the court below appears to be, however
that while the actual words of cession are clearly abso
lute, the rest of the treaty contains provisions inconsisten

with an absolute cession, so that taking the treaty as a whole the intention with regard to the character of the cession is not expressed with absolute certainty, but leaves room for construction and interpretation in the light of evidence outside the instrument itself, and, further, that the jurisdictional act must have contemplated a resort to such construction and interpretation. As to the treaty itself, the opinion says:

> That the cession under consideration was by treaty does not exclude those means of ascertaining the intention of the parties which have the effect of informing the court of every material fact supposed to govern them when the treaty was executed, if, as appears here, the ceding clause be followed by language embodying such terms and conditions as to raise reasonable doubt of what the parties really intended. * * * This is not a case * * * where both parties were entitled to have and receive by virtue of the act conferring jurisdiction only those things to which they were entitled under the stipulations of a treaty plain upon its face, concerning which there was but little or no controversy, but one where the instrument, *being ambiguously expressed*, left room for doubt as to the intention of the parties. * * * The use of evidence *aliunde* the instrument, showing, or tending to show, the avowed objects in view, does not necessarily imply that the language of the treaty is to be amended by the extrinsic matter, or that the treaty executed by the parties is to be displaced for one to be made by the court (which, of course, can not be done), but that *the doubtful instrument as it appears to have been written* is to be interpreted in the light of the occurrences which explain the intent and the reasons for the different understanding. (Rec., 408–410.)

After such assertions as these, one would naturally expect that the opinion would at once proceed to point out clearly those portions of the treaty which throw doubt upon the meaning of the words of cession, and make their apparently plain meaning ambiguous. This, however, the opinion does not do, but proceeds with the consideration, previously begun, of various matters outside the treaty, which are thought to throw light upon it; and it is only after these matters have been pretty fully considered that the language and provisions of the treaty are reviewed at all. In fact, taking the opinion of the court below as it stands, the suspicion arises that this evidence *aliunde* has been looked at first, and has so affected the mind of the learned judge as to make him afterwards see in the treaty the doubtful and ambiguous provisions which, he says, authorize a recourse to evidence *aliunde*.

Coming at last to the treaty itself, the learned judge says:

> Following the cession is a proviso relating to the disposition and uses of the fund. Then come numerous articles covering many subjects with much circumstantiality of detail. (Rec., 414.)

These articles are briefly referred to, after which the opinion proceeds to declare them inconsistent with the idea of an absolute cession of the "leased district," saying:

> Why *so many things* should be annexed to a simple cession of land if the transfer was meant to become absolute does not appear. Enough does appear to make an unqualified transfer seem inconsistent and repugnant, and though some of the conditions and qualifying words leave room to suppose that no reservation as to title or an interest in the land was

> intended to be made, taken as a whole the language following the cession is inconsistent with the absoluteness of the transfer and offers a glaring want of reciprocity and equality between the parties. There is at least enough of *contradiction and inequality* to create the belief that, as the parties did not see fit to make the cession for so much money to be paid and stop at that, something else was intended by one party or the other, or by both. (Rec., 415.)

The expression "so many things" is vague, and unfortunately the opinion does not state what bearing any one of these "many things" has on the cession so as to affect its absolute character, nor does it point out the "contradiction and inequality" which these "many things" involve, and which indicate that the cession could not have been intended to be absolute. It even leaves it doubtful as to what the "many things" are.

The reference to the "conditions" and "qualifying words" is also vague, but the idea appears to be that some of the provisions for the "many things"—which the learned judge says are "annexed" to the cession—are consistent with an absolute cession, while others are not; but as he does not point out which provisions belong to the one class and which to the other, nor what the fundamental difference between the two is, his statement does not greatly aid us in understanding the matter.

But what, after all, are the "many things" "annexed" to the cession, which the learned judge thinks prevent the transfer from becoming absolute? Taking his words as they stand, the "many things" must be the matters referred to in his four preceding paragraphs, viz, the various other provisions of the treaty, and yet none of

these would seem to be "annexed to the cession," other than in the broad sense of being included in the same treaty, except, possibly, the provisions for the disposition and uses of the consideration to be paid for the cession. By "annexed" the learned judge must mean something more than being merely contained in the same instrument. He must mean that the "things" which are "annexed" affect or control the cession in some way so as to make it other than it would be if they were not "annexed" thereto. Now, it may be stated with confidence that there is not a single provision in the treaty, from one end of it to the other, that touches in the remotest degree the cession of the "leased district," except the provisions of Articles III and XLVI, in regard to the disposition and uses of the consideration, and those of Articles X and XLV, in regard to the preexisting obligations of the United States and rights and privileges of the Choctaws and Chickasaws; and further, that none of these provisions can possibly affect the character of the cession in the least degree.

Articles X and XLV are as follows:

> ARTICLE X. The United States reaffirms all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw nations, entered into prior to the late rebellion, and in force at this time, *not inconsistent herewith;* and further agrees to renew the payment of all annuities and other moneys accruing under such treaty stipulations and acts of legislation from and after the close of the fiscal year ending on the 30th of June, in the year 1866.
>
> * * * * *

ARTICLE XLV. All the rights, privileges, and immunities heretofore possessed by said nations, or individuals thereof, or to which they were entitled under the treaties and legislation heretofore made and had in connection with them, shall be, and are hereby, declared to be in full force, *in so far as they are consistent* with the provisions of this treaty. (14 Stats., 774, 779.)

Undoubtedly, if the cession of the "leased district" was not absolute, the treaty obligations of the United States toward the Choctaws and Chickasaws in regard to that district were reaffirmed by Article X, and the rights of those nations in the said district continued in force under Article XLV, but the provisions of those articles are of no effect in determining whether or not the cession was absolute, for, if absolute, it was inconsistent with those provisions, and excepted from their operation. The opinion says that "these articles are consistent with the cession for Indian purposes," which is true, but as they are equally consistent with an absolute cession they may be left out of consideration altogether.

The provisions of Article III, concerning the disposition and uses of the fund, have already been given in full above. They relate to certain laws, rules, and regulations to be made by the Choctaws and Chickasaws for the benefit of the persons of African descent resident with them, and to the possible use of this fund for the benefit of such persons in case such laws and regulations should not be made. That the Choctaws and Chickasaws were called upon to make such laws and regulations could have had nothing whatever to do with the fact that they also

ceded certain land to the United States or with the character of the cession. The propriety of calling upon them to make such laws and regulations, or of using the fund for the benefit of the persons of African descent in case such laws and regulations were not made, was precisely the same whether the cession for which the fund was the consideration was absolute or in trust. Although these provisions are introduced by the words "provided that," they relate to a matter so wholly distinct from the cession, that it can not have been intended that they should operate as conditions, or that unless they were carried out there would be no cession at all, i. e., that such rights of the Choctaws and Chickasaws in the land as remained to them after its lease in 1855 would revert to them. Moreover, even if these provisions could conceivably have been intended to operate as conditions, yet, as it is not denied that they have been carried out, they can not have the effect of causing a reverter, and no other possible effect upon the cession can be ascribed to them.

Article XLVI provides for the immediate payment to the Choctaws and Chickasaws, subject to possible ultimate repayment, of $200,000 of the moneys stipulated to be paid "for the cession of the leased district and the admission of the Kansas Indians among them," the balance to remain in the Treasury and bear interest, payable annually. This is the article to which the opinion refers when it speaks of—

> the recitals which, providing for the repayment of a part of the money after the admission of the Kansas Indians and the application of the other part of the consideration to the support of a government

which included the new population proposed to be incorporated, continued the country for the use of Indians. (Rec., 421.)

This article refers to money coming from two sources, viz, "the cession of the leased district," under Article III, for which the United States was to pay, and "the admission of the Kansas Indians among them," under Article XXX, to be paid for out of the funds of those Indians, as provided in Article XXXVII. There is no room for a shadow of doubt as to this, "the admission of the Kansas Indians among them, being precisely what Article XXX provides for in express terms; but the learned judge seems to have overlooked this when he said the recitals of Article XLVI "continued the country for the use of Indians." This was true of the country east of the ninty-eighth meridian, where the Kansas Indians were to settle, but this article could have no effect whatever upon the ultimate disposition of the leased district. The learned judge has evidently mixed up two matters which are wholly distinct, and has treated the article as if it read, "the cession of the leased district and the admission of the Kansas Indians *into it;*" but it reads "admission of the Kansas Indians *among them*," i. e., among the Choctaws and Chickasaws, and into the districts occupied by them, east of the ninety-eighth meridian, as stated in Article XXX.

It appears, then, that *none* of the "many things annexed" to the cession have any bearing on its character whatever; that *none* of them "make an unqualified transfer seem inconsistent and repugnant," and that "taken as a whole the language following the cession" *is not* "inconsistent

with the absoluteness of the transfer," and *does not* offer "a glaring want of reciprocity and equality between the parties," nor involve "contradiction and inequality;" and the opinion does not point to a single "thing" in the treaty to warrant its statements in this respect. That the Choctaws and Chickasaws were not on an equality with the United States politically or intellectually, or in point of strength and resources, is true; but this can not be the lack of equality to which the opinion refers. What is meant is that *the terms of the treaty* are not reciprocal and equal, as between the parties, if the cession is absolute, i. e., that one party gives more than the value of the consideration that it receives. If this be true at all, it is not because of any of the "things" which are "annexed" to the cession, but simply because $300,000 was an inadequate price for the interests conveyed, and this the opinion does not say. The learned judge says, in effect, that $300,000 was inadequate as a consideration for a cession of "all interest" in the land, but the actual cession made in 1866 was not of "all interest," but only of the very limited interest that remained to the Choctaws and Chickasaws after the "lease" of 1855. The learned judge also intimates that the "things," or some of them, "annexed" to the cession would involve "contradiction and inequality" if the cession were absolute, but it has been shown that the other provisions of the treaty have no bearing on the cession, and can not possibly indicate its character.

Another matter influencing the mind of the learned judge, in connection with the "contradiction and inequality" (which he does not point out, but whose existence

he simply asserts), is that, "as the parties did not see fit to make the cession for so much money to be paid and stop at that, something else was intended by one party or the other, or by both." The phrase "stop at that" may mean "confine the treaty to that one matter," or it may mean "place no restrictions on the disposition of the consideration money." If the first, the answer is that a treaty covering the seven stipulations had to be made in any event, and it was simpler to cover everything by one treaty; if the second, the answer is that the disposition of the money was adopted as a convenient mode of insuring compliance, in one way or the other, with the requirements of the ~~fifth~~ third stipulation, and, whichever be meant, the further answer is that neither the provisions as to the consideration for the cession nor any other provision of the treaty can possibly affect our understanding of the character of the cession.

Looking at the matter practically, to "make the cession for so much money to be paid and stop at that" was precisely what the parties did, as far as the cession was concerned. What else they did was altogether separate and apart from the cession.

The learned judge's "belief" as to what the parties intended suggests a pertinent question. If the parties intended a cession in trust, why was not the trust stated in distinct terms? Why should not the literal wording of the treaty express the intention of the parties? The opinion gives no answer to this question, and until it is satisfactorily answered the reasonable understanding of the matter must be that the language of the treaty,

plainly importing an absolute cession, expresses precisely what the parties intended.

The jurisdictional act gives no power to reform the treaty.

The other ground assigned by the court for going behind the plain words of cession in Article III remains to be considered. The opinion says:

> The act conferring jurisdiction is misleading and delusive if, without the power to direct the court to consider the treaty as a contract, and apply the rules which obtain in equity to ascertain its meaning, Congress has shifted the responsibility of reaching the intent of the treaty upon the court. The inquiry being always open to the Indians how they understood their treaty as a contract, it was competent for Congress to direct the consideration of extrinsic facts in explanation of the intent. This includes the examination of matters historically true and all circumstances throwing light upon the intent and the reason and justice of the matter, and the uses in this case to which the small consideration was to be put upon its ultimate payment, so that the treaty should not lead to injustice, oppression, or absurd consequence. (Rec., 409.)

The jurisdictional act provides as follows:

> That as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, which claim is controverted by the United States, jurisdiction be, and is hereby, conferred upon the Court of Claims to hear and determine the said claim of the Choctaws and Chickasaws and to render judgment thereon, it being the intention of this act to allow said Court of Claims jurisdiction, so that

> the rights, legal and equitable, of the United States and the Choctaw and Chickasaw nations, and the Wichita and affiliated bands of Indians in the premises, shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party in the hearing of said claim. * * * *And provided further*, That nothing in this act shall be accepted or construed as a confession that the United States admit that the Choctaw and Chickasaw nations have any claim to or interest in said lands or any part thereof. (28 Stats., 898.)

This language is much the same as that of the act of February 25, 1889 (25 Stats., 694), in regard to the "Old Settlers," although there the effect of the language was perhaps broader, the intention being stated to be "to allow the said Court of Claims *unrestricted latitude* in adjusting and determining the said claim, so that the rights," etc. Under this broad language the claimants asked that a certain treaty should be considered as a contract in every respect similar to one made between private parties, and that they should be relieved from its provisions on the ground of duress and fraud, but this court held that the jurisdictional act, broad as its language was, provided for a strictly judicial proceeding, and did not clothe the court with power to annul a treaty on the ground of fraud or duress in its execution. It said, moreover:

> There is nothing in the jurisdictional act of February 25, 1889, inconsistent with the treaty of 1846 (or any other), and nothing to indicate that Congress attempted by that act to authorize the courts to proceed in disregard thereof. Unquestionably a treaty

> may be modified or abrogated by an act of Congress, but the power to make and unmake is essentially political, and not judicial, and the presumption is wholly inadmissible that Congress sought in this instance to submit the good faith of its own action or the action of the Government to judicial decision, by authorizing the stipulations in question to be overthrown upon an inquiry of the character suggested, and the act does not in the least degree justify any such inference. (*United States* v. *Old Settlers*, 148 U. S., 427, 468.)

Now, if a court can not, under a jurisdictional act of even broader language than the present one, go behind a treaty on the ground of duress or fraud, neither can it reform a treaty on the ground that its language does not express the intention of the parties. It is undeniable that, as the court below states, a court of equity has power to reform a written instrument so as to carry out the intention of the parties and prevent fraud or oppression. It is true that a deed absolute on its face may be shown to be a mortgage, or to be subject to conditions; but it is not true that a treaty can be dealt with in any such way. A treaty is "the law of the land," and must control the court; the court can have no control over the provisions of a treaty. The court may construe the language of a treaty, but in the present case the court below has gone far beyond construction and has attempted reformation.

Had the words of cession been such as might properly convey either a trust estate or an absolute estate, or had the cession been stated to be for the permanent settlement of Indians, then there would have been room for construction as to what character of estate was intended, or

as to what disposition of the land was consistent with such permanent settlement, but as it is the language is too plain to leave any room for construction.

The court below, however, thinks the present case an exception to the general rule, because, in its opinion, unless the jurisdictional act authorized it to go behind the plain language of the treaty the act was useless. The opinion says:

> The act conferring jurisdiction is misleading and delusive if, without the power to direct the court to consider the treaty as a contract and apply the rules which obtain in equity to ascertain its meaning, Congress has shifted the responsibility of reaching the intent of the treaty upon the court. (Rec., 409.)

While these words are perhaps a trifle obscure, it is evident that "to consider the treaty as a contract" must mean to subject it to the same treatment that any ordinary contract would receive in a court of equity, e. g., to treat a grant, absolute on its face, as a grant in trust, or as subject to conditions, or to avoid it altogether on account of duress or fraud; yet the last of these things is precisely what this court has said in the Old Settlers' case can not be done under such a jurisdictional act, and if this can not be done, the other things can not be done either, or, in other words, the court is not at liberty "to consider the treaty as a contract."

The act not ineffective, though no power to reform given.

The fact that the act did not authorize the court below to go behind the treaty, or to reform it, does not, however, make the act either "misleading" or "delusive."

As the Wichita and affiliated bands of Indians claimed compensation on account of certain alleged possessory rights in the lands of the reservation (see Wichita Agreet., Art. V; 28 Stat., 896), the act provided that these rights, legal and equitable, should be fully considered and determined, and the court below has considered and determined them. Besides this claim of the Wichita and affiliated bands, the Choctaws and Chickasaws claimed to have "some right, title, and interest" in and to the lands ceded in the agreement, and jurisdiction was given to consider and determine these rights also. What the claims of the Choctaws and Chickasaws were, the act did not state, though it did provide against any inference of a confession of the validity of such claims. There is nothing in the act to show that Congress knew that these claims contravened the plain language of the treaty of 1866, or that sustaining the claims would involve reforming the treaty. Even if the action of a former Congress in regard to a similar claim (act of March 3, 1891; 26 Stat., 1022–1025), and the representations made to it (H. Report 3147, Fifty-first Congress, first session; Senate Mis. Doc. 107, same session; Senate Mis. Docs. 82 and 95, and Senate Report 552, Fifty-second Congress, first session; H. Report 1661, same session), be held to have affected the Fifty-third Congress with a knowledge of the character of these claims, as previously presented, the fact that the act gave no authority to disregard the terms of the treaty of 1866 indicates that Congress intended to prevent any claims from being considered which involved a substantial reformation of the terms of any treaty.

The mere fact that the parties who call for a reformation of the treaty of 1866 are Indian communities can not alter the case. The rule which takes into account the fact that in the making of treaties between the United States and such communities "the parties are not on an equal footing" (*Choctaw Nation* v. *United States*, 119 U. S., 1, 28) is a rule of interpretation, but it does not warrant reformation where the language is capable of but one interpretation.

II.

THE CESSION OF THE "LEASED DISTRICT" IN 1866 WAS AN ABSOLUTE ONE.

Assuming, for the sake of the argument, that the jurisdictional act permits an inquiry as to whether the cession made by Article III of the treaty of 1866 was intended to be less absolute than its language would indicate, the second ground of the appeal will now be considered.

The conclusion of the court below.

The opinion of the court below reviews the various dealings between the United States and the Choctaws and Chickasaws down to and including the treaty of April 28, 1866, and puts its construction upon them. Of the cession made by Article III of that treaty it says:

> If the transaction had been between individuals, and especially between guardian and ward, inquiry would at once arise how it came that one of the parties, and that party the ward, should for a consideration of $300,000 part with all interest in nearly 8,000,000 acres of land worth about $8,000,000

> (according to the value put by the grantee at the time upon land adjoining the ceded territory) and at the same time bargain to give from other possessions tracts of more than 300,000 acres to get the money, or, failing to yield these tracts to the third persons who by the arrangement were to become the beneficiaries, leave themselves in position to surrender indefinitely land enough for 8,000 people to cultivate besides conferring upon them other rights. But under this treaty neither the integrity of the sovereign nor the good faith of the guardian can be questioned. In looking for the proper objects, then, which we must suppose actuated the sovereign as guardian the statements and situation of the parties, the amount and value of the grant considered with reference to the consideration, the benefits to be conferred and where they were to go, and the ends sought to be accomplished from all the parties possessed of land, may be considered in determining whether the cession was or was not attended with any underlying trusts or uses. (Rec., 406.)

The opinion then goes on to discuss what it considers the evidence of the object of the cession, the attendant circumstances, and various subsequent proceedings, and finally reaches this conclusion:

> We hold the cession in the treaty of 1866 was not intended to divest the Choctaws and Chickasaws of all their interest in the leased district, but was intended to enlarge the scope of the ninth article of the treaty of 1855. Hence a trust must be implied in favor of the claimants under the terms of the grant. * * * The Government had the right to settle Indians permanently on the lands mentioned in the agreement, but not to divert the proceeds of the sale of the lands from the Choctaw and Chickasaw nations to other Indians. (Rec., 427.)

Before reviewing the evidence of the object of the cession, or the attendant or subsequent circumstances and proceedings, it is necessary first to call attention to a very serious error of fact into which the court below has fallen, and which has presumably influenced its decision. The first of the above extracts, that from page 406 of the record, is clearly equivalent to a statement that according to the view taken by the United States in the present case, the Choctaws and Chickasaws did, by the treaty of 1866, "for a consideration of $300,000, part with all interest in nearly 8,000,000 acres of land," i. e., the land between the ninety-eighth and one hundredth meridians and the Canadian and Red rivers. As a matter of fact, the consideration for which they parted with "all interest" in that land was not $300,000, but $1,100,000, i. e., $800,000 in 1855, when they leased it *permanently* to the United States for the settlement of other Indians thereon, reserving to themselves only the right to settle in the district, and $300,000 in 1866, when they parted with all their remaining interest. To conform the statement of the court below to the actual facts, therefore, $1,100,000 would have to be substituted for $300,000 as the consideration for which "all interest" in the land in question was parted with.

This error in the statement of the court below is the more remarkable because the opinion had previously referred to the lease of 1855, and had said enough to show that $800,000 must have been paid for it (Rec., 391), although the opinion did not state any definite conclusion as to this. It would seem as if the learned writer of the opinion, when he came to this cession of 1866, forgot all

about the lease of 1855, and treated the cession as if the United States had then for the first time acquired an interest in the land ceded to it, whereas in point of fact it already had the right to permanently settle the Indians from a very large region upon it, a right which it might, if it saw fit, so use, by filling up the entire district with such Indians, as to exclude the Choctaws and Chickasaws from all enjoyment of the land whatever.

Whether the ultimate conclusion of the court below would have been the same if it had borne in mind the fact that the interest which the Choctaws and Chickasaws parted with in 1866 was very far from being complete, and might easily have become purely nominal, is a matter of speculation. The one certain fact is that in reaching its conclusion the court has overlooked certain important premises; and of course such a conclusion can not command the same degree of respect as if all the premises had received their due consideration.

The arguments against the conclusion of the court below.

In proceeding to attack the conclusion of the court below it will be necessary to consider, first, what sort of an interest it was which the Choctaws and Chickasaws had when they made the cession to the United States in 1866, and what was the total consideration which the the United States gave for whatever interest it acquired in the land ceded in 1866; secondly, the circumstances attending the cession; and thirdly, all subsequent acts and declarations of the parties which have been thought to affect the matter.

In considering the first point it is necessary to review

the various treaties and negotiations with the Choctaws and Chickasaws prior to that of 1866, in order to show conclusively that the United States had already acquired for a large consideration a very important interest in the "leased district," so that it could at any time have excluded the Choctaws and Chickasaws from all beneficial interest therein.

This branch of the argument may be subdivided as follows:

A. The amount of the consideration paid by the United States for the "lease" of 1855.

(1) Whether the Quapaw cession of 1818 extended west of the one hundredth meridian.

(2) Whether the cession to the Choctaws in 1820 extended west of that meridian.

(3) Whether the treaty of 1830 annulled that of 1820.

(4) Whether the quitclaim of 1855 was the renunciation of a valid claim, or a correction of the cession of 1820 in conformity with the intention of the parties.

B. The nature of the title acquired by the United States under the cession of 1866.

(1) What provisions of the treaty of 1866 were intended to carry out the fifth stipulation announced at Fort Smith in 1865.

(2) The nature of the cession of 1866.

A.

THE AMOUNT OF THE CONSIDERATION PAID BY THE UNITED STATES FOR THE "LEASE" OF 1855.

Article 9 of the treaty of June 22, 1855, covers a quitclaim and relinquishment by the Choctaws, alone, of all

their right, title, and interest in lands west of the one hundredth meridian, as well as a lease by the Choctaws and Chickasaws, together, of the country between the ninety-eighth and one hundredth meridians, and article 10 provides as follows:

> In consideration of the foregoing relinquishment and lease, and as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct.

It was contended in the court below that the whole sum of $800,000 was paid for the quitclaim alone, but the court below has manifestly declined to sustain this contention, and has expressly held that the claim for land west of the one hundredth meridian was a claim of the Choctaws alone, and that the quitclaim was made by them alone and not by the Chickasaws (Rec. 391–396), so that as regards these latter the money paid them ($200,000) was paid exclusively for the lease, and not for the quitclaim at all. The court below has also distinctly stated that "the rights of the Choctaws and Chickasaws as between themselves had been fixed by agreement, with the consent of the Government, in the proportion of three-fourths to the former and one-fourth to the latter tribe in all the land to which either tribe could lay claim." (Rec. 397.) The inevitable conclusion from this is that, as the Choctaws received for the lease precisely three-fourths of the total consideration and the Chickasaws one-fourth, this consideration must

have been paid for the lease exclusively; but this the court below does not seem to admit, although it has carefully avoided committing itself as to how much of the $600,000 paid to the Choctaws in 1855 was for the lease and how much for the quitclaim. It may well be that the court below really held that no substantial portion of the $600,000 was paid for the quitclaim, but whatever was the view of the court, it is clear that if anything at all was paid for the quitclaim, then the Choctaws did not receive their fair proportion of the money paid for the lease, and there is no indication whatever that they were or were intended to be treated at all less favorably than the Chickasaws in this matter.

Precisely what correspondence passed between the United States and the Choctaws in 1855 will be considered below. It is expedient to take up the whole matter chronologically and to point out, first of all, the reason why the $600,000 were paid to the Choctaws exclusively for the lease, and not at all for the quitclaim, viz: that the quitclaim was not the relinquishment of any real or substantial claim, but merely the correction of an error in the description of the land ceded to the Choctaws by the treaty of October 18, 1820, a correction necessary in order to make the terms of that cession conform to the intention of the parties at the time the cession was made.

The court below has held that the quitclaim of 1855 was a relinquishment of an interest in lands west of the one-hundredth meridian, which the United States really intended to cede to the Choctaws by the treaty of October 18, 1820, but which were recognized as Spanish in the

previously made, but subsequently ratified, treaty with Spain (made February 22, 1819, ratified February 19, 1821), and consequently were excluded by the treaty of September 27, 1830.

To demonstrate the error of the court below, as to the intention of the United States in the treaty of 1820, it is necessary to turn to the instructions given to the commissioners who made that treaty, and to their report of what they had done. As, however, they were instructed to cede, and reported that they had ceded, a portion of the Quapaw cession of 1818 only (Am. State Papers, Ind. Affs., Vol. II, 231, 241), their instructions and report can not be properly understood without first considering the extent of that Quapaw cession, by which the United States obtained that right of occupancy which it undertook to grant to the Choctaws in 1820.

(I.)

The Quapaw cession of 1818 did not extend west of the one hundredth meridian. (See the second assignment of error.)

The language of the Quapaw treaty of August 24, 1818 (7 Stat., 176), describing the cession, is as follows:

> Beginning at the mouth of the Arkansaw river; thence extending up the Arkansaw to the Canadian fork, and up the Canadian fork to its source; thence south, to Big Red river and down the middle of that river, to the Big Raft; thence * * *

The treaty states an impossible boundary.

In comparing this description with a map of to-day, while the eastern boundary is clear enough, the western

is at once seen to be impossible; not merely because the source of the Canadian Fork, or Canadian River, as it is now called, is about 2 degrees west of the westernmost point of the Red River, so that a line can not be drawn "south" from the source of the Canadian to any point of the Red River, but also because, even disregarding the word "south," no line drawn from the source of the Canadian to even the westernmost point of the Red River would serve as a boundary of land running westward to the source of the Canadian. The source of the Canadian lies so far north, and the course of that stream is so irregular, that such a line must cross the Canadian itself several times, the last point of crossing (the only point from which the line could serve as a boundary of land lying between the two streams) being about longitude 103° 47′ west, or about 250 miles below the source of the Canadian. In other words, if the word "source" in the treaty be taken, as the court below has taken it, to mean the actual source, then not merely must the word "south" be taken to mean "southeastwardly," but the whole description would have to be reconstructed, so as to read as follows:

> Thence extending up the Arkansaw to the Canadian Fork, and up the Canadian Fork to [longitude 103° 47′ west, being 250 miles below] its source; thence south [16° 30′ east] to Big Red River, and down the middle of that river.

It is submitted that such a departure from the express words of the treaty is inadmissible, if, as is the case, the intention of the parties to the treaty can be ascertained and a boundary can be run in accordance with that intention.

Interpretation being necessary, the understanding of the parties, in so far as it can be ascertained, should prevail.

The rules of law which govern the interpretation of treaties are as well established as they are familiar, and may practically be summed up by saying that, when it is necessary to resort to interpretation, what the parties to the treaty themselves meant by the words they used should be ascertained, and the words should be given that meaning as far as possible.

> In the interpretation of a treaty, or of any other deed whatsoever, the question is to discover what the contracting parties have agreed upon—to determine precisely, on any particular occasion, what has been promised and accepted—that is to say, not only what one of the parties intended to promise, but also what the other must reasonably and candidly have supposed to be promised to him—what has been sufficiently declared to him, and what must have influenced him in his acceptance. Every deed, therefore, and every treaty, must be interpreted by certain fixed rules calculated to determine its meaning, as *naturally understood by the parties concerned at the time when the deed was drawn up and accepted.*
>
> * * *
>
> Since the sole object of the lawful interpretation of a deed ought to be the discovery of the thoughts of the author or authors of that deed, whenever we meet with any obscurity in it we are to consider *what probably were the ideas of those who drew up the deed*, and to interpret it accordingly. This is the general rule for all interpretations. (Vattel, Law of Nations, Bk. II, §§ 268, 270.)

In *Marryat* v. *Wilson* (1 Bos. and P., 430, 438), Eyre, C. J., after pointing out that the responsibility for the

consequences of a treaty rested with those who had advised it, and not with the courts who might be called on to interpret it, said:

> We are not even the expounders of treaties. This treaty is brought under our consideration incidentally as an ingredient in a cause in judgment before us; we only say how it is to be understood between the parties to this record. This we are bound to do; and we have but one rule by which we are to govern ourselves. We are to construe this treaty as we would construe any other instrument, public or private. We are to collect from the nature of the subject, from the words and from the context, *the true intent and meaning of the contracting parties*, whether they are A and B, or happen to be two independent States.

It is certainly true, as stated by Vattel and quoted by the court in *Geofroy* v. *Riggs* (133 U. S., 258, 270), that a treaty "ought to be interpreted in such a manner as that it may have its effect, and not prove vain and nugatory;" but the words "its effect" (*son effet*) obviously mean the effect which the parties intended at the time to give to it, and not some other and further effect, which could not possibly have been within the contemplation of the parties at the time. An interpretation which would make a treaty cover what the parties did not intend that it should cover would be as improper as one which made it vain and nugatory. The intention of the parties must control, so as to prevent an unwarranted extension of scope just as much as an unwarranted limitation.

> It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed,

> and for that purpose all of its provisions must b
> examined in the light of attendant and surroundin
> circumstances. To some terms and expressions
> literal meaning will be given and to others a large
> and more extended one. * * * The inquiry i
> all such cases is as to *what was intended* in the law
> by the legislature, and in the treaty by the contract
> ing parties. (*In re Ross*, 140 U. S., 453, 475.)

Applying this doctrine to the present case, it is clear in the first place, that interpretation must be resorted to If the relative position of the Canadian and the Red River were such that a line could be drawn south from the source of the former to any point of the latter, so as to form a western boundary of the land between the two streams, there would be no opportunity for interpretation. The language of the treaty is so plain that if the actual geography made it possible to lay off a district with the boundaries called for by the treaty, it would have to be done, whether the parties to the treaty were acquainted with the geography or not. The plain language of the treaty, "the law of the land," would have to control, and no court would be authorized to inquire whether the parties had really meant what they had said. In the present case, however, the actual geography is such that no district can be laid off with the boundaries called for by the treaty, because the line required can not be drawn, so that interpretation *must* be resorted to, and the only question is as to what that interpretation shall be. By the settled doctrine the intention of the parties, in so far as it can be learned, must rule in the interpretation, and if it can be shown, as, it is submitted, it clearly can be, that the intention was to run a line south from where

they believed the source of the Canadian to be, viz, on or just east of the one hundredth meridian, where such a line can easily be run, then this intention should prevail.

The words used in the Quapaw treaty, "up the Canadian fork to its source, thence south to Big Red river," indicate, first, that the Canadian was not regarded as a river by itself, but as a mere fork of the Arkansas; and, second, that the source of the Canadian was believed to be due north of some point on the Red River east of the source of the latter, or, in other words, that the Canadian rose farther east than the Red River. Had the words been "thence south to the *source* of the Red River," they would have indicated a belief that the Canadian rose due north of the source of the Red; but the words "south to Big Red river" clearly mean a point below, to the east of, the source of that stream. Hence the full meaning of the words would be expressed thus: "Up the Canadian Fork to its source, which we believe to be farther east than that of the Big Red River, thence south to the latter river."

So much being clear, it remains to ascertain at what point farther east than the source of the Big Red River the parties to the treaty of 1818 believed the source of the Canadian to be. As to this it is submitted that *by the "source" of the "Canadian fork" the parties to the Quapaw treaty of 1818 understood a point on that stream at, or just east of, 100° west longitude, from which point a line can be drawn due south to the Red River.*

As the western boundary of the Quapaw cession had not been surveyed, it is necessary to determine the understanding of the parties to the treaty in regard to that

boundary, an understanding which is to be ascertain
from three things, viz, the map on the face of the treat
itself, the general belief of the day as to where the sour
of the Canadian was, and the understanding as to ho
far west the Quapaw country extended.

The map at the head of the Quapaw treaty is a part o
the treaty.

It is a well-settled rule of law that if a deed or treat
refers to a map or plan the latter is to be given the sam
effect as if it had been expressly made a part of the in-
strument (*McIver's Lessee* v. *Walker*, 9 Cr., 173; *Nomet*
v. *Lee*, 2 Black, 499; *Craigin* v. *Powell*, 128 U. S., 691,
696; *Jefferis* v. *Omaha Land Co.*, 134 U. S., 178, 194;
United States v. *Texas*, 162 U. S., 1, 37), the extent to
which the map will control depending, of course, upon
the extent to which it is relied on in the instrument
which refers to it. Thus, in *United States* v. *Texas* it
was held that the words in the Spanish treaty of 1819,
following a statement of the boundary line between the
dominions of Spain and the United States, "the whole
being as laid down in Melish's map of the United States,
published at Philadelphia, improved to the 1st of Janu-
ary, 1818," meant that the boundary was to run substan-
tially as shown by that map; but that where the map
was at fault the actual geography was to rule, especially
as the treaty itself had provided for a survey, the results
of which were to have the same force as if inserted in
the treaty. In the present case the treaty itself, the very
instrument executed by the parties, contains, as an inte-
gral part of itself, in the most prominent place, viz, the

upper portion of the first page, a map entitled "Map of the territorial limits of the Quapaw cession." U. S. Exhibit No. 10, *infra*.) It is true that the only boundary lines which are specifically referred to in the treaty as being "on the above map," are those which bounded the eastern portion of the cession; but there can be no doubt that the whole map represents the understanding and intention of the parties to the treaty, and that the map was embodied in the treaty in order to leave no doubt as to the extent of the country ceded thereby.

The treaty map is based on Pike's chart.

This map shows the "Canadian Fork" rising about 40 miles from a point on the Red River, and flowing north-east for a distance a little short of 200 miles on a straight line, but somewhat more than that by the course of the stream itself. A line about 40 miles long is shown as drawn from the source of the Canadian due south to the Red River. There are no indications of latitude or longitude, but the map is so obviously based on Plate I, of Pike's Chart of the Internal Parts of Louisiana (U. S. Exhibit No. 2, *infra*), being drawn to the same scale (40 miles to the inch) and showing substantially the same general topographic features, that the latitude and longitude of the latter may properly be referred to in order to show what was meant by the former. This treaty map was made by René Paul, who had previously made the map of the Indian country (Rec., 159), accompanying Chouteau's notes, dated February 21, 1816. Paul seems to have been, like Chouteau, a native of the Louisiana Territory, and to have been personally familiar with the

eastern part of the country shown in his map, but for the western part he manifestly relied upon Pike. Pike's chart, which was prepared by Antoine Nau, a draftsman in the employ of the Government (see Pike's letter of May 27, 1808, in Pike's Expeditions, p. lxi, Coues' ed.), was published with the first complete edition of Pike's book in 1810. It is in two plates, each of which has the degrees of latitude and longitude marked at its edges, but not across its face, and it is probably due to this fact that the numbers of the degrees of longitude on the top and bottom do not agree, those at the top being each marked one degree higher than they should be. This fact is shown by the position of the north and south line on each plate, and also by the indications of latitude. If lines were drawn from the numbered points on the bottom to the correspondingly numbered points on the top they would not run north and south but would slant off to the east. Much of what appears on this chart is conjectural, but if the position of those portions which represent country well known in 1810 be observed, it will be seen that the numbers shown at the bottom of the chart indicate most nearly the actual longitude. Thus, the first number at the right on the bottom of Plate I, indicating the thirteenth meridian from Washington (77° west from Greenwich[1]) corresponds with the number

[1] The actual meridian of Washington is 77° 2' west from Greenwich, but as a matter of convenience, to avoid using two sets of meridian lines, the seventy-seventh meridian was treated as that of Washington. E. g., the Spanish treaty of 1819, art. 6, says, "the degree of longitude 100 west from London and 23 from Washington," while the meridians on maps counting from Washington were really Greenwich meridians, with a difference of 77 degrees.

14 at the top of the sheet, and the number 23 at the bottom of the sheet, indicating the meridian 100° west from Greenwich, corresponds with the number 24 at the top of the sheet. A line drawn across the face of the sheet from the figure 23 at the bottom to the figure 24 at the top would run very slightly west of the point where the source of the Canadian is indicated; or, in other words, this chart shows the Canadian as rising at the one hundredth meridian of west longitude, and the treaty map, being so evidently based on Pike's chart, must be understood as indicating the same position of the source of that stream.

The standard maps of the day placed the source of the Canadian about the one hundredth meridian.

As to the authority of Pike's chart, it may fairly be said to have been, in spite of all its defects, the best map of that particular region that had yet been made. That it was generally received as authority is shown by the fact that it was substantially followed in all later maps, both English and American, until the actual geography of the region was discovered and made known by Major Long. Thus Melish, who published in 1816, and again in 1818 and 1820, what was regarded as the standard map of the United States, shows the Canadian as Pike had shown it, i. e., rising just east of the one hundredth meridian, and emptying into the Arkansas near the ninety-seventh, the only departure from Pike's delineation being that Melish showed the stream as flowing first southeast and then northeast, rather than continuously northeast. Darby's map of Louisiana, published

in 1818, resembled Melish. The English map maker Pinkerton (1815) and Arrowsmith (Atlas to Thompson's Alcedo, 1816) adopted Pike's delineation of the course of the Canadian, but placed it about 2 degrees farther east, thus bringing the mouth of the stream nearer its actual location. Another proof of the reputation of Pike's map is that it was the only one used by Long in his expedition of 1819–20, at least as far as the country about the Rocky Mountains was concerned. (See Long's reports, Rec., 266, 275.)

Pike's first expedition, in 1805–1806, had taken him up the Mississippi, and the second, in 1806–1807, by the Missouri and Osage rivers; thence across country to the Republican Fork of the Kansas; thence to the Arkansas, about the one hundred and second meridian, and up that stream to its sources, and thence to Santa Fé, whence the Spaniards conducted him through New Mexico and Texas to Natchitoches. He does not seem to have ever passed through any part of the Quapaw cession except the extreme eastern portion by the Mississippi, but his subordinate officer, Lieutenant Wilkinson, came down the Arkansas in canoes, with some of the exploring party, passing the mouth of the Canadian December 29, 1806, and made a report which appears as Chapter V, Coues' edition of the second volume of Pike's book, and as Document No. 2 in the appendix to the edition of 1810. Pike's knowledge of the geography of the Arkansas below the one hundred and second meridian (as the note on Plate II indicates), and of the Canadian, was manifestly, therefore, derived in the main from

Wilkinson's "survey" (see Pike's Expeditions, Vol. II, p. 518, Coues' ed.) and investigations.

While Pike's map shows comparatively little of the Canadian River, indicating it as rising at the one hundredth meridian and emptying into the Arkansas at about longitude 96° 45′ west (the mouth is actually at about the ninety-fifth meridian), this is really more than is shown in any previous map. Before Pike's time the standard map of Louisiana seems to have been De l'Isle's "Carte de la Louisiane et du Cours du Missisipi," the first edition of which is map No. 38 in volume 2 of De l'Isle's Atlas Nouveau (put in evidence by the attorney for the Chickasaws; see exhib. 28, Rec. 81–2), which is believed to have been published in 1741. All the later eighteenth century maps are plainly based on De l'Isle, and the revised edition of 1782 was referred to as an authority by Messrs. Pinckney and Monroe in 1805 and Mr. Adams in 1818, when presenting to the Spanish minister a statement of the claims of the United States as to the western boundary. (Am. State Papers, For. Relns., Vol. II, p. 664; Vol. IV, p. 471.) This map of De l'Isle (a reproduction of which is annexed to this brief), like all the other maps earlier than Pike's, does not give the name Canadian Fork or River to any stream at all, nor does it show any branch whatever entering the main stream from the west or south, but merely some short, nameless branches, coming *from the north*. Pike's knowledge of the Canadian could not, therefore, have been gained from other maps, but must have been acquired from persons who knew something of the stream, and his notes as to the

points where the prairies begin, where the waters begin to be navigable, where Fabry wintered, etc., show that he must have made considerable inquiry into the matter. At all events, his chart certainly represents what was known and also what was currently believed in regard to the geography of the region shown at the time the map was made, and it does not appear that in 1818, when Paul made the treaty map, there was any increased knowledge or change in belief.

Moreover, Pike's map shows (what the treaty map does not run far enough west to show) that the actual source of the Canadian was known, but was believed to be the source of the Red River, the course of the former stream, below a point a comparatively short distance from its source, being unknown. This peculiar fact merits attention, as it shows conclusively that when the words "up the Canadian fork to its source" were used in the treaty of 1818, the actual source of that stream could not have been meant, it being firmly believed to be the source of another stream.

Explanation of this error in the maps.

The Canadian River rises in the Raton Pass, near the northern border of New Mexico, about 104° 30′ west longitude, being there known as the Red River.

This Red River flows south till it is joined by the Cimarron, which rises a little east of Taos, and below this confluence the stream is known as the Canadian. Still farther down, about where the general course of the Canadian begins to be southeastward, it is joined by a

small stream called the Rio Mora. For about the first half of its course the Canadian flows through territory the Spanish claim to which was finally established by the treaty of 1819, while the further course is through a part of the Louisiana cession, but neither French nor Spaniards settled on the stream, nor even systematically explored it, as its extreme shallowness (parts of it becoming altogether dried up in the summer time) would have prevented its ever becoming an avenue of trade, even if the Spaniards had cared more about trade than they did, or if the presence of the Apaches, Lipanes, and other wild tribes, through whose habitat the Canadian flowed, had not made regular trade along that stream an impossibility.

Owing to these causes the upper Canadian was practically an unknown stream down to the publication, in 1822, of the narrative of Long's expedition of 1819–20; for although the Spaniards were familiar with its sources, as also with those of the Arkansas, they could only guess as to the connection between those sources and the rivers which the French knew in Louisiana, and hence Humboldt's map of New Spain (U. S. Exhibit No. 1, *infra*), based upon his own observations in that country, and upon the data existing in 1804, gave to the streams at their sources the local names, and added notes as to their supposed identity with streams farther east. About latitude 39° north he shows the Rio de Napestle for a certain distance, where he stops it and puts the note: "It is unknown in New Mexico under what name the Rio Napestle is known farther east in

Louisiana. Could it be identical with the Arkansas?" That guess was correct, but not so the next one, where he shows the stream (now called the Cimarron) rising east of Taos and the Mora flowing into it, but calls it "Rio Rojo de Natchitoches or Rio de Pecos," and where he stops it puts this note:

> It is believed in New Mexico that the river which rises northeast of the village of Taos, and which receives the Rio Mora, is the same which, farther east in Louisiana, is known by the name of the Red River. This last, mingling its waters with those of the Boeuf River and Black River, empties into the Mississippi below Fort Adams.

The same map shows the true Red River (which it calls Rio Rojo de Natchitoches, and Rivière Rouge, running southeastwardly in a continuation of the course of the supposed Red River after it receives the Rio Mora, beginning at about 36° north latitude, 103° west longitude, which is about a degree north and a few miles east of its actual source. The Canadian River, except that portion which is erroneously called the Red River of Natchitoches, does not appear on the map at all.

The French map makers of the eighteenth century, knowing less of the actual geography than did Humboldt, were much bolder in their assumptions, and without any qualifications or cautionary notes, they showed the Red River as rising in the Rocky Mountains, far to the northwest of its true source, while the Canadian, as already stated, they took no account of. Their ignorance of the Canadian shows conclusively that the written account of the discovery of that stream in 1740 was

hidden away in the French archives, and that all other record of the discovery soon perished with the few Frenchmen who knew or had heard of it. M. Pierre Margry's recent publication of original documents in regard to French explorations shows that the two brothers Mallet, who had gone to Santa Fé in 1739 by a more northern route, returned in 1740 by a stream which they expected would flow into either the Red River or the Arkansas, but which ultimately brought them to the point where the Canadian enters the Arkansas.[1] The

[1] The 8th of June they returned to the river's edge, which they followed to the 11th; the 15th, 16th, 17th, 18th, and 19th they stopped, and, having consulted carefully about the course which this river seemed to take, they resolved to abandon 18 horses which they had and to make canoes of elm bark to embark in. That was done, although they had only two knives among the four. They had then made 220 leagues by land from Santa Fé.

The 20th they embarked in two little canoes and made 10 leagues, this stream having but little current.

The 21st they made the same amount of distance. The 22d they saw two fine mouths of rivers, which might well be the Pecos and Mare rivers, which they had crossed near Santa Fé. Finally, the 24th, they were agreeably surprised to find themselves at the fork of the Arkansas River. They had then made 42 leagues by canoe. They found, below the fork, a cabin of Canadians, who were hunting for salt meat. As they only had their arms and some ammunition left, they went on a hunt with the others and loaded a dugout with salt provisions, with which they betook themselves to the fork of the Arkansas and from there to New Orleans. (Margry, Decouvertes Et Etablissements Des Francais Dans L'Amerique Septentrionale, part 6, page 161).

As printed in Margry, the first reference to the forks of the Arkansas in the above quotation reads "source," obviously a misprint for "Fourche," which occurs two lines below. The presence of Canadians just below the mouth of the then unnamed Canadian River suggests the most probable origin of the name it ultimately received.

stream which they followed down was the Canadian, and the next year André Fabry de la Bruyère tried to ascend it in boats in order to reach Santa Fé, but could not get beyond a point a little east of 98° 30′, as shown by Pike's chart, which puts the mouth of the Canadian much too far west. Fabry wintered there, but went no farther. He called the river the St. André.[1]

[1] The Sieur Fabry, having no more provisions on his arrival, had two oxen killed, one of which he had salted in order to go to the fork, not counting on getting game below them. He obtained with much trouble five dugouts from the savages, with which he left the 31st of October and went in 35 days to four leagues from the fork of the river of the Arkansas [Indians], whence [i. e., from whose village] to this place he counts only 145 leagues, instead of 200, as the hunters compute it. The frequent rains which had then fallen and the good intelligence of the Canadians and the soldiers making him hope to succeed readily, he continued on his route and entered on the 7th of December the left fork, which is the river which should go up as far as Santa Fé. He found there enough water up to the mouth of the two other streams, whose water it received 17 leagues above its mouth; but on the 13th the water failed above the last of these streams, which he named South River, and he was stopped there until the 21st, when a storm having made the water rise five feet in the river which leads to the Spaniards, and to which he gave the name of the River St. André, he advanced until the 25th, when the water again failed him. He could only continue his route on the 10th of January, 1742, and with much difficulty, having been obliged to drag the dugouts in some places.

The 15th he reached the entrance of a large bayou, above which there was not six inches of water in the river. He camped at this bayou to wait for the water there, having then made, by his calculation, 42 leagues from his entrance into the river St. André.

* * * * * *

The 29th [of February] they loaded the dugouts at the mouth of the bayou. It was necessary to get into the water and drag them, and they could only make a league and a quarter the whole day; the 1st of March a league and three-quarters in the same manner; the 2d, a third of a league, the cold being too great for them to stay in the water; the 3d, three-quarters of a league; the 4th, three-quarters of a

The brief account of the Mallets' trip, as well as Fabry's letters, were filed away, however, and the facts as to the Canadian remained unpublished, so they had not the least influence upon the persistently held theory, which soon developed into an undisputed geographic fact in the eyes of map makers, that what we know as the sources of the Canadian were the sources of the Red River. This is shown not merely by the statements on

league; the 5th, a league and three-quarters, it being necessary to unload and use levers to pass places where there was no water, and they encamped in a warm region. The 7th they did not advance, everyone being wearied with such laborious navigation.

Nevertheless, there was no other course to take than to procure horses. He proposed to them to go himself and seek them where he was sure of finding some; that to this end he would descend with dugouts, lightened, to the Arkansas, and that if he could not obtain any [horses] from that nation, where they are still rare, he would find at least some of the king's horses, which would serve him for carrying his goods as far as the Caddos, where he would find some cheap.

This plan having been approved, the sieur Fabry got ready for his departure with five men.

Having taken all the precautions which he judged necessary, he left on the 4th of April, but the water was so low that he could only drift a league in three hours and a half's time, dragging the dugouts the whole way, which forced him to return to the camp and wait until the water rose. On the 5th it rained, the first time since the 8th of February. The water increased a little in the night, and on the 6th it had increased three inches. He promptly embarked in another dugout to go to join the one he had left lower down. He divided the load between the two in order to drag them more easily, and at once departed. He spent six days in going as far as the fork, where he found the river so low that he was 12 days in descending it, having run aground in several places.

On the 26th he reached the Arkansas [Indians]. (Margry, Découvertes, etc., Part 6, pp. 473 to 485.)

Humboldt's map, but even more strongly by those on Pike's chart. On this latter map (U. S. Exhibit No. 2, *infra*), although Fabry's wintering ground of 1741–42 on the Canadian is shown, yet at a point on the Red River about the ninety-sixth meridian there appears the note, "The Acadians, returning from Sta. Fie in June, 1740, left their horses here, and descended the Red River in bark canoes." The fact was that these Acadians were the Mallet brothers, and the extract from their journal, as published by Margry, states that on June 20, 1740, four days before reaching the Arkansas, they abandoned their eighteen horses, and embarked in two bark canoes, which they had made during the five preceding days.[1] They then supposed that they were on a branch either of the Red or the Arkansas, and they ultimately found that they were on the as yet unnamed Canadian, but so strong was the belief that the Red River rose near Santa Fé and that the Canadian was a comparatively small stream, that although a tradition of the Mallets' return from Santa Fé was preserved, their route by the Canadian was forgotten, and it was asserted that they had returned by the Red River.

Maj. Amos Stoddard's Historical and Descriptive Sketches of Louisiana, published in 1812, and written during the eight years preceding, contains these statements:

> That country [Louisiana] is less known than any other (inhabited by a civilized people) of the same extent on the globe. While it was in the possession of France and Spain, at least till near the close of

[1] See note p. 65, *supra*.

> the American Revolution, it was almost inaccessible to us. * * * All the old maps are extremely defective. * * * No detailed accounts of the interior are to be found in the records of Louisiana literature. * * * Of the immense country between these low grounds and the rivers to the westward of them, and between the Washita and the Arkansas, no correct information was ever obtained. It was partly explored by the Frenchmen in the early part of the last century, but no record of their discoveries, at least of any merit, has been handed down to us. * * * It is certain that the French nearly a century ago penetrated the Arkansas to its source, but they have left us no accounts of the country in that quarter (pp. v, vi, vii, 203, 206).

Major Stoddard was the officer who took possession of upper Louisiana under the cession, in 1804, and he spent between five and six years on the Lower Mississippi and the Red River. It is therefore very significant when he states that no record of the French discoveries in the interior have been handed down. It is also significant that in his chapter on the rivers of Louisiana he does not mention the Canadian at all, and says in regard to the Red River:

> The main branch of this noble river has its source in the Mexican mountains to the eastward of Santa Fé, and in about north latitude 36° (p. 378).

This latitude is nearly that of the source of the Canadian, and Stoddard's various statements only serve to show how completely the record of the Mallets' discovery had been lost.

The strength of the idea that the sources of the Canadian were really the sources of the Red River is shown

by the fact that, of all the geographers who made maps of this region before 1821, Humboldt was the only one who did not consider the identity of the Spanish Rio Rojo, rising in the Rocky Mountains, with the Red River of Louisiana so certain as to warrant their being put down on a map as one continuous stream. That the geographers before Humboldt showed the Red River as flowing down from the Rocky Mountains, and omitted the Canadian, has been already seen; and those who followed him (Pike, Melish,[1] Darby, Pinkerton, and Arrowsmith, U. S. Exhibits 2, 3, 5, 6, 11, 12) did the same, except that they showed the Canadian, though always rising at or east of the one hundredth meridian. That it did not rise west of that line seems to have been as generally and as firmly believed in 1818 as the fact that the city of Washington was situated near the seventy-seventh meridian, or that Philadelphia was on the Delaware River.

Mistaken view of the court below as to early maps showing the Canadian.

The court below is of opinion, however, that the fact that the source of the Canadian lay some distance west of the one hundredth meridian was sufficiently indicated

[1] The court has pointed out (*United States* v. *Texas*, 162 U. S., 1, 29) that the one hundredth meridian, "astronomically located, is more than 100 miles farther west than is indicated by the Melish map." This fact is immaterial in the present connection, as the Melish map certainly shows what was believed at the date of its publication. Were this error allowed for, the only result would be to show the Canadian as rising "more than 100 miles" *east* of the one hundredth meridian.

by certain maps made prior to 1818, and which were relied upon in the boundary negotiations between the United States and Spain. The opinion says:

> While it may be true that no map published prior to 1820 delineated the Canadian River, by that name, with its source west of the one hundredth meridian, yet there were maps in existence which did in fact delineate the stream subsequently known as the Canadian, with its source west of the one hundredth meridian. (Map of De l'Isle, De l'Isle's Atlas Novean, vol. 1, No. 5; vol. 2, No. 28; Boehme's map, published at Amsterdam in 1746; American Maps, vol. 1, No. 18.)
>
> During the period commencing in 1805 and ending in 1821 there are evidences that some of these maps were used by the United States in the negotiations with Spain, at different times, preceding the treaty with that country which resulted in an exchange of the land between the Canadian and Red rivers, west of the one hundredth meridian, for Florida, then owned by Spain.
>
> Among the proofs of the title of the United States to all the land between the Mississippi and the Rio Grande del Norte, watered by rivers flowing into the Gulf of Mexico or the river Mississippi, are the maps last mentioned. They were used by Secretary Madison, by Ministers Monroe and Pinckney, by Secretary Monroe, and by Secretary Adams, and as later geographical explorations gave to the world the absolute information that the true source of the Canadian was on the meridian at 104° 30′ west longitude, we think the evidence sufficiently clear to conclude that the possessions of the United States covered the territory ceded to the Choctaw Nation by the treaty of 1820. (Rec., 392.)

It is submitted, in the first place, that these maps could not have been among those made use of by the statesmen concerned in the negotiations with Spain; and secondly, that they do not show any stream which could possibly have been understood as the Canadian River.

All three of these maps, tracings of portions of which appear in the record (Clmts.' Exhibs., Nos. 29, 34, 35, opp. pages 82, 84, 85), have been reproduced under the order of this court, and the reproductions are annexed to this brief. They are on a very small scale. The first De l'Isle map is one of the Western Hemisphere, published in 1720; the second De l'Isle map is of North and South America, published in 1739; while Boehme's map (which is No. 18 in volume 1 of the collection of American maps in the Library of Congress) is little more than a duplication of the latter. These maps may have served well enough to indicate in the most general way the geography of the American continent as a whole; but none of them would have been used in a primary school to teach the geography of the Louisiana cession, as they are entirely too small for such a purpose, to say nothing of negotiations in regard to an international boundary. Had the maps in De l'Isle's Atlas Nouveau been used at all in the negotiations with Spain, no attention would have been paid to such rudimentary maps as the two mentioned by the court below, but only the large maps would have been regarded, such as Nos. 38 and 39 in volume 2 (especially the former), which were put in evidence by the attorney for the Chickasaws, by partial tracings (Clmts.' Exhibs., Nos. 28 and 30, opp.

rec. 82 and 83), and both of which have been reproduced under the order of the court.

Not one of the three maps named by the court below is mentioned in the American State Papers in connection with the negotiations with Spain. Boehme's map is not among the lists either of Spanish or of American authorities (Am. State Papers, For. Relns., Vol. IV, 471, 482), while the "De l'Isle's map," referred to in those lists as a "geographical authority" in support of the claim of the United States was, of course, the one mentioned in the letter of Messrs. Pinckney and Monroe to Don Pedro Cevallos, April 20, 1805, where reference is made to maps of *Louisiana*, including "that of De l'Isle, of the Royal Academy of Sciences at Paris, which was revised and republished in 1782." (Am. State Papers, For. Relns., Vol. II, p. 664.)

De l'Isle's map of Louisiana of 1782 is well known, and a reproduction has been annexed to this brief for the convenience of the court. Its title is, "Carte de la Louisiane et du Cours du Mississipi," and it is substantially the same—precisely the same so far as concerns the Arkansas River—as the map of 1741, which is No. 38 of volume 2 of De l'Isle's Atlas Nouveau. It shows the Arkansas rising at about longitude 275° 45′ east of Ferro, or 101° 45′ west of Greenwich, and flowing southeast, without any tributaries whatever on its southwestern side.

Moreover, the three maps mentioned by the court below do *not* "delineate the stream subsequently known as the Canadian, with its source west of the one hundredth meridian." Both of the De l'Isle maps show the

main Arkansas River, and a branch of about the same length as the main stream uniting with it some distance down. In the Western Hemisphere map the river is unnamed, but in the Map of America the name "R. des Acansa" is given to the *southern* stream, identifying it as the main stream, and the other as a branch coming in from the northwest, either the Verdigris or the Neosho, and evidently believed to be as long as the main stream. Had the Western Hemisphere map been on a scale that made it worth while to identify the Arkansas by a name, certainly this name would have been affixed to the southern stream, as in the slightly larger Map of America. The Boehme map does not name either branch, nor any part of the Arkansas. It is evidently based upon these De l'Isle maps, and in fact is little more than a duplication of them, calling for no separate notice.

What these maps show is simply a conventional representation of a general idea that the lower Arkansas—the only portion of the stream that had actually been explored when these maps of De l'Isle were made—was formed by the confluence of two branches (and in point of fact it is formed by the confluence of several), an idea probably due to some information given by La Harpe, who, in 1719, was on what he called "the southwestern branch of the river of the Alcansas" (Rec., 155), though he reached it by marching across country and not by ascending it. He said he was told by the Indians that the river came down from the villages of the Spaniards and the Padoucas, uniting below the village where he then was; but La Harpe did not visit the point where the streams

join, nor is it at all certain whether he was on the Canadian, the Cimarron, or the Arkansas itself. The confluence of the Canadian with the Arkansas was first discovered by the Mallet brothers in 1740, but, as already stated, the records, both of their journey and of Fabry's attempt to ascend the Canadian, were buried in the French archives and had no influence on the maps at all, whatever tradition of their journey survived being to the effect that they came down the Red River, as shown by the note on Pike's map.

It is submitted that one has only to look at the larger maps of De l'Isle, to say nothing of other geographers, to realize that what appears on his small-scale maps was not intended to delineate the Canadian at all, that stream being unknown to him. Had he known of it, he would of course have put it in his large-scale maps.

The very palpable mistake of the learned judge of the court below in regard to what the three maps named by him show, was probably due to his not looking at the maps themselves, but at the incorrect tracings of small portions of them, which were filed by the attorney for the Chickasaws. The tracing (clmts.' exh. No. 29, opp. Rec., 82) from the map of the Western Hemisphere (No. 5 in vol. 1 of De l'Isle's Atlas Nouveau) gives the name R. des Acansas to a northern confluent of what is of course intended for the Arkansas River, but in the original map both this confluent and the main stream are nameless. The same tracing shows the confluent as much longer than the main stream, which the original map does not do. The words "main stream" and "confluent" are

here used advisedly, not merely because De l'Isle's larger maps show no tributaries of the Arkansas on its southwestern side, but also the map of America (No. 28 in vol. 2 of De l'Isle's Atlas Nouveau), which is on nearly the same scale as the Western Hemisphere map, gives the name "R. des Acansa" to the southern stream, showing that that was the main stream, and the northern stream one of its numerous northern branches. By inserting the words "R. des Acansas" on the tracing of the map of the Western Hemisphere in a place where they do not belong, and by omitting them from the tracing of the map of America (elmts.' exhib. No. 34, opp. Rec. 84), the attorney for the Chickasaws succeeded in completely perverting the testimony of De l'Isle's maps, making them show precisely the contrary of what they did show, and apparently misleading the court below.[1]

The Quapaws had no land west of the one hundredth meridian.

Not only does the treaty map, when understood, as it was clearly intended to be, with reference to the longitude shown on Pike's chart, conform to the best geographic

[1] These remarks must not be understood as casting any reflection upon the *bona fides* with which these tracings were made. The errors were, of course, purely accidental, and the tracings were made with reference to the question of the disputed western boundary of Louisiana, and before the counsel for the United States called attention to the fact that the Canadian River was not shown on any map before Pike's. Had the attorney for the Chickasaws had any idea when he made these tracings that the delineation of the Arkansas and its branches had any bearing on the case, he would presumably have taken especial pains to be accurate in regard to them.

knowledge of its day in representing the Canadian as rising at or just east of the one hundredth meridian, but in point of fact the Quapaws had no claim to any land west of that meridian. Of course they knew nothing of meridians, but as a matter of fact their hunting grounds, according to their utmost claim, did not extend farther west than the actual country which lies in what geographers call the one hundredth degree of west longitude.

The Quapaw tribe was usually called by the French the Akansa, though with many variations of spelling, that being the name used by the Illinois, and the spelling of it has taken final form as Arkansas. As the villages of this tribe were near the mouth of the Arkansas, the first Frenchmen who descended the Mississippi, meeting these Indians, called the river where they dwelt the rivière des Akansas. Joutel, who returned to Canada with some of La Salle's followers after the latter's death, reached their villages on July 24, 1687, and reported their warriors at about 700.

> The villages of the nation were called: The first, Otsoté; the second, Thoriman; the third, Tonguinga, and the fourth, Cappa, of which we have already spoken. Although this nation is called Akansa in general, not one of the said villages bears the name. The two first are situated on the river called that of the Akansas, and the two others on the river Colbert [Mississippi], one on one bank and the other on the other.

After mentioning the three villages in succession, he wrote:

> The 30th, we left the said village to go to that of the Kappa, which was the last of this nation, and

> which they told us was 8 leagues off. * * * According to what I could learn 400 warriors would go out of [i. e., go on the war path from] this village and fully 300 from the others. (III Margry, 444, 458, 462; Rec., 146, 147.)

La Harpe, who visited the Arkansas in 1722, mentions the Ougapa village on the Mississippi (Rec., 158), and Le Page du Pratz, whose book was published in 1758, refers to the Kappas as having retired among the Arkansas, residing on the river of that name, 4 leagues from its mouth. (Rec., 226.)

Sibley, writing in 1805, said:

> ARKANSAS. Live on the Arkansas River, south side, in three villages, about twelve miles above the post or station. The name of the first village is Tawanima; second, Ousolu; and the third, Ocapa; in all, it is believed, they do not at present exceed one hundred men, and diminishing. They are at war with the Osages, but friends with all other people, white and red; are the original proprietors of the country on that river, to all which they claim, for about 300 miles above them to the junction of the river Cadron with Arkansas. Above this fork the Osages claim; their language is Osage. (Am. State Papers, Ind. Affrs., Vol. I, p. 725.)

As Cadron Creek (a small stream entering the Arkansas from the north about 25 miles above Little Rock) is much less than 300 miles above the site of the Quapaw villages (one of which was close to what is now Little Rock), and could not properly be described as a "river," or a "fork" of the Arkansas, it is very probable that Sibley confused this stream with the Canadian, to which his language would be more appropriate. It is true that on

the *north* side of the Arkansas the Cadron, or Quadrant, was recognized as the Quapaw boundary (see treaty map *infra*, and Paul's map of 1816, Rec., 159), and this fact probably caused Sibley's error.

While the Quapaws were certainly less numerous than in Joutel's time, Sibley's estimate of their population was too low; as Clark reported them in 1816 as 1,060 souls, including 340 men. (Rec., 244.) He stated that they lived in four villages, which indicates that Sibley, who only mentions three, was unaware of the fourth village, and omitted its inhabitants from his estimate.

Chouteau's report of February, 1816, contains this statement:

> The country of the Arkansas was bounded as follows: Beginning on the Mississippi at the *Ile aux Chicots*, thence to the Quadrant (on Arkansas River), thence with the line of the Grand Ozages to White River, thence to the mouth of the St. Francis, thence across the Mississippi thirty miles, and including that distance on the east side thereof to a point opposite the beginning. (Rec., 166.)

Long's report of January 30, 1818, referred to the Quapaws as follows:

> The Quawpaws, a small tribe residing on the south of the Arkansaw, between 100 and 150 miles above its confluence with the Mississippi, at present able to furnish no more than sixty or seventy warriors, next laid claim to a portion of the country, which they have enlarged from time to time at the instigation of the French and other whites, who have resided and intermarried with them, till at length they pretend to claim all the country under consideration. The Quawpaws are a branch of the Osage

> Nation, as is plainly evinced by the similitude of their language, shape, and features to those of the Osages, and claim the country under the same tenure, the right of conquest and possession. The original claim was limited as follows:
>
> Beginning at the lower end of the village or post of Arkansaw, on the south of the river, and running up the river on the same side to Michael Bon's settlement, thence southwardly in the nearest direction to the main fork of the Saline of the Washitan, thence down said fork, Saline, and Washitan, to a point nearest to the place of beginning, and thence northwardly to the place of beginning, including a tract about forty miles in width and fifty in length. (Rec., 169.)

Judged by Clark's report of November, 1816, Long seems to have considerably underestimated the number of the Quapaws, and Clark was certainly the more competent authority of the two. Chouteau's ideas of the limited extent of the Quapaw country seem to have been modified two years later, when Clark and he negotiated the treaty with them, and reported as follows:

> It will be seen that a large tract of valuable country (which at all times heretofore has been considered their [i. e., the Quapaws'] property, as well by former governments as by the Osages, their neighbors) has been ceded to the United States. (Am. State Papers, Ind. Affs., Vol. II, p. 177.)

This report shows that Clark and Chouteau understood the Quapaw hunting grounds to have extended very considerably west of the small district immediately surrounding their villages, and their report necessarily carries great weight. It is probable that the Quapaws

could, with some justice, claim about as far west as the one hundreth meridian, where the source of the Canadian was then believed to be, but beyond this they certainly could not claim. Whether or not the Quapaws could really claim anything west of the Cross Timbers, which would seem to be a natural boundary between them and the Indians of the Western prairies, is a purely speculative question. The treaty says nothing about the Cross Timbers, and undertakes to limit the cession on the west by a line not yet surveyed, a purely artificial boundary. Whether or not the Quapaws ever ventured as far west as where a surveyor would have marked that line, it is certain that beyond it, as Humboldt's carefully drawn map shows, was the acknowledged hunting ground of the Comanches, Kiowas, Apaches, Lipans, and other hereditary foes of the Indians of the Lower Arkansas. Sibley's report of 1805 gives some idea of the extent of the Comanche country, where he says: "They alternately occupy the immense space of country from the Trinity and Braces, crossing the Red River, to the heads of Arkansas and Missouri, to river Grande and beyond it, about Santa Fé, and over the dividing ridge on [to?] the waters of the Western Ocean." (Am. State Papers, Ind. Affs., Vol. I, p. 723.) The reference to "the Western Ocean" is an exaggeration, but there is no doubt that the Comanches roamed over the eastern part of the region mentioned by Sibley, probably as far east as the Cross Timbers. The true boundary between them and the Quapaws is uncertain, but it could not have been west of the one hundreth meridian.

The proper interpretation of the Quapaw treaty.

It is true that "course and distance yield to natural and ascertained objects" (*Preston's Heirs* v. *Bowman*, 6 Wheat., 580), and that "the most material and most certain calls shall control those which are less material and less certain" (*Newsom* v. *Pryor*, 7 id., 7), as stated by the court below, but it is not enough that an object should be "natural" in order that it should control. It must also be "ascertained," i. e., known. In 1818 the source of the Canadian Fork was really unknown, unascertained, and hence any reference to it must be controlled by that belief of the parties which took the place of actual knowledge. That belief gave this call for the source of the Canadian the only certainty which it possessed at that day. It was believed to be near the one hundredth meridian, where the standard maps of the day placed it. Interpreting the treaty of 1818 by the knowledge and belief of the parties, therefore, it is clear that the intention was to cede the country bounded by the Canadian to about the one hundredth meridian, the boundary line running southward on or near that meridian to the Red River.

Where the intention of the parties to a deed is clear, but there are mistakes of description, owing to a misconception of the position of natural objects, the intention of the parties will be made to prevail. Thus in *Croghan* v. *Nelson* (3 How., 187) the clear intention to enter 1,000 acres of land was upheld, although this involved a change in some of the calls.

Where a deed names a boundary line which is supposed by the parties to have a certain location, but which is really located elsewhere, it has repeatedly been held

that the intention must control the meaning of the words of the deed. In one such case it was said:

> When the true line has long been doubtful, and conveyances have been made bounding on the *reputed or supposed line*, or line of actual holding and possession, and such reputed or supposed line is capable of being shown by proof, such conveyances will have their full effect in passing the land up to such supposed line, though a different line be afterwards fixed by the legislature as the true line by a declaratory act. (*Cook* v. *Babcock*, 7 Cush., 526.)

In another case, Gray, J., said:

> In the case at bar the jury were therefore rightly instructed that although the presumption upon the face of the deeds would be that they conveyed to the true record line, yet that line was not necessarily the boundary between these parties, but if a different line was shown to exist, adopted by the towns and their inhabitants, and considered universally (which would include the parties to the deeds) to be the Shirley and Lunenburg line, that would be the boundary referred to in the conveyances. (*Putnam* v. *Bond*, 100 Mass., 58.)

Similarly it has been held in New Hampshire:

> If "Derry old line," as located, had been shown, as the plaintiffs contended the fact to be, not to have been the true original line of Londonderry, then it was competent for the jury to consider and find, from the evidence before them, what line was understood and intended by the parties to the deed to be designated by that expression; and if they found it to be a certain located line, marked by monuments, other than the true original line of Londonderry, but known as "Derry old line," the intention of the parties should govern. (*Hall* v. *Davis*, 36 N. H., 569.)

The rule that monuments, whether natural or artificial, must control in boundaries is far from being inflexible. A boundary inadvertently inserted, or contravening all other terms of the description, or defeating the evident intention of the parties, may be rejected, even though it may be identified by a natural monument. Thus in *Parks* v. *Loomis* (6 Gray, 467) a boundary by a named stream was rejected on the ground that "its description is impossible and the lines can not be made to meet," and a boundary line was required to be run at a considerable distance from the stream, it being evident that the stream had been referred to through ignorance or inadvertence. So in *Murdock* v. *Chapman* (9 Gray, 156) a description by course and distance was disregarded because it excluded a lot shown on a plan and mentioned in the deed as being conveyed. It was held that the plan and reference in the deed showed the plain intent of the parties, and that the actual description in the deed would have to yield to this. (To the same effect are *Davis* v. *Rainsford*, 17 Mass., 207; *Thatcher* v. *Howland*, 2 Met. Mass., 241; *Bosworth* v. *Sturtevant*, 2 Cush., 392.)

In the present case the supposed source of the Canadian was not, indeed, "marked by monuments," but it was the subject of a very definite, though incorrect, understanding on the part of geographers and explorers, and also of the community generally, as far as the matter had received the attention of the public. It is immaterial that the true intent and meaning of the parties was based on an error. The important matter is to know what that true intent and meaning was, and it

seems clear that it was to bound the cession by a line drawn due south from where they believed the source of the Canadian to be, to the Red River, such line being, accordingly, either on or just east of the one hundredth meridian.

This construction of the cession by the intent and meaning of the parties does not at all conflict with the view taken by this court in *United States* v. *Texas* (162 U. S., 1, 37) in construing the Spanish treaty of 1819, that where the map referred to in the treaty was in error as to the position of the meridian which was to form the boundary, the true meridian must have been intended and not the meridian as shown on the map. The error in Melish's map as to the one hundredth meridian was of a different kind from the error as to the source of the Canadian. The error as to the meridian could make practically no difference as to the quantity of territory on either side of the meridian line, because, whether the map were right or wrong, each party could, and very probably did, calculate with at least reasonable accuracy the area of the district which was now conceded to belong to it under the treaty, as distinguished from that of the district which it had formerly claimed. The distance between any point known by latitude and longitude and any meridian in any latitude is a matter of mathematical calculation, and the fact that a map may show a meridian too far east can not affect the calculation. Such an error in a treaty may mislead the parties as to the geography of the region through which the meridian passes, but it can not mislead them as to the extent of the territory on either side of the meridian. Where, however, as in the

case of the Quapaw treaty, the boundary is not placed at a fixed meridian, but at a line running south from a natural object, and that natural object is misplaced on the map, the error would mislead the parties in any calculation they might make as to the area of the territory so bounded, because that calculation would have to be based on the map. The decision in *United States* v. *Texas* carried out the intention of the parties to the Spanish treaty of 1819, because it placed the boundary at a point which would give each party the amount of territory which it understood that it was to have; but in the present case to construe the Quapaw treaty of 1818 as calling for a line south from the true source of the Canadian to the Red River would not carry out the intention of the parties, not only because no such line could be drawn, but because the line most nearly approximating thereto would make the cession contain a very much larger area than was intended. Hence the doctrine underlying the decision in *United States* v. *Texas*, the doctrine of carrying out the intention of the parties, requires that in the present case the source of the Canadian should be understood as meaning the point where the parties to the Quapaw treaty understood that source to be, and not the actual source.

Mistake of the court below as to the Quapaw treaty.

The opinion of the court below says little in regard to the Quapaw cession, but enough to show that the majority of the court held that it extended west of the one hundredth meridian. The opinion says:

> There is no proof that in the negotiation or in the ratification of the Quapaw treaty either the Quapaws

> or the United States used any maps at all or considered the question of longitude. * * * Upon the question of intention we think it more probable that the Government originally intended to acquire from the Quapaws * * * all the territory west of the one hundredth meridian to the dominions of Spain. (Rec., 393–395.)

That the Quapaws knew little of maps and did not consider the question of longitude is probably true, but there is convincing proof of the use of maps in connection with the making of the treaty. As already stated, a carefully drawn map of the cession and adjoining country appears on the very first page of the treaty, and is referred to in the text of the treaty itself. (Art. 2, 7 Stats., 176.) The map is in fact a part of the treaty. It is true that it has no lines to show latitude or longitude, but it closely follows Pike's chart, which does show them, and it is morally certain that the commissioners who executed the treaty, and probably also the Secretary of War and the Senate committee who reported it favorably, compared it with that chart and took note of the longitude.

The opinion holds it to be "more probable that the Government originally intended to acquire from the Quapaws * * * all the territory west of the one hundredth meridian to the dominions of Spain." Why "to the dominions of Spain?" The treaty says nothing about those dominions, the boundary of which was in dispute, but refers to the source of the Canadian, and to a line drawn south from that source to the Red River, which was manifestly believed to rise farther west than the Canadian. It is much more probable that the Government originally intended to acquire from the Quapaws

the country between the Canadian and Red rivers, up to a line drawn south from where the source of the Canadian was then believed to be, to the Red River, than that it intended to acquire the country as far west as an undefined and disputed boundary not mentioned in the treaty at all. The claim made by some persons in authority at that time was that the Rocky Mountains or the Rio Grande constituted the proper boundary, but no one had ever hinted that the source of the Canadian, and a line drawn thence southward to the Red River, had anything to do with the boundary of the Spanish dominions. The fact that the compromise line subsequently adopted, i. e., the one hundredth meridian, did pass where the source of the Canadian was believed to be, or just west of it, was a mere matter of coincidence. To speak of the Quapaw cession as intended to run westward to the dominions of Spain is to utterly disregard the terms of the Quapaw treaty.

(2.)

The cession to the Choctaws in 1820 did not extend west of the one hundredth meridian. (See Third assignment of error.)

To show, as has been done above, what was the western boundary of the Quapaw cession of 1818, is the first step toward refuting the theory of the court below as to the western boundary of the cession to the Choctaws in 1820. The next step is to show that what passed by the latter cession was simply the western portion of what had been acquired by the former one, and that the understanding and intention of the parties to the treaty of 1820 were, as regards the western boundary, the same as those of the parties to the treaty of 1818.

The treaty commissioners in 1820 believed the Canadian to rise at the one hundredth meridian.

For more than two years after the Quapaw treaty of 1818 no new map of this region appeared, Melish's map of the United States, edition of 1820, being, as to this region, identical with the map of 1818. The American Universal Geography, by Jedidiah Morse (seventh edition, Boston, 1819) does not mention the Canadian at all, nor show it on its map, but refers to the Arkansas and Red rivers as follows:

> *Arkansaw River*, after the Missouri, is the longest, and in some seasons the largest, branch of the Mississippi. It rises near the 41st degree of N. lat. and 110th of W. lon., among the same mountains which give rise to the Platte and Yellow Stone branches of the Missouri; to the Colorado, of California, and to the Rio del Norte. Its general course is S. E., and it empties into the Mississippi in lat. 34 N. and lon. 91 W., having traversed 7° of lat. and 19 of lon., upwards of 1,100 miles in a direct course, or nearly 2,000 following the windings of the stream. The Arkansaw greatly exceeds in length either the Ohio or the Mississippi proper. That part of the river which runs within the Arkansas territory is skirted in great part by extensive prairies and has much alluvial land. The navigation of the river is impeded by a considerable number of rapids. (Vol. I, p. 656.)
>
> *Red River* falls into the Mississippi in lat. 31° 5′ N., lon. 91° 47′ W., 1,068 miles below the Missouri. It rises in Mexico, and is there, according to Humboldt, believed to be the same with the Rio de Pecos, which rises near lat. 38° N. and lon. 104° W., a little

northeast of the village of Taos. Its length on this supposition is upwards of 1,200 miles (p. 669).

As Morse's book was undoubtedly an authority in its day, this identification of the source of the Canadian as that of the Red River, coupled with the omission of all mention of the Canadian as a branch of the Arkansas, is very significant. In this state of geographic knowledge the Secretary of War, on July 12, 1820, sent to Generals Jackson and Hinds their commissions to treat with the Choctaws, instructing them to offer the Choctaws "*a portion of the Quapaw cession* in the Arkansas Territory, the boundaries of which, copied from the treaty, are inclosed." (Am. State Papers, Ind. Affs., Vol. II, p. 231.) These instructions not merely explain how the language of the grant to the Choctaws came to follow so closely that of the cession by the Quapaws, but they show conclusively the intention of the United States in regard to the land to be ceded. Whatever district, great or small, was to be ceded to the Choctaws, it was to be within the limits of the Quapaw cession, and could not lie outside those limits. When, therefore, the commissioners drafted and executed a treaty, using the words "up the Arkansas to the Canadian Fork, and up the same to its source; thence due south to the Red River," and reported to the Secretary of War that they had done so (Am. State Papers, Ind. Affs., Vol. II, p. 241), they meant that the treaty was to grant to the Choctaws the western portion of the Quapaw cession as that cession was understood with reference to the maps of the day, i. e., that it was to run to, or very nearly to, the one hundredth

meridian. Their report refers specifically to the map as the means of ascertaining the extent of the cession. They say:

> From an examination of the map you will find that Little River is about 60 miles above the Great Raft on Red River, and that we have located the Choctaws as high up the same as practicable.

It is immaterial whether "the map" meant any particular map or not, for all maps of the day that showed the Canadian at all were based on Pike's chart, which placed its source at the one hundredth meridian or just east of it, from which supposed source it appeared easy to draw a line due south to the Red River. In point of fact it is practically certain that Pike's chart was the map referred to, its scale rendering it the standard for that particular region (see Long's mention of it as his "only guide," Rec., 266), just as Melish's map was the standard map of the United States taken as a whole. The words "as high up the same [i. e., the Red River] as practicable" were, of course, used with reference to the authority of the commissioners, and meant "as high up the Red River as the extent of the Quapaw cession permits."

The President, the Secretary of War, and the Senate had the same understanding.

There can not be a shadow of doubt that the Secretary of War understood the instructions to the commissioners as authorizing them to cede land up to about the one hundredth meridian, but not beyond it; that the commissioners so understood the instructions, and that both

commissioners and Indians understood the cession as not going beyond that line. The treaty, executed with this understanding on October 18, 1820, reached the War Department in December, 1820 (the exact date not being shown on the Department records; see Rec., 266), and was transmitted by the Secretary to the President without comment December 12, 1820. (Rec., 269.) The President sent it to the Senate without comment on December 14, and that body referred it to a committee, received it back from the committee without amendment on December 19, and ratified it on December 21. (3 Sen. Ex. Jour., 227, 229, 230.) It was proclaimed January 8, 1821. There is no evidence whatever that any question was ever raised prior to the proclamation of the treaty by any of the persons who had to do with it, as to the position of the source of the Canadian being anywhere else than as understood when the Quapaw treaty was made, and as shown on all the standard maps of the day.

That the President and the Senate understood the treaty at the time of its ratification and proclamation precisely as the commissioners and the Indians had understood it at the time of its execution, i. e., as ceding land up to about the one hundredth meridian, but not west of it, is certain, for the following reasons:

First. No map existed until some time afterwards that showed the source of the Canadian west of the one hundredth meridian.

Second. The words "up the Arkansas to the Canadian Fork, and up the same to its source; thence due south to the Red River," are perfectly intelligible with reference

to the maps of 1820, but express a geographic impossibility when construed with reference to our present geographic knowledge.

Third. After a protracted period of negotiation an agreement had at last been reached with the Spanish minister in regard to the cession of East and West Florida, and also the long-standing claims of the United States and its citizens against Spain, the Spanish claims against the United States, and the western boundary of Louisiana. A treaty covering all these matters had been made on February 22, 1819, and ratified by the United States, and it only required the ratification of the King of Spain. The time fixed for the exchange of ratifications expired August 22, 1819; but President Monroe was willing to waive the delay of the Spanish, as was ultimately done by the Senate in passing a second resolution of ratification in February, 1821. The boundary established by this treaty followed the Red River from a certain point westward to the one hundredth meridian, and ran thence due north to the Arkansas, thus making a fair compromise between the respective pretensions of Spain and of the United States.

It may be assumed as indisputable that while this treaty was awaiting the Spanish ratification the Administration regarded this boundary as established, at least as far as concerned its own dealings with the region affected by the treaty. The boundary must have been taken into consideration when Generals Jackson and Hinds were instructed to offer the Choctaws a portion of the Quapaw cession. Had any part of that cession been

understood to lie outside the boundary fixed by the Spanish treaty, it can not be doubted for a moment that the instructions would have explicitly excluded such part from the district which the commissioners were authorized to offer. The presumption of common sanity, not to speak of that of the correctness of official action, forbids the idea that the Administration, which had successfully negotiated the Spanish treaty in the face of many difficulties, and which was using all the means in its power to secure the ultimate establishment of that treaty, could have intended to disregard it in the negotiations with the Choctaws. As it was, however, the map upon which the description of the boundary in the Spanish treaty was based, Melish's map of 1818, as well as all other American maps, showed the source of the Canadian as lying just east of the one hundredth meridian, or, in other words, just within the boundaries established by the Spanish treaty. Certain English maps showed the source of the Canadian as still farther within that boundary, but of course only the American maps would be relied upon by the American Government in such a matter; and at all events every map showed the Canadian as wholly within the treaty limits of the United States. This condition of the maps fully accounts for the fact that the instructions to Generals Jackson and Hinds made no reference to the boundary of the United States established by the Spanish treaty.

Erroneous view of the court below as to the Spanish treaty.

The court below, however, holds that the United States had, in 1820, a title to land west of the one hundredth

meridian capable of being conveyed to the Choctaws; that the United States did, in the Choctaw treaty of 1820, undertake to grant a large tract of land west of the one hundredth meridian, and that it *subsequently* sold this tract to Spain as the price of the acquisition of Florida.[1]

It is submitted that this view of the court below, especially as to the two latter points, is wholly untenable. It is immaterial whether the claims of France to the boundary of the Rio Grande and the mountains (claims which the United States seems to have assumed along with the sovereignty of Louisiana) were well founded or not. The important point is that these claims were disputed, and that they were ultimately surrendered, though not in exchange for Florida, as the court below supposes, but in exchange for an undisputed title to the country between the Mississippi and the agreed boundary. The court below has wholly overlooked both the fact that if the United States claimed the country south and west of the Red River and the one hundredth meridian, as far as the Rio Grande and the mountains, Spain, with at least equal persistence, and possibly equal justice, claimed all the country south and west of the Bayou Atchafalaya, the Mississippi, and the

[1] Observe the following language in the opinion of the court: "When the United States actually sold the western part of the province of Louisiana, including all the land west of the one hundredth meridian, to the Spanish King, the treaty with the Choctaws had been closed. * * * Taking the proof altogether, we do not think it was the intention to place the western boundary [of the cession to the Choctaws] at the one hundredth meridian, * * * the intention of our Government in ceding land to them, which at that time we were trying to sell to Spain in exchange for Florida." (Rec., 392–395.)

Missouri, and the further fact that the price of Florida was the relinquishment of the American claims against Spain, and not the grant of any American territory.

By the Spanish treaty the United States relinquished disputed claims, but no territory.

The errors of the court below in this matter of history can be readily seen by referring to the American State Papers. In his message of December 6, 1805, President Jefferson stated that he had endeavored to come to an understanding with Spain as to the boundaries of Louisiana, but that he had so far procured from the Spanish Government only "a declaration that we had no rights eastward of the Iberville, and that our line to the west was one which would have left us but a string of land on the bank of the river Mississippi." (Am. State Papers, For. Rels., Vol. II, p. 613.) On March 19, 1806, he further stated:

> Unwilling to take any measure which might preclude a peaceable accommodation of differences, the officers of the United States were ordered to confine themselves within the country on this side of the Sabine River, which, by delivery of its principal post, Natchitoches, was understood to have been itself delivered up by Spain; and, at the same time, to permit no adverse post to be taken nor armed men to remain within it. In consequence of these orders, the commanding officer at Natchitoches, learning that a party of Spanish troops had crossed the Sabine River and were posting themselves on this side the Adies, sent a detachment of his force to require them to withdraw to the other side of the Sabine, which they accordingly did. (Ibid., p. 798.)

Napoleon's overthrow of the Spanish Government interrupted for several years all negotiations between the United States and Spain in regard to the various matters in dispute, but in December, 1815, negotiations were renewed. On January 19, 1816, Secretary Monroe wrote the Spanish minister as follows:

> It is known to your Government that the United States claim by cession, at a fair equivalent, the province of Louisiana as it was held by France prior to the treaty of 1763, extending from the river Perdido, on the eastern side of the Mississippi, to the Bravo or Grande, on the western. To the whole territory within those limits the United States consider their right established by well-known facts and the fair interpretation of treaties. In a like spirit may the United States demand the surrender of all the territory above described, now in the occupancy of Spain, as a condition to the commencement of any negotiation for the adjustment of differences. (Am. State Papers, For. Rel., Vol. IV, p. 425.)

The Chevalier de Onis stated in reply, February 22, 1816, that—

> The country to which you allude, extending to the Rio Bravo, or Del Norte, has been under the dominion of Spain, not only before and since France ceded Louisiana to His Majesty by the treaty of 1764, but from the time of the discovery and conquest of Mexico, without ever having passed by treaty to any other nation. (Ibid., p. 427.)

On June 10, 1816, Mr. Monroe repeated his claim (ibid., p. 430), but at a subsequent conference De Onis declared that he would not accede to an arrangement by

which Spain should cede her pretensions to the territory east of the Mississippi, if the United States did not relinquish theirs to the west of that river. Mr. Monroe appears to have offered to Spain the district between the Colorado and the Rio del Norte in exchange for Florida, but De Onis replied:

> As not only these lands, but all those which lie between the Colorado and Cape North, drawing a line by the river Mermento or Mermentao toward the Presidio of Adais, and from thence by the Arroyo Onda toward Natchitoches, are a part of the Province of Texas, belonging to and in the uninterrupted possession of His Majesty, without there having been in relation thereto any dispute between France and Spain (that dispute being solely as to Natchitoches, which fort the French raised unjustly in the territory of His Catholic Majesty), it results that this proposition not only does not offer compensation to His Majesty for West and East Florida, whose cession the United States intimate would be very agreeable to them, but it involves the relinquishment of the property and possession which His Majesty has of the territory in the Province of Texas which lies between the Colorado and the vicinity of Natchitoches. (Ibid., p. 438.)

The views of the two Governments in regard to this matter of boundary were so far apart that De Onis considered that any adjustment of the dispute would necessitate greater powers than he then possessed. Toward the close of 1817 these powers were given him and negotiations were renewed. On December 29, 1817, he wrote:

> The King, my master, being disposed to oblige the United States in whatever might be compatible

with the rights and honor of the Monarchy, and the dignity becoming his august character, would condescend to cede the two Floridas to this Republic in consideration of an exchange or equivalent which might be useful or convenient to Spain. But as this exchange or equivalent must consist of a territory belonging to the United States and which may offer invariable points, marked by nature, to fix the divisional line between the possessions of the Union and those of the crown of Spain in a manner never to admit of doubt or controversy hereafter, His Catholic Majesty caused certain proposals for the said exchange or equivalent to be made through his principal secretary of state to the minister of the United States at Madrid. * * *

You can not, therefore, but agree with me, sir, that it is absolutely necessary we should first settle the principal points relative to the question of boundaries before we proceed to form and offer proposals for the cession of the Floridas, and for an equivalent to their value or estimation, or for the general and definite settlement of all pending differences. (Vol. IV, p. 452.)

Mr. Adams's reply of January 16, 1818, included the following statement:

I am instructed by the President to propose to you an adjustment of all the differences between the two countries by an arrangement on the following terms:

1. Spain to cede all her claims to territory eastward of the Mississippi.

2. The Colorado, from its mouth to its source, and from thence to the northern limits of Louisiana, to be the western boundary; or, to leave that boundary unsettled for future arrangement.

3. The claims of indemnity for spoliations, whether

Spanish, or French within Spanish jurisdiction, and for the suppression of the deposit at New Orleans, to be arbitrated and settled by commissioners in the manner agreed upon in the unratified convention of 1802.

4. The lands in East Florida, and in West Florida, to the Perdido, to be made answerable for the amount of indemnities which may be awarded by the commissioners under this arbitration, with an option to the United States to take the lands and pay the debts, or to sell the lands for the payment of the debts, distributing the amount received equally, according to the amount of their respective liquidated claims, among the claimants. No grants of land subsequent to the 11th of August, 1802, to be valid.

5. Spain to be exonerated from the payment of the debts, or any part of them (p. 464.)

The Chevalier de Onis replied on January 24, 1818, with this proposition:

The dividing line between Louisiana and the Spanish possessions to be established in one of the branches of the Mississippi, either that of La Fourche, or of the Atchafalaya, following the course of that river to its source. Spain to cede the two Floridas to the United States in full and complete sovereignty.

As an alternative he proposed:

The western line of division to be established from the sea, at a point between the rivers Carcasa and the Mermento, or Mermentao, running thence by Arroyo Hondo, till it crosses the Colorado at Natchitoches, between that post and Adaes, thence northward to a point to be fixed and laid down by commissioners respectively appointed for the purpose.

He proposed that the respective claims of Spain and the United States against each other should be the subject of arbitration by a joint commission, but limited somewhat the scope of the American claims. (P. 466.)

On March 12, 1818, Mr. Adams stated that the Spanish terms could not be accepted, and discussed the various matters at some length (pp. 468–480).

On March 23 De Onis replied with arguments in support of the Spanish position (pp. 480–486), but made no further propositions until October 24, 1818, when he offered to agree to the cession of Florida, the renunciation of the respective claims of the two Governments against each other, and the following boundary:

> To avoid all cause of dispute in future, the limits of the respective possessions of both Governments to the west of the Mississippi shall be designated by a line beginning on the Gulf of Mexico, between the rivers Mermento and Calcasia, following the Arroyo Hondo, between the Adaes and Natchitoches, crossing the Rio or Red River at the thirty-second degree of latitude and ninety-third of longitude from London, according to Melish's map, and thence running directly north, crossing the Arkansas, the White, and the Osage rivers, till it strikes the Missouri, and then following the middle of that river to its source, so that the territory on the right bank of the said river will belong to Spain, and that on the left bank to the United States. The navigation, as well of the Missouri as of the Mississippi and Mermento, shall remain free to the subjects of both parties (p. 529.)

Mr. Adams replied on October 31, agreeing to the proposition as to Florida and the claims, but proposing

a boundary more favorable to the United States, as follows:

> Beginning at the mouth of the river Sabine, on the Gulf of Mexico; following the course of said river to the thirty-second degree of latitude; the eastern bank and all the islands in said river to belong to the United States, and the western bank to Spain; thence due north to the northernmost point of the thirty-third degree of north latitude, and until it strikes the Rio Roxo, or Red River; thence, following the course of said river to its source, touching the chain of the Snow Mountains in latitude thirty-seven degrees twenty-five minutes north, longitude one hundred and six degrees fifteen minutes west, or thereabouts, as marked on Melish's map; thence to the summit of the said mountains, and following the chain of the same to the forty-first parallel of latitude; thence, following the said parallel of latitude forty-one degrees to the South Sea. The northern bank of the said Red River and all the islands therein to belong to the United States, and the southern bank of the same to Spain (p. 530–531).

On November 16, 1818, De Onis submitted another proposition as to the boundary, as follows:

> My third proposal refers to the boundary line to be established between the possessions of the Crown of Spain and those of the United States. Acceding, as far as possible for me do, to the modification proposed by you, and with a view of offering to the United States an additional proof of my wish to remove existing difficulties, I will undertake to admit the river Sabine instead of the Mermento as the boundary between the two powers, from the Gulf of Mexico, on the condition that the same line

proposed by you shall run due north from the point where it crosses the Rio Roxo (Red River) till it strikes the Mississippi [Missouri], and extend thence along the middle of the latter to its source, leaving to Spain the territory lying on the right and to the United States the territory lying on the left of the same (p. 532).

On November 30, 1818, Mr. Adams wrote that the United States would not agree to these terms and reserved its rights to the boundary on the Rio Bravo del Norte (p. 545).

De Onis made some further concessions in December, 1818, and January, 1819 (pp. 612–616), which were refused January 29, 1819 (p. 616).

On February 1, 1819, De Onis made a further concession, as follows:

> In consideration of these obvious reasons, I propose to you that, drawing the boundary line from the Gulf of Mexico by the river Sabine, as laid down by you, it shall follow the course of that river to its source; thence, by the ninety-fourth degree of longitude, to the Red River of Natchitoches, and along the same to the ninety-fifth degree, and crossing it at that point to run by a line due north by the Arkansas, and along it to its source; thence, by a line due west, till it strikes the source of the river San Clemente, or Multnomah, in latitude forty-one degrees, and along that river to the Pacific Ocean; the whole agreeably to Melish's map (p. 617).

On February 6, Mr. Adams made a counter-proposition:

> It is agreed that the western boundary between the United States and the territories of Spain shall be as follows: Beginning at the mouth of the river

Sabine, on the Gulf of Mexico; following the course of said river to the thirty-second degree of latitude, the eastern bank and all the islands in the river to belong to the United States, and the western bank to Spain; thence, due north, to the northernmost part of the thirty-third degree of north latitude, and until it strikes the Rio Roxo, or Red River; thence, following the course of said river, to the northernmost point of the bend, between longitude 101° and 102°; thence, by the shortest line, to the southernmost point of the bend of the river Arkansas, between the same degrees of longitude 101° and 102°; thence, following the course of the river Arkansas, to its source, in longitude 41° north; thence, following the same parallel of latitude 41°, to the South Sea. The northern banks and all the islands in the said Red and Arkansas rivers, on the said boundary line, to belong to the United States, and their southern banks to Spain: the whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818 (p. 617).

On February 9 De Onis proposed:

The boundary line between the two countries shall begin on the Gulf of Mexico, at the mouth of the river Sabine, in the sea; continuing north along the middle of that river to the thirty-second degree of latitude; thence by a line due north to the thirty-third degree of latitude, where it strikes the Rio Roxo of the Natchitoches (Red River), following the course of the Rio Roxo to the westward to the one hundredth degree of longitude and thirty-third and one-fourth degree of latitude, where it crosses that river; thence by a line due north, by the said one hundredth degree of longitude from London, according to Melish's map, till it enters the river

Arkansas; thence along the middle of the Arkansas to the forty-second degree of latitude; thence a line shall be drawn to the westward, by the same parallel of latitude, to the source of the river San Clemente, or Multnomah, following the course of that river to the forty-third degree of latitude, and thence, by a line due west, to the Pacific Ocean. All the country belonging to His Catholic Majesty included in said line to the eastward His Majesty cedes to the United States, in full property and sovereignty, forever; as also the islands in the rivers Sabine, Red River of Natchitoches, Arkansas, and Multnomah that may be situated within the limits which are here pointed out; both parties to maintain the navigation of all of them free as respects the parts thereof which constitute their frontiers (p. 618).

On February 13 Mr. Adams replied with a proposition making the one hundred and second meridian the boundary between the Red River and the Arkansas, and varying from the terms of De Onis in some other respects (pp. 619, 620).

On February 16 the boundary was finally agreed upon, as stated in the treaty of February 22, as follows:

> The boundary line between the two countries, west of the Mississippi, shall begin on the Gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing north along the western bank of that river to the thirty-second degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo of Natchitoches, or Red River; then following the course of the Rio Roxo westward to the degree of longitude one hundred west from London and twenty-three from Washington; then crossing the said Red River,

and running thence, by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas to its source in latitude forty-two degrees north, and thence, by that parallel of latitude, to the South Sea; the whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818. But if the source of the Arkansas River shall be found to fall north or south of latitude 42 degrees, then the line shall run from the said source due north or south, as the case may be, till it meets the said parallel of latitude forty-two degrees, and thence along the said parallel to the South Sea; all the islands in the Sabine and the said Red and Arkansas rivers throughout the course thus described to belong to the United States, but the use of the waters and the navigation of the Sabine to the sea, and of the said rivers Roxo and Arkansas, throughout the extent of said boundary on their respective banks, shall be common to the respective inhabitants of both nations (p. 623-4).

It is very clear from these negotiations that Mr. Adams's proposition of January 16, 1818, that Florida should be ceded by Spain as an equivalent for all claims of the United States against the Spanish Government, was ultimately adopted, and that the establishment of the western boundary of Louisiana did not depend upon the cession of Florida, but was a compromise between the claims of the two countries, whose representatives, each beginning with claims for a large district whose possession the other was unwilling to concede, and then each withdrawing his boundary by successive steps, ultimately reached a point of agreement about halfway between the

limits of their original pretentions. The original Spanish proposition, viz, that Florida should be exchanged for territory of the United States, was certainly not adopted, as the treaty secured to Spain no territory which she had at any time conceded to be within the limits of the United States, but, on the contrary, secured to the United States an indisputable title to a large district in Louisiana to which Spain had hitherto laid persistent claim.

That the establishment of the boundary was not really regarded by either party as a cession of territory is shown by the words of the treaty. In the second article "His Catholic Majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida," and the fifth provides that "the inhabitants of the ceded territories shall be secured in the free exercise of their religion, without any restriction; and all those who may desire to remove to the Spanish dominions shall be permitted to sell or export their effects, at any time whatever, without being subject in either case to duties." Article 3, on the other hand, defines the boundary and then merely provides for a mutual cession and renunciation of "all their rights, claims, and pretensions to the territories" on either side of the boundary respectively, with no provision for the removal to the United States of any persons living on the Spanish side of the line. This shows that all that passed by the third article were "rights, claims, and pretensions," not territory, as in the case of Florida.

No intention in 1820 to disregard the Spanish treaty.

In view of the character of the negotiations which had taken place, there is no warrant whatever for holding that in 1820, when the Choctaw treaty was made, the Administration and the Senate intended to disregard the Spanish treaty, on account of the delay in its ratification, or to grant to the Choctaws any land which that treaty had recognized as within Spanish borders. Some oratory was expended against the treaty in Congress, but nothing was done that hindered the ultimate ratification in any way, and from the signing of the treaty in February, 1819, until its second ratification and final proclamation two years later, the executive branch of the United States Government did everything in its power to establish the treaty. It is sometimes said, as in *Meade* v. *United States* (2 C. Cls. R., 224, 255), that Spain refused to ratify the treaty, but the word "refusal," used by Casey, C. J., in the opinion in that case, goes beyond what the facts warrant. Delay on the part of Spain there undoubtedly was, and failure to ratify within the time set in the treaty, but no positive refusal to ultimately ratify when satisfactory explanations as to certain vexed questions should have been received. In fact, in all its dealings with this Government, Spain never took a single step which was inconsistent with that ultimate ratification which eventually took place. It sent over, early in 1820, a special envoy, General Vives, to obtain certain explanations in regard to the treaty. It did, indeed, entertain and liquidate Mr. Meade's claim, although it was not required to do so if the treaty was to be ratified, as

in that case the ninth article would operate to relieve Spain of its liability. Just what it was that induced Spain to do this while there was still a probability of ultimate ratification does not appear, but the liquidation of the Meade claim could not possibly hinder the ratification, and Spain was very careful not to pay the money.

It is true that on August 21, 1819, Mr. Forsyth, the American minister, wrote to the Spanish Government that as the ratifications had not been exchanged, "all the claims and pretensions of the United States * * * will stand in the same situation as if that convention had never been made" (Am. State Papers, For. Rels., Vol. IV, p. 661); but the decided language of Mr. Forsyth was never adopted by the Government of the United States, which never attempted nor threatened to close the door against ratification. The letter of the Secretary of State to the Spanish minister of May 3, 1820 (id., 683), regrets that the latter is not authorized to exchange ratifications there and then, but agrees that if the minister will give a promise of ratification by Spain the President will refer the matter to the Senate for action. Even after it appeared that a positive promise could not be obtained, negotiations were not broken off, but the President referred the correspondence to Congress for its decision as to the further delay requested by the Spanish minister. (See Mr. Adams's letter of May 8, 1820, same vol., 685.)

The message, dated May 9, 1820, clearly invites Congress to acquiesce in the request for further time, and for the reason that the United States had nothing to lose and much to gain by such forbearance. The message concludes with the words, "I submit it to the wisdom of

Congress whether it will not still be advisable to postpone any decision on this subject until the next session." (Messages, Vol. II, p. 72.) Congress adopted this policy of forbearance, and the annual message of November 14, 1820 (id., 75), stated that the result of the deliberations of the Cortes (a result which the President manifestly expected would be favorable, as proved to be the case) was "daily expected."

The Spanish delay was partly due to the disturbed condition of that country, ending in the reestablishment of the constitution of 1812 (Am. State Papers, For. Rels., Vol. IV, p. 689); but the new Cortes authorized the ratification of the treaty October 8, 1820, and the King of Spain ratified it on October 24. (Same vol., pp. 694, 702.) The American minister at once communicated these facts to the Secretary of State, and while, with the slow communications of that day, the Senate may not have known the facts by December 21, when it finally ratified the Choctaw treaty, yet it is clear from the President's message of May 9, 1820, concluding that "there is just ground to presume that our differences with Spain will be speedily and satisfactorily settled," as well as from the message of November 14, and the constant communications between the American minister and the Secretary of State, that ultimate ratification was daily expected. (Same vol., pp. 676–694.)

The only bearing of the negotiations with Spain in 1819–1821 upon the present case is as an indication of the probable intention of the United States Government in regard to the Choctaw treaty of 1820. The court below has held, not merely that until the ratifications of

the Spanish treaty were exchanged in 1821 the United States owned the land west of the line fixed as the boundary in that treaty, but also that the President, the Senate, the Secretary of War, and the treaty commissioners all *intended* to grant to the Choctaws land west of that line, and did so with their eyes open. This view, it is submitted, presupposes utter want of good faith, and even of ordinary sanity, on the part of the Government.

Undoubtedly the Government had the power to include, *on paper*, land west of the one hundredth meridian in its grant; but unless the Spanish treaty had finally fallen through, such a grant would have conveyed nothing as against Spain. The ratification of a treaty relates back to the time of signing, and where territory is ceded by treaty the exercise of sovereignty by the ceding country ceases *at the time of signing*, except for strictly municipal purposes, so that the ceding country can not grant lands in the ceded territory even before ratification. The reason for this has been stated by this court as follows:

> After the treaty is made, there is not in either [the ceding country or the country receiving the cession] the union of possession and the right to the territory, which must concur to give *plenum dominium et utile*. To give that, there must be the *jus in rem* and the *jus in re*, or what is called in the common law of England the *juris et seisinæ conjunctio*. (*Davis* v. *Police Jury*, 9 How., 280, 289.)

It being well known to the President and the Senate, as an established doctrine of the law of nations, that unless they threw over the Spanish treaty altogether on account of the delay (which was the last thing that they then wished to do), they had no power to grant any land

beyond the borders of the United States as established by the treaty, it is utterly unreasonable to hold that they deliberately undertook to make such a grant to the Choctaws. The view of the court below involves the supposition that the President and the Senate intended either to create an Indian claim against Spain for land which the treaty of 1819 declared was Spanish, or else to make a grant of land which they neither wished nor expected the grantees to receive, thereby exposing the United States to a claim for a partial failure of its grant. Neither intention could have been entertained by sane men. The only rational conclusion is that the President and the Senate did not intend to grant to the Choctaws one foot of land west of the one hundredth meridian.

Major Long's discovery of the source of the Canadian was not actually known to the President, the Secretary of War, or the Senate.

Fourth. Although the facts as to the actual location of the source of the Canadian were known to an officer of the United States Army and his men thirty-eight days before the Choctaw treaty was signed, these facts could not have been known to the United States commissioners or to the Choctaws when they made the treaty, and there is no evidence that any information as to the true source of the Canadian was communicated to the President or the Senate before the treaty was ratified.

The court below holds, however, that Long's discovery of the course of the Canadian, communicated in a brief report to the War Department, received in November, 1820, so affected the Government with knowledge of the source of the Canadian that "the presumption *must be*

that the treaty-making powers had this knowledge." (Rec., 393.) It is submitted that this presumption is wholly unwarranted. The facts as to Long's discovery and the report of it are as follows:

Maj. Stephen H. Long, of the Topographical Engineers, had left Pittsburg May 3, 1819, in command of an expedition to explore "the Mississippi, Missouri, and their navigable tributaries," by order of the Secretary of War. On July 24, 1820, the party, being then on the Arkansas River, about 103° 50′ west, separated, one party, under Captain Bell, proceeding down the Arkansas, while the other, under Major Long himself, started for the Red River, intending to follow it down from its source. On July 30 they reached the dry bed of a stream, and on the 31st its confluence with a creek which apparently contained water. From their course, as shown on Long's map, they seemed to have been then on that branch of the Canadian which is still called Red River, though the map erroneously calls it Rio Mora. They followed along by this stream until September 10, when they reached a river, which, to their "no small disappointment," they perceived to be the Arkansas. (Rec., 275.) They reached Belle Point (Fort Smith) September 13, and the next day Major Long wrote the last of the series of brief reports that he had sent to the Secretary of War from time to time, containing the following statement:

> I regret that for want of a guide and a proper knowledge of the country that the detachment accompanying me were led into a mistake and explored the Canadian of the Arkansas instead of the

> Red River. On parting from Captain B.'s detachment we proceeded southwardly about 150 miles farther, in view of the mountains, and came to a brook running in a southeastwardly direction, which, according to Pike's map and description of the country, our only guide, we took to be a branch of Red River. After pursuing it downward more than 100 miles we fell in with a party of Indians of the nation of Bad Hearts, who confirmed us in this opinion by repeatedly assuring us that the stream on which we were traveling was Red River. Having traversed it by our courses about 800 miles, by its meanderings more than 1,000, we arrived at its confluence with the Arkansas, and discovered our error when it was too late to retrieve it. (Rec., 266.)

This report, by its indorsement, seems to have reached the War Department in November, 1820, and soon after Major Long was himself in Washington, where orders were sent him November 24, 1820, to repair to Philadelphia and as soon as practicable furnish a report of the country traversed by his expedition, with a map. (Rec., 266, 267.) This report bears date Philadelphia, February 20, 1821 (Rec., 272), and concludes with a statement that the map "shall be reported as soon as the necessary elements and data can be compiled and the drawings executed," showing that the map, which was for practical purposes more important than the report, did not exist till some time after the Choctaw treaty was ratified.

It is clear that the Secretary of War *could*, if he had made inquiry, have known in November, 1820, that the Canadian rose far to the west of where the maps of the day placed its source, but there is no proof whatever that

de did know it, and the fact that he made no communication at any time, either to the President or to the Senate, in regard to Major Long's discovery (Rec., 268), although he transmitted the Choctaw treaty on December 12, shows conclusively that he did not know it.

Secretary Calhoun's ignorance is not at all remarkable. He could not personally attend to every detail of the work of his Department, which occupied the place of both the War and Interior Departments of the present day. Major Long's report of September 14, 1820, was presumably read by the officer in charge of the Topographical Bureau, but it is most unlikely that the Secretary ever saw it. When Major Long reported at headquarters, there is no probability that he saw the Secretary. Major Long could have been in Washington but a very few days at most, and, besides, he was out of health. Moreover, he had been traveling for more than eighteen months over a large extent of country, and he probably considered his stumbling on the head waters of the Canadian as a minor incident in his explorations. His report of September 14, 1820, expresses no satisfaction over a discovery, but only regret that he had wasted his time in following down the Canadian instead of exploring the Red River, as he had wished.

Presumably Major Long's orders of November 24, 1820, emanated from the head of the Topographical Bureau, and were signed by the Secretary of War as a matter of office routine. The instructions to prepare a map indicate that Long had at that time no map showing his route, and Long's subsequent promise to furnish it "as

soon as the necessary elements and data can be compiled," shows that the preparation of the map was a lengthy task. Without a map, the chief impression conveyed by the report of September 14, 1820, would be that the source of the Red River was not where it was supposed to be, but not that there was anything specially erroneous about the supposed location of the source of the Canadian.

To persons living in the present days of phenomenally rapid diffusion of information it may seem extraordinary that the importance of Long's discovery of the source of the Canadian, as bearing upon the language of the Choctaw treaty, should not at once have been observed and published to the world. That it was not, simply marks the difference in conditions between 1820 and the present day. Had Long himself known of the making of a treaty naming the Canadian "to its source" as the boundary of a cession, he would of course have realized that those words were used under a misapprehension of the real geography of the country, and would have so informed the Secretary of War. That there is no record of his so doing is proof that he knew nothing of the treaty. The treaty was made October 18, 1820, near Natchez, when Long was at St. Louis, whence he returned to Cape Girardeau about November 1, thence, though in ill health, he went to Washington (Long's Expedition, Vol. II, pp. 321, 324). His reports and orders show that he left Washington for Philadelphia before the treaty arrived. Under these circumstances it would not be surprising, even to-day, that he, having nothing to do with the making of treaties himself, should not know that the treaty was being made,

or at all events, that it referred to the source of the Canadian, and it is still less surprising in view of the conditions prevailing in 1820.

Whatever be thought of Secretary Calhoun's ignorance of Long's discovery and of its bearing on the Choctaw treaty, there is certainly nothing surprising about the ignorance of the President and the Senate, as they had nothing to do with Long or his report, which remained on the files of the War Department, his discoveries not being published to the world until 1822. At all events, it would seem that the fact of their ignorance could no more admit of serious question than the fact of equal ignorance on the part of Generals Jackson and Hinds and the Choctaws themselves, who had had no possible chance to know of Long's discovery at the time they made the treaty.

In spite of all this the court below says:

> It is certain that the Government was in possession of information before the ratification of the treaty that the source of the Canadian was far to the west of the one hundredth meridian as delineated by the earlier maps, and in the absence of proof it can not be assumed that the treaty was ratified with the knowledge that the boundaries fell short of the actual source of that river.
>
> There is as much reason to say that the maps which excluded from the cession much of the country now occupied by the Chickasaws were used as to say that the other maps then in existence delineating the source of the Canadian about the one hundredth meridian were made the basis of the treaty boundaries. The use of all the maps involve contradictions and destroy the value of the argument. Upon the question of intention we think it more probable that

> the Government originally intended to acquire from the Quapaws, and also intended to grant to the Choctaws, all the territory west of the one hundredth meridian to the dominions of Spain.
>
> The ratification of the Spanish treaty which fixed the boundary of the United States on the line of the one hundredth meridian was subsequent to the ratification of the treaty with the Choctaws which gave to those people the land that extended to the source of the Canadian. With the ratification of the Spanish treaty, however, such title as had been granted to the Choctaws [west of the one hundredth meridian] became extinguished, * * * but the right to compensation for the value of the land remained with the Choctaws as against the Government which first gave, and then took from them, the land. (Rec., 394–395.)

The above statement involves, in the first place, a serious misunderstanding in regard to the maps. As has been already shown, in considering the geography of this region as it was understood when the Quapaw treaty was made, there are no earlier maps delineating the source of the Canadian as far to the west of the one hundredth meridian. The two small scale maps of De l' Isle, and that of Boehme, cited by the court below, do not show any stream that could have been intended or understood to represent the Canadian. The maps "which excluded from the cession much of the country now occupied by the Chickasaws," i. e., the maps which showed the source of the Canadian east of the ninety-eighth meridian, were merely the two English maps of Pinkerton and Arrowsmith, who for some reason did not choose to follow Pike in matters of longitude, though copying him in other respects, but these maps were not regarded as authorities in the United

States, where Pike's map was the standard for that particular locality, and Melish's for the country as a whole. There is simply no reason whatever to say that these English maps, based on American data at secondhand, and marked only by arbitrary departures from the recognized authority, "were made the basis of the boundaries." It is true that "the use of *all* the maps involves contradiction and destroys the value of the argument," but a person who understood the maps would not attempt to use *all* of them; he would distinguish between them, and recognize that some were based on original information and others not; that some were accepted as standards and others not, and that some undertook to give geographic details, while others, covering a much larger expanse of country, on a very much smaller scale, gave merely a conventional representation without any regard to actual detail. If the maps are properly understood, no difficulty whatever need result.

In the second place, the fact that "the Government was in possession of information, before the ratification of the treaty," as to the source of the Canadian, is only evidence tending to show actual knowledge by the President and the Senate of the facts stated in Long's report of September 14, 1820. The court below has practically regarded the receipt of Long's report by the War Department as constructive notice to the President and the Senate of the contents of that report. The court's language is rather obscure, but it seems to assert that where certain officers of the Government cooperate to perform an official act, and certain other officers, not concerned with the performance of such act, possess the

knowledge of certain facts, which if known by the former would give to their act an effect which it would not otherwise have, the Government is estopped from denying that the knowledge of the latter officers was imparted to the former, although it may, in point of fact, never have been actually imparted either to them or to the other parties concerned in the act until after the act was performed. This is certainly going very far. The doctrine that a Government is charged with the knowledge possessed by its officers only holds where the neglect to act on such knowledge has caused injury to other parties. A familiar instance is where a city officer has knowledge of the defective condition of a public highway, and the city does not remedy the defect, and some one is injured (*Logansport* v. *Justice*, 74 Ind., 378; *Carrington* v. *St. Louis*, 89 Mo., 208; *Rehberg* v. *New York*, 91 N. Y., 137); but even in such cases the officer must have some duties connected with the highway in order to affect the city with notice. (*Cook* v. *Anamosa*, 66 Iowa, 427.) In the present case the Choctaws were in no way injured by the failure of the President and Senate to avail themselves of Major Long's knowledge, and to amend the treaty so as to make the description run to a point not farther west than the one hundredth meridian, in accordance with the intention of the parties. To construe the treaty as covering a grant to where the source of the Canadian was believed to be, instead of where it really was, would never at any time have taken away from the Choctaws anything that was really theirs, but would give them precisely what they expected to receive and what the United States intended to grant.

If the President and the Senate had known of Long's discovery, at any time while the treaty was before them, and had not become suddenly insane, it is absolutely certain that they would have at once amended the treaty, not merely because they would have known that they were granting territory which they had already agreed should belong to Spain, but also because they would have seen that the boundary was an impossible one, and called for *some* change before any tract of country could be laid off by it. Had they even intended to grant to the Choctaws land west of the one hundredth meridian, shutting their eyes (as the court below thinks they did) to the effect of the Spanish treaty, which they were eagerly awaiting an opportunity to ratify anew, they would still have had to amend the description in the Choctaw treaty. No men in their senses would have knowingly approved a treaty containing so gross an error of description as to make the described boundary impossible. They would have changed it *in some way*, even if they had run it far west of the one hundredth meridian. To say, therefore, as the court below has said, that "it can not be assumed that the treaty was ratified with the belief[1] that the boundaries fell short of the actual source of" the Canadian, is to say that it can not be assumed that the President and the Senate were sane, since unless they either held that belief or were insane they would never have ratified the treaty without some change in its language.

[1] The court below says "knowledge," but as it is impossible to *know* that a thing is where it is not, "belief," and not "knowledge," must be what is meant, and the word "belief" has accordingly been used above.

Had the Spanish treaty ceded any Choctaw lands, the Choctaw treaty of 1825 would not have been silent about it.

The fact that the Canadian had its source in the Rocky Mountains was made known to the world in 1822 by the publication of the account of Long's expedition of 1819–20, with an accompanying map, and thereafter Melish and other American map makers showed the source correctly; but it was not until July, 1854 (Sen. Mis. Doc. No. 31, Thirty-fourth Congress, first session, p. 42), that the Choctaws undertook to claim that the treaty of 1820 had granted them any land west of that one hundredth meridian which, by the Spanish treaty of 1819, was fixed as the western boundary of the United States in that quarter. On January 20, 1825, a treaty with the Choctaws was made at Washington, whereby the Choctaws, in consideration of a perpetual annuity of $6,000, re-ceded to the United States the easternmost portion of the cession of 1820, being the portion lying within the State of Arkansas. (7 Stats., 234.) The negotiations which led to this treaty are set out at length in the American State Papers (Ind. Aff's., Vol. II, pp. 549–558), and show that the Indians were thoroughly well informed as to the location of the land ceded them in 1820, and with its value, and that the United States was dealing fairly with them. Had anyone then considered that the cession of 1820 was to be interpreted in the light of Long's discovery, so that it covered land west of the then limits of the United States, the question would undoubtedly have come up and would have been settled at the time the eastern boundary of the cession was recti-

fied. The absence of all reference to the western boundary is proof that it was universally understood as located far enough east to be unaffected by the Spanish treaty.

The same understanding is manifest from the record of the unsuccessful negotiations of 1826, when it was sought to secure a complete emigration of the Choctaws (Am. State Papers, Ind. Affs., Vol. II, pp. 708–718), and also from that of those which resulted in the treaty of 1830. (Sen. Doc. No. 512, Twenty-third Congress, first session, Vol. VIII, pp. 251–261.) A portion of the Indians were adverse to a new treaty involving a cession of all their Mississippi lands, and they made their complaints and objections well known on both occasions. Certainly if they had had any complaint on account of any land ceded them in 1820 having been given away to Spain, it would then have been made, but the records may be searched in vain for any such complaint, although the new treaty stated specifically that the cession did not run beyond the limits of the United States. There is not the slightest evidence that the silence of the Indians as to the western boundary was due to any deception by the officers of the United States, and certainly no such deception can be presumed.

It is submitted, therefore, under the authorities already cited in regard to the Quapaw treaty of 1818, that it being the intention of the parties to the Choctaw treaty of 1820 that the grant therein made should be bounded on the west by a line drawn due south from where they supposed the source of the Canadian to be, i. e., about the one hundredth meridian, the treaty must be construed in accordance with that intention.

(3.)

The Choctaw treaty of 1830 annulled that of 1820. (See the fourth assignment of error.)

Even had the facts been otherwise, and had the treaty of 1820 granted to the Choctaws land west of the one hundredth meridian, the treaty of September 27, 1830 (7 Stats., 333) must have annulled such grant and extinguished all claims on account of it. By that treaty it was proposed to effect a complete settlement of the Choctaws in the West, and the whole matter was provided for *de novo*. The western bounds of the country which the United States by this treaty agreed to convey to the Choctaws were expressed as running to the source of the Canadian Fork, if in the limits of the United States, or to those limits; thence due south to Red River; and Article I provided that "all other treaties heretofore existing and inconsistent with the provisions of this are hereby declared null and void." The provisions of the treaty of 1830 differed considerably from those of 1820. The Indians ceded to the United States all their land in Mississippi (except certain portions to be allotted to individuals who wished to remain and become citizens), and in consideration of this increased cession the United States made certain promises, the nonperformance of which ultimately led to a suit in which the net proceeds of the sales of the lands ceded by the Choctaws were awarded to them as damages. (*Choctaw Nation* v. *United States*, 119 U. S., 1.) Both parties undertook to enter into a new agreement in regard to lands and emigration, and hence all previous treaties inconsistent with the new

treaty were declared null and void. The uncertainty expressed as to the location of the source of the Canadian Fork is peculiar, as Melish's and other maps had shown it correctly since 1823, but the reference to "the limits of the United States" established beyond question the one hundredth meridian as the western boundary of the cession.

There can be no doubt that the intention was to nullify the entire treaty of 1820, for the words are not "all parts of other treaties heretofore existing which are inconsistent with the provisions of this," or "all other treaties heretofore existing, so far as inconsistent with the provisions of this," but "all other treaties heretofore existing and inconsistent with the provisions of this." The treaty of 1820 was inconsistent with the provisions of that of 1830, and hence the former was, in its entirety, declared null and void.

The statement in *Choctaw Nation* v. *United States* (119 U. S., 1, 38), that the land west of the Mississippi "had already been secured to them [the Choctaws] by its cession under the treaty of 1820," can not be understood as meaning that that cession had not been nullified. It simply means that the lands ceded to them by the treaty of 1830 were the same that had previously been ceded to them by the treaty of 1820, that their area was not increased to balance the increased area ceded by the Choctaws, so that the consideration for the increase must be looked for elsewhere.

Even if it could be possible to uphold any part of the treaty of 1820 as not inconsistent with that of 1830, the nullifying clause restricts the cession of land to that made

by the latter treaty, for if the cession of 1820 differed from that of 1830, then it was inconsistent with it, and consequently "null and void." In the court below it was attempted to make a fine distinction between the two, to the effect that the treaty of 1820 ceded a certain tract of country to the Choctaws, while that of 1830 merely covenanted to convey a certain tract "in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it," so that the two are not to be regarded as inconsistent. It is manifest, however, that the intention was the same in both cases, i. e., to give the Indians a tract of country which was to belong to them as long as they occupied it, and if the boundaries of the two grants were not the same, then the first grant was clearly inconsistent with the second, and became null and void when the treaty of 1830 was made.

If any part of any treaty should ever be held binding upon any Indian tribe, so as to estop it from denying that it was bound thereby, the annulment clause of the treaty of 1830 should be held binding upon the Choctaws to estop them from claiming that there remained to them, after 1830, any right to any land granted in 1820 and not in 1830. If there is one thing that the treaty of 1830 makes plain, it is that it was intended to settle and establish the rights of the Indians in regard to land. The cessions on both sides were made over again, just as if there had been no prior cessions. A portion of the cession of 1820 had been given up by the Choctaws in 1825 in consideration of an annuity of $6,000 (7 Stats., 234),

and Article XVII of the treaty of 1830 provided that all annuities secured under former treaties should continue. This shows a consistent purpose to leave no claims of the Choctaws in regard to land outstanding, but to provide for everything. The Indians agreed to the new provisions and received the new considerations, and therefore they had no right afterwards to assert any claim on account of a supposed cession in 1820 of land not included in the cession of 1830.

The fact that the Choctaws had no real, substantial claim on account of land west of the one hundredth meridian is shown by the absence of all reference to such claim in the treaty of 1837 between them and the Chickasaws. (7 Stats., 605.) Had such a claim then existed that treaty would have referred to it, either to admit the Chickasaws to a share in it or to exclude them therefrom. The silence of that treaty shows that no one thought of such a claim at that time, and in fact there is no evidence that any such claim was ever brought forward by the Choctaws until the time of the negotiations which resulted in the treaty of 1855.

The opinion of the court below says that the treaty of 1830, in spite of its plain language, could not have been intended to nullify that of 1820, because that would have taken away the right to any claim for land west of the one hundredth meridian, without compensation. (See Rec., 395.) The answer to this criticism is that it is practically certain that both parties recognized that no such claim existed, as no such land had ever been granted by the treaty of 1820, but that even if such claim was

recognized it must have been taken account of in the new considerations promised in the treaty of 1830, which was, in the words of Article I, to "be considered *the treaty* existing between the parties."

(4.)

The quitclaim of 1855 was merely a correction of the terms of the cession of 1820 in accordance with the original intention of the parties.
(See the fifth assignment of error.)

It has been sufficiently shown above that the intention of the parties to the treaty of 1820 was that the lands ceded to the Choctaws should extend to where the parties believed the source of the Canadian to be, i. e., to about the one hundredth meridian, so that the Choctaws could have had no valid claim to any land west of that meridian; and further, that the subsequent annulling of the treaty of 1820 would have ended such a claim if it had ever existed. The necessary conclusion from this state of facts is that when by the treaty of June 22, 1855, the Choctaws relinquished to the United States "all their right, title, and interest in and to any and all lands west of the one hundredth degree of west longitude," and also, in common with the Chickasaws, leased to the United States the land between the ninety-eighth and one hundredth meridians and the Canadian and Red rivers, and the United States paid $600,000 to the Choctaws and $200,000 to the Chickasaws "in consideration of the foregoing relinquishment and lease," this consideration was paid entirely for the lease, the relinquishment being merely the formal correction of an error in description in the treaty of 1820. This error

in description (describing the Choctaw cession as running to the source of the Canadian, when it was only intended that it should run to where that source was believed to be), occurring in treaty, called for correction in an instrument of the same character, but as it could not justly have given rise to any claim, its correction could not fairly have been the subject of compensation. It was the duty of the Choctaws, by all the rules of fair dealing, to consent to the correction of the error and to the restriction of the cession to its legitimate limits, without asking any compensation whatever, so that evidently any demand for compensation must have been due either to ignorance or to greed; and while it is conceivable that the Government might yield to such a baseless and unjust demand in order to avoid dispute, yet certainly such yielding is not a thing to be presumed, and it can not be believed to have occurred, except on clear proof.

The court below has held, however, that the claim for compensation for land west of the one hundredth meridian was valid, and further, that the United States recognized the claim and paid at least a portion of the $800,000 to extinguish it, though what portion of that sum was so paid it does not attempt to say. (Rec., 395–396.) The second point is practically a corollary of the first, for if the claim was valid, every presumption would favor the conclusion that the Government recognized it as such. That the court below was in error on the first point has already been shown, and it is submitted that the record of what transpired in 1854 and 1855 makes it clear that the court has erred as to the second point also.

The making of the provision for the quitclaim and the lease came about in the following way:

By an agreement made January 17, 1837 (7 Stats., 605), the Choctaws sold to the Chickasaws certain rights and privileges, including the privilege of forming a district within the Choctaw country, which district embraced the portion lying between the Canadian and Red rivers, west of an irregular boundary therein specified, which apparently could not have been really followed in any actual survey (Sen. Ex. Doc. No. 1, Thirty-third Congress, second session, Part I, p. 339), but was intended to run from a point 8 or 10 miles below the mouth of the False Washita to a point 10 or 12 miles above the mouth of the South Fork of the Canadian. This district was not to belong to the Chickasaws exclusively, as the right to dispose of it was declared to be held by the Choctaws and Chickasaws in common, and both Choctaws and Chickasaws were entitled to settle in any part of the Choctaw country.

Various dissensions and controversies having arisen between the Choctaws and Chickasaws, the two tribes sent delegates to Washington in 1854 to arrange all matters in dispute between them, and also certain matters of controversy with the United States.

In July, 1854, after the negotiations had been going on for three months, the Choctaw delegates made the following statement, in a communication evidently colored by a certain measure of irritation that their previous demands had not yet been acceded to:

> Our country extends west to the head waters of the Canadian, about the one hundred and third de-

gree of west longitude, and we are prepared to maintain our rights to a boundary that far west by facts and evidence which can not be disputed. In the compromise with Texas in 1850, that portion of our country west of the one hundredth degree of west longitude was assigned to that State in direct and palpable violation of our rights. We must demand to be repossessed of this portion of our country; and, if this is not done, our people will take possession of it and leave the Government to settle with Texas and the Indians upon it for such damages as they claim. (Sen. Mis. Doc. No. 31, Thirty-fourth Congress, first session, p. 42.)

This was the first time that any such claim had, apparently, ever been made, and the statement was obviously one of those referred to by the Secretary of the Interior in a letter of September 25, 1854, as follows:

> The letter of the 11th of July last contains some expressions which, as I doubt not they were used without due reflection, I refrain from noticing. (Id., 45.)

Pending the negotiations, which had not theretofore concerned any acquisition by the United States of rights in any of the Choctaw and Chickasaw country, the special Indian agent for Texas wrote to the Indian Commissioner, February 1, 1855, as follows:

> I have the honor to suggest the propriety of negotiating with the Choctaw delegation now at Washington for a tract of land lying on the east side of the Red River (known as Cache Creek) near the Wichita Mountains, for the colonization of the Wichita Indians and such other prairie Indians as may be convenient to that location. (Sen. Ex. Doc. No. 13, Forty-eighth Congress, first session, p. 15.)

In accordance with this suggestion the Choctaw delegation was asked upon what terms they would agree to the settlement of the Wichitas and other Indians in their country. The answer first made by them was this:

> We are unwilling to lease, for the purpose mentioned, any portion of our country east of the ninety-ninth degree, but for the lease of that west of that degree we will consent, in behalf of our people, to take the sum of $400,000. (Sen. Mis. Doc. No. 31, Thirty-fourth Congress, first session, p. 60.)

If the Choctaw delegation really believed what they had previously stated, that their country extended "west to the head waters of the Canadian, about the one hundred and third degree," it is clear that what they were willing to lease for $400,000 included the country between 100° and 103°, but it is more likely that their proposal did not refer to country west of 100°, their claim therefor being chiefly valuable for purposes of argument. At all events the Secretary of the Interior had no idea of leasing country belonging to Texas, and his instructions to the Indian Commissioner were as follows:

> All things considered, [I] am disposed to think the proposition for the permanent accommodation of the Wichita and other Indians, and the amount demanded therefor, worthy your consideration; and you are authorized to enter into negotiations with the Choctaws on that basis. I think, however, that notwithstanding their claim to an extent of country west of the one hundredth meridian is regarded by the Department as without any foundation in law or equity, it might prevent further trouble in regard to it to insert an article in the supplemental treaty

or convention now to be held requiring the Choctaws to relinquish and abandon all right or claim to the same. (Ib., 61.)

Following these instructions the Choctaw agent asked the delegation:

> * * * Whether you will agree, the Chickasaws assenting, to lease the country included between 98° and 100° west longitude, and between Red and Canadian rivers, to the United States, for the permanent settlement of the Wichita and other bands of Indians within the territorial limits of the Choctaw Nation; and if so, upon what terms, it being understood that the Choctaws shall relinquish and quitclaim, in favor of the United States, whatever interest they may have in the country lying west of the 100° of west longitude. (Ib., 62.)

To this the Choctaw delegates replied:

> As a consideration for the whole arrangement, we would consent to take $800,000—one-half thereof for the lease of the country between 98° and 100° of west longitude, and the other half for the relinquishment of our right west of the latter degree.
>
> The above proposition has reference to the arrangement as a whole. Were it confined only to the lease of the portion of the country between the two degrees of longitude mentioned, we should, for obvious reasons, feel constrained to ask not less than $600,000 therefor. (Ib., 63.)

It is clear that the Government did not propose to buy up a claim whose validity it totally denied, but merely to lease the country between 98° and 100°, with which lease the relinquishment of all claim to country west of 100° was to be coupled, in order to "prevent further

trouble." Accordingly, adopting the terms which the Choctaw delegates stated they would demand for the lease alone, the agent replied:

> If the Choctaws will propose to lease to the United States the territory west of 98° and east of 100° west longitude (the Chickasaws assenting) and couple with it a relinquishment of all claim west of 100° west longitude, the Government will agree to pay them $600,000. (Ib., 63–64.)

These terms were ultimately accepted by the Choctaws, and as the Chickasaws agreed to take $200,000 for the lease of their interest in the country between 98° and 100°, the arrangement was incorporated into the treaty. The record shows conclusively that the whole consideration of $800,000 was paid for the lease, and that the relinquishment was demanded by the United States to "prevent further trouble" and as a condition of its agreement to the terms proposed by the Choctaws. The United States refused to pay for the relinquishment of the unfounded claim, but did not haggle over the terms of the lease. The Choctaws proposed first to lease the country west of 99° for $400,000, and then asked the same sum for the lease of the country west of 98°, provided $400,000 besides was paid for the relinquishment of the claim for country west of 100°, stating at the same time that by itself the lease was worth $600,000. The United States consented to pay the Choctaws $600,000 for the lease, but continued to demand that the relinquishment should be coupled with it without affecting the consideration, and to this the Choctaws ultimately agreed.

This agreement found its place in the treaty of June 22, 1885, in the following articles:

ARTICLE 9. The Choctaw Indians do hereby absolutely and forever quitclaim and relinquish to the United States all their right, title, and interest in and to any and all lands west of the one hundredth degree of west longitude; and the Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein, excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas River, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas, which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the President for their government: *Provided, however*, The territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore.

ARTICLE 10. In consideration of the foregoing relinquishment and lease, and as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct.

The division of the consideration between the Choctaws and Chickasaws in the proportion of three to one shows of itself that it was paid for the lease, in which the

Chickasaws joined, and no part of it for the quitclaim, which was made by the Choctaws alone, for otherwise the Chickasaws would have received more than their share.

In 1853 the population of the Choctaws and the Chickasaws was reported by the agents to those tribes as "not far from 15,000" and 4,709, respectively. (Sen. Doc. No. 1, Thirty-third Congress, first session, pp. 402, 407.) In the Indian Commissioner's report for 1855 the number of Choctaws west of Arkansas was stated as 16,000, and the number of Chickasaws as 4,787, taken from the annuity pay roll of 1854. (House Ex. Doc. No. 1, Thirty-fourth Congress, first sesssion, p. 575.) Schoolcraft's History of the Indian Tribes (vol. 4, p. 582; vol. 6, p. 690) gives the number of Choctaws and Chickasaws as 15,767 and 4,715, respectively, by the census of 1853. In short, while the ratio of the Choctaws to the Chickasaws in 1855 was rather more than three to one, it was so nearly that as to make it not unreasonable to adopt that ratio in the treaty as the basis of division of the fund given as the consideration for the lease. In point of fact this ratio of three to one is that which has always been taken to measure the respective interests of the Choctaws and the Chickasaws in the land ceded to the Choctaws in 1830, and in which they subsequently granted an interest to the Chickasaws. Thus, by Article III of the treaty of 1866, the consideration for the final cession of the leased district was divided on this ratio, and by Article XXXVII the consideration for the land to be selected by the Indians from Kansas was to be similarly divided. Hence, when it is provided that the

sum of $800,000 is to be divided between the Choctaws and the Chickasaws in the ratio of three to one, this fact shows that it represents the consideration for the conveyance of some interests in land which the Choctaws and Chickasaws held in common (in this instance the lease of what was thereafter called the leased district), and that it can not include the consideration for any relinquishment or conveyance of any right or interest belonging to the Choctaws exclusively. Had what the Choctaws received been intended to cover not merely the lease, but also the relinquishment of a substantial right to territory west of the one hundredth meridian, the disproportion between the amount received by them and that received by the Chickasaws would have been most unfair.

The court below has correctly stated that "the rights of the Choctaws and Chickasaws as between themselves had been fixed by agreement, with the consent of the Government, in the proportion of three-fourths to the former and one-fourth to the latter tribe in all land to which either tribe could lay claim" (Rec. 397), and it has also shown clearly enough that the quitclaim was executed by the Choctaws alone (Rec. 390–391), but it has wholly overlooked the fact that as the payment of $600,000 to the Choctaws and $200,000 to the Chickasaws was in proportion to their interest in the land which they leased, it must have been paid exclusively for the lease, leaving nothing for the quitclaim. The conclusion of the court below is therefore not warranted by its premises, which, as well as the other facts in the case, show convincingly that the United States paid to the Choctaws $600,000 for the lease of their share of the

leased district exclusively, just as it paid $200,000 to the Chickasaws exclusively for the lease of their share, the quitclaim of the Choctaws being something for which no consideration could fairly be asked, it being merely the formal correction of an inadvertent error of description in the treaty of 1820.

In this connection it may be proper to quote the language of the Indian Commissioner in 1860, as showing it to be the understanding of his office that the $600,000 were paid the Choctaws for the lease, and for nothing else:

> Under the treaty of 1855 the Choctaws leased a portion of their country, for which the United States paid the sum of $600,000. (House Ex. Doc. No. 82, Thirty-sixth Congress, first session, p. 3.)

As to the lease itself, it is rather difficult to see why the word "lease" was used, as there was neither term nor rental, two of the most usual features of a lease. On the contrary, there was a single sum of money (viz, $800,000) paid as consideration, and the object of the "lease" was expressed to be for the *permanent* settlement of the Wichitas and other Indians, facts which would indicate that the Choctaws and Chickasaws had permanently parted with their title to the district, except as to the right of settlement therein, which, as far as appears, they never exercised. Hence the word "lease" was really a misnomer. The reservation of the right of settlement by the "lessors" makes the conveyance one of an undivided interest in common, while the statement of the purpose of the conveyance seems to affix a trust to it. Altogether the conveyance was one of a very anomalous

character, and would seem to have been the work of persons who cared very little for the law of real estate. As, however, the land in question has for over forty years been known as the "Leased District," that designation will, as a matter of convenience, be used in this argument, but without being intended as an admission that the district was, strictly speaking, leased.

The court below, wholly overlooking the permanent character of the conveyance, insists that it was not merely of no higher character than a lease, but that it was not even that. The opinion says that it was "a mere permit" to use the country for special purposes, and that a future sale for the use of the lessors was implied. (Rec., 397.) Certainly no such sale could have been called for as long as the United States wished to use the country for the purpose specified in the treaty, and if such purpose was ultimately abandoned, a surrender to the "lessors," rather than a sale for their use, would have been more in keeping with the terms of the treaty. One reason set up by the court below for holding that the "lease" to the United States gave it very little right to the land of the district is that the Choctaws called it Hotubbee district, and empowered their principal chief to exercise authority over Choctaws residing therein until the district should "be duly organized" like the other districts of the Choctaw Nation (Choctaw Const. of 1860, preamble and Art. VII, sec. 1; Choc. Laws, 1869, 7, 18), the United States never objecting to this assumption of a right of government within the district. (Rec., 397.) The answer to this is that very soon after the adoption of the constitution containing the provisions referred to, the Choctaws made war

on the United States, and that this state of things lasted until 1865, when the steps which led to the treaty of 1866 were taken. Under these circumstances the Government concerned itself rather with the overt acts of the Choctaws than with their paper declarations. Besides, Hotubbee district never was organized by the Choctaws for the purposes of government, and if it ever had been so organized no government which the Choctaws could have established could have exercised any authority over any Indians whom the United States might settle there under the "lease," such Indians being, by the terms of the treaty, "subject to the exclusive control of the United States."

Another reason given by the court below for minimizing the effect of the "lease" is that unless the "leased district" had been included in the lands of the Choctaw Nation they would have had less land, in proportion to their numbers, than the Chickasaws had. (Rec., 397.) The answer to this is that, as regards the property rights of the Indians, the area of the respective districts assigned to the Choctaws and the Chickasaws was immaterial, the whole country being held by them "in common, so that each and every member of either tribe shall have an equal undivided interest in the whole." (Treaty of 1855, art. 2.) If the Choctaws thought the district assigned to the Chickasaws too large, all that they had to do was to go and settle there themselves. That the district "leased" to the United States was within the territory assigned to the Choctaws is true, but this fact merely gave the Choctaws a right of government over such Choctaws and Chickasaws as might settle there, and it in no way lessened the rights

of the United States secured to it by the "lease," which, be it observed, was made by both tribes together, and not by the Choctaws alone. The United States paid a substantial consideration for the "lease," and obtained substantial rights in the district.

B.

THE NATURE OF THE TITLE ACQUIRED BY THE UNITED STATES UNDER THE CESSION OF 1866.

(1.)

Articles XXX, XXXI, and XXXVII of the treaty of 1866 were intended to carry out the fifth stipulation, announced at Fort Smith in 1865. (See the sixth assignment of error.)

At the close of the rebellion the circumstances affecting the relations of the United States with the Choctaws and Chickasaws were as follows:

The United States held by what was called a lease the right to settle permanently the Indians from a large region in the district between the ninety-eighth and one hundredth meridians and the Canadian and Red Rivers (which district was not occupied by any settlement of the Choctaws or Chickasaws), and had begun to make use of this right by settling the Wichita and affiliated bands on a portion of the district, but the war had interrupted the further carrying on of this policy. It could, however, have gone on and filled the entire district with Indians, to the total exclusion of the Choctaws and Chickasaws, who had not, apparently, settled on any part of it, and whose right of settlement was necessarily limited to such parts of the district as were not occupied by the Indians placed there by the United States.

The various tribes within the Indian Territory had more land than they needed, and the United States wished to settle Indians from other parts of the country upon such surplus land. (Rept. of Sec. of Int., 1864, p. 177.)

The Choctaws and Chickasaws, being slaveholders, had, early in 1861, declared their intention to side with the South, and had subsequently made a treaty with the Confederate States and had made war upon the United States, their hostilities continuing until the suppression of the rebellion. (Reb. Rec., Vol. I, 682; Vol. III, 585; Vol. VIII, 1–33, 194–5, 206–8, 235–6, 534, 697–8, 709, 712–13, 715, 719–21; Vol. XIII, 297–304, 333–6, 820, 831, 859, 892–6, 944–948, 952, 955–6; Vol. XXII, pt. 1, 28–36, 457–462; pt. 2, 1118; Vol. XXXIV, pt. 1, 107–112, 849, 888, 1011–13; pt. 2, 875, 882, 959, 994, 1084; pt. 3, 746, 824; pt. 4, 694–5; Vol. XLI, pt. 1, 31–6; pt. 3, 982–4; pt. 4, 1086–96; Vol. XLVIII, pt. 1, 456; pt. 2, 911, 1302–4, 1311, 1315.)

By their rebellion the Choctaws and Chickasaws and other Indian allies of the Confederacy had put an end to all the treaty obligations of the United States toward them, and could only look to the mercy and generosity of the United States for the resumption of the payment of their annuities and the renewal of the relations previously existing. The United States, having put down their rebellion, had determined, as one of the conditions of the restoration of the *ante bellum* relations, to compel the slaveholding tribes to free all their slaves and to provide for them suitably out of the tribal property.

Under these circumstances the commissioners who met the rebellious tribes at Fort Smith in September, 1865, said:

> The following-named nations and tribes have, by their own acts, by making treaties with the enemies of the United States at the dates hereafter named, forfeited all right to annuities, lands, and protection by the United States.
>
> The different nations and tribes having made treaties with the rebel government are as follows, viz: * * * Choctaws and Chickasaws, July 12, 1861. * * *
>
> By these nations having entered into treaties with the so-called Confederate States, and the rebellion being now ended, they are left without any treaty whatever or treaty obligations for protection by the United States.
>
> Under the terms of the treaties with the United States, and the law of Congress of July 5, 1862, all these nations and tribes forfeited and lost all their rights to annuities and lands. (See. of Int. Rept., 1865, p. 482.)

The rebellion of the Choctaws and Chickasaws has an important bearing upon the treaty of 1866. The United States had a right to demand, and did demand, of them certain conditions before the former harmonious relations could be restored. These conditions were not oppressive or severe, but they called for some surrenders of rights previously enjoyed, surrenders which, but for the rebellion, the United States would have had no right to demand. It is a mistake to suppose that the Choctaw and Chickasaw treaty of 1866 put the tribes back where they were before their rebellion. It did so to a great extent, but it required of them conditions which they would

never have voluntarily agreed to had their old treaty rights not been forfeited.

The commissioners at the Fort Smith council declared that although it was purposed to treat the Indians liberally, yet new treaties must be made by each tribe, which treaties "must contain substantially the following stipulations:"

1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.

2. Those settled in the Indian Territory must bind themselves, when called upon by the Government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory, and with the United States.

3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage and for their incorporation into the tribes on an equal footing with the original members, or suitably provided for.

4. A stipulation in the treaties that slavery or involuntary servitude shall never exist in the tribe or nation, except in punishment of crime.

5. A portion of the lands, hitherto owned and occupied by you, must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by Government, or such as may be fixed by the Government.

6. It is the policy of the Government, unless other arrangements be made, that all the nations and tribes in the Indian Territory be formed into

one consolidated government after the plan proposed by the Senate of the United States for organizing the Indian Territory.

7. No white person, except officers, agents, and employees of the Government, or of any internal improvement authorized by the Government, will be permitted to reside in the Territory unless formally incorporated with some tribe according to the usages of the band. (Report of Sec. of Interior, 1865, 482.)

No such treaties were actually entered into at that time, however, but a treaty of peace was made with each tribe (Rept. of Sec. of Int., 1865, p. 485–6; Deposition of Cyrus Bussey, Rec., 51), and it was agreed that each tribe should appoint commissioners to make the treaties demanded by the United States. Besides this, the commissioners proposed to the Choctaws and Chickasaws a treaty which, according to the Indian Commissioner's report, "was agreed upon" by the delegation from those tribes, and was to be approved by their councils and signed. (Rept. of Sec. of Int., 1865, p. 204.) This treaty, which was never ultimately executed, covered the seven stipulations, and also removed the restriction as to the purposes of the lease of 1865, as may be seen by the following comparison:

Stipulations.	*Proposed treaty.* (Rec., 452.)
1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.	ARTICLE 1. Peace and friendship are hereby firmly established between all the citizens of the United States and all the individuals comprising the aforesaid tribes; and all the friendly relations that existed

2. Those settled in the Indian Territory must bind themselves, when called upon by the Government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory, and with the United States.

3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage and for their incorporation into the tribes on an equal footing with the original members, or suitably provided for.

4. A stipulation in the treaties that slavery or involuntary servitude shall never exist in the tribe or nation, except in punishment of crime.

5. A portion of the lands, hitherto owned and occupied by you, must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be agreed upon by the parties

between them before the rebellion shall be, and the same are hereby, renewed. [See also art. 8.]

ART. 2. The Choctaw and Chickasaw tribes of Indians do hereby bind themselves to use their influence, and whenever called upon by the Government to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians of the Territory, and with the United States.

ART. 3. The Choctaw and Chickasaw tribes of Indians hereby admit that the institution of slavery is abolished, and that slavery or involuntary servitude shall never hereafter exist in either tribe, except in punishment of crime, whereof the party shall have been duly convicted, and they promise and agree that measures shall be immediately taken by their respective national councils to properly provide for such emancipated slaves as may have belonged to the members of the respective tribes, such provision to be subject to the approval of the President of the United States.

ART. 4. The Choctaw and Chickasaw tribes of Indians hereby agree to open their country to the settlement of friendly Indians from Kansas and elsewhere upon such terms as may

and approved by Government, or such as may be fixed by the Government.

hereafter be agreed upon by the respective parties and approved by the Government, and the Government may settle such friendly Indians on a portion of said Territory east of the ninety-eighth degree of west longitude, not necessary for the use of said Choctaw and Chickasaw tribes, as it may desire, not exceeding one-third of the whole remaining territory, for a fair and equitable consideration, to be fixed by the Government.

ART. 5. The Choctaw and Chickasaw tribes agree to a modification of the ninth article of the treaty concluded at the city of Washington the 22d day of June, A. D. 1855, by which they agree that all that portion of their common territory west of the ninety-eighth degree west longitude, leased to the United States, may be used for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate thereon, without exception or restriction as to the character of the tribes.

6. It is the policy of the Government, unless other arrangements be made, that all the nations and tribes in the Indian Territory be formed into one consolidated government after the plan proposed by the Senate

ART. 6. The Choctaw and Chickasaw tribes of Indians promise and agree to submit and recommend, at the first meeting of their respective general councils, the adoption of the plan proposed in the Senate bill 459,

of the United States for organizing the Indian Territory.

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nesty of all past offenses, either against their government or the Government of the United States, and no Indian or Indians shall be proscribed, or any act of forfeiture or confiscation passed against those who may have remained friendly and loyal to the United States, but they shall all enjoy equal privileges with other members of said tribes.

ART. 9. The United States hereby promise and agree to restore the Choctaw and Chickasaw tribes of Indians to all their rights and privileges in lands and annuities, that they were possessed of and entitled to, and they shall be applicable to the same objects as existed at the breaking out of the rebellion, except such part or parts of annuities and moneys as have been expended by the President in providing for the relief of destitute Indians, who were reduced to want on account of their friendship to the Government of the United States, which shall not be refunded.

ART. 10. It is hereby mutually agreed that all of the provisions of the treaty of June 22, 1855, between the United States and the Choctaw and Chickasaw tribes of Indians not inconsistent with the foregoing articles are hereby adopted and made a part of this instrument.

ART. 11. The Choctaw and Chickasaw tribes of Indians expressly agree that any amendment to this treaty, which the Senate of the United States may make, shall be taken and held as a part of the same, and as binding in every respect as if it had, after being made, been formally submitted to and ratified by such parties.

In the proposed treaty the only provision which affected the leased district was the removal of all restriction as to the tribes whom the Government might settle there, and the Choctaws and Chickasaws were to be required to agree to this without any compensation. Either it was thought that the removal of the restriction was a matter of indifference to the Choctaws and Chickasaws, or else it was demanded by the United States, as compliance with the seven stipulations was demanded, in consideration of the pardon accorded to the Indians for their rebellion. At all events, the removal of the restrictions as to the tribes who could be settled in the leased district was something outside the seven stipulations, the fifth of which was fully and completely embodied in article 4, which even contains some of the precise language used in that stipulation. The terms of the fifth stipulation do not apply to the case of the leased district but to lands "hitherto owned and occupied by" the Indians. The only land "hitherto occupied by" the Choctaws and Chickasaws was east of the ninety-eighth meridian, and there is absolutely no evidence of any real occupation by those tribes west of that line. The "leased district," too,

could hardly have been properly described as "owned" by the Choctaws and Chickasaws, it being subject to a perpetual lease for the *permanent* settlement of the Wichitas and certain other Indians thereon, a disposition of the district which might conceivably involve its total occupation, to the exclusion of the Choctaws and Chickasaws in case they should not have availed themselves of their right of settlement before the district had been wholly settled by others. Certainly it was not owned in the same sense in which the Choctaw and Chickasaw districts were owned by those tribes. Moreover, the "leased district" did not require to "be set apart for friendly tribes," as it had been so set apart and partly occupied ever since 1855.

The proposed treaty was approved by the Choctaw and Chickasaw commissioners, but they had not been empowered to do more than sign a treaty of peace, so that it remained unexecuted, and the next year, when the Indian commissioners came to Washington, a new treaty was executed on April 28, 1866, and proclaimed July 10, 1866 (14 Stats., 769). That treaty not merely covered the ground of the proposed treaty much more elaborately and in detail, but also provided for several matters not covered by the proposed treaty, such as grants of rights of way to railroad companies and subscriptions to their stock, payable in land; Federal legislation for the protection of personal and property rights; the survey of the Choctaw and Chickasaw lands, and their division in severalty, including various provisions for the selection of land by individuals; post-offices and the carriage of

mail; capitalization of annuities and funds; and the claims of loyal Indians and the damages due them.

The stipulations announced at the Fort Smith council were embodied in this treaty of 1866, as follows:

The first and second in Article I;

The third in Articles II, III, and IV;

The fourth in Article II;

The fifth in Articles XXX, XXXI, and XXXVII;

The sixth in Article VIII;

The seventh in Article XLIII.

That the stipulations were so embodied will be readily seen by the following comparison:

Stipulations.	*Treaty of 1866.*
1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.	ARTICLE I. Permanent peace and friendship are hereby established between the United States and said nations; and the Choctaws and Chickasaws do hereby bind themselves respectively to use their influence and to make every exertion to induce Indians of the plains to maintain peaceful relations with each other, with other Indians, and with the United States.
2. Those settled in the Indian Territory must bind themselves, when called upon by the Government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory, and with the United States.	
4. A stipulation in the treaties that slavery or involuntary servitude shall never exist in the tribe or nation, except in punishment of crime.	ART. II. The Choctaws and Chickasaws hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in punishment of crime whereof the parties shall have been duly convicted, in accordance with
3. The institution of slavery, which has existed among several of the tribes, must be forthwith	

abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes, on an equal footing with the original members, or suitably provided for.

laws applicable to all members of the particular nation, shall ever exist in said nations.

ART. III. * * * The said sum [$300,000] shall be invested and held by the United States, at an interest not less than five per cent, in trust for said nations, until the legislatures of the Choctaw and Chickasaw nations respectively shall have made such laws, rules and regulations, as may be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the

said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter—less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules, and regulations shall elect to remove and actually remove from the said nations respectively. And should the said laws, rules, and regulations not be made by the legislatures of the said nations respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper—the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be

upon the same footing as other citizens of the United States, in said nations.

ART. IV. The said nations further agree that all negroes, not otherwise disqualified or disabled, shall be competent witnesses in all civil and criminal suits and proceedings in the Choctaw and Chickasaw courts, any law to the contrary notwithstanding; and they fully recognize the right of the freedmen to a fair remuneration on reasonable and equitable contracts for their labor, which the law should aid them to enforce. And they agree, on the part of their respective nations, that all laws shall be equal in their operation upon Choctaws, Chickasaws, and negroes, and that no distinction affecting the latter shall at any time be made, and that they shall be treated with kindness and be protected against injury; and they further agree, that while the said freedmen, now in the Choctaw and Chickasaw nations, remain in said nations, respectively, they shall be entitled to as much land as they may cultivate for the support of themselves and families, in cases where they do not support themselves and families by hiring, not interfering with existing improvements without the consent of the occupant, it being understood that in the event of

6. It is the policy of the Government, unless other arrangements be made, that all the nations and tribes in the Indian Territory be formed into one consolidated government, after the plan proposed by the Senate of the United States for organizing the Indian Territory.

5. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government.

the making of the laws, rules, and regulations aforesaid the forty acres aforesaid shall stand in place of the land cultivated as last aforesaid.

ART. VIII. [This article covers the details of a consolidated government for the Indian Territory, a matter not relevant to the issues involved in this case.]

ART. XXX. The Choctaw and Chickasaw nations will receive into their respective districts east of the ninety-eighth degree of west longitude, in the proportion of one-fourth in the Chickasaw and three-fourths in the Choctaw nation, civilized Indians from tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory, not exceeding ten thousand in number, who shall have in the Choctaw and Chickasaw nations, respectively, the same rights as the Choctaws and Chickasaws, of whom they shall be the fellow-citizens, governed by the same laws and enjoying the same privileges, with the exception of the right to participate in the Choctaw and Chickasaw annuities and in other moneys, and in the public domain should the same

or the proceeds thereof be divided per capita among said Choctaws and Chickasaws, and among others the right to select land as herein provided for Choctaws and Chickasaws, after the expiration of the ninety days during which the selections of land are to be made, as aforesaid, by said Choctaws and Chickasaws; and the Choctaw and Chickasaw nations pledge themselves to treat the said Kansas Indians in all respects with kindness and forbearance, aiding them in good faith to establish themselves in their new homes, and to respect all their customs and usages not inconsistent with the constitution and laws of the Choctaw and Chickasaw nations, respectively. In making selections after the advent of the Indians and the actual occupancy of the land in said nation, such occupancy shall have the same effect in their behalf as the occupancies of Choctaws and Chickasaws.

ART. XXXI. And whereas some time must necessarily elapse before the surveys, maps, and selections herein provided for can be completed so as to permit the said Kansas Indians to make their selections in their order, during which time the United States may desire to remove the said Indians from their present abiding places, it is hereby

agreed that the said Indians may at once come into the Choctaw and Chickasaw nations, settling themselves temporarily as citizens of the said nations, respectively, upon such land as suits them and is not already occupied.

ART. XXXVII. In consideration of the right of selection hereinbefore accorded to certain Indians other than the Choctaws and Chickasaws, the United States agree to pay to the Choctaw and Chickasaw nations, out of the funds of Indians removing into said nations, respectively, under the provisions of this treaty, such sum as may be fixed by the legislatures of said nations, not exceeding one dollar per acre, to be divided between the said nations in the proportion of one-fourth to the Chickasaw Nation and three-fourths to the Choctaw Nation, with the understanding that at the expiration of twelve months the actual number of said immigrating Indians shall be ascertained and the amount paid that may be actually due at the rate aforesaid, and should still further immigrations take place from among said Kansas Indians, still further payments shall be made accordingly from time to time.

7. No white person, except officers, agents, and employees of the Government, or of any

ART. XLIII. The United States promise and agree that no white person, except officers, agents,

internal improvement authorized by the Government, will be permitted to reside in the Territory, unless formally incorporated with some tribe, according to the usages of the band.

and employees of the Government, and of any internal improvement company, or persons traveling through, or temporarily sojourning in, the said nations, or either of them, shall be permitted to go into said Territory, unless formally incorporated and naturalized by the joint action of the authorities of both nations into one of the said nations of Choctaws and Chickasaws, according to their laws, customs, or usages; but this article is not to be construed to affect parties heretofore adopted, or to prevent the employment temporarily of white persons who are teachers, mechanics, or skilled in agriculture, or to prevent the legislative authorities of the respective nations from authorizing such works of internal improvement as they may deem essential to the welfare and prosperity of the community, or to be taken to interfere with or invalidate any action which has heretofore been had in this connection by either of the said nations.

The provisions of this treaty of 1866 are, as already stated, much more detailed than those of the treaty proposed in 1865, but it is evident that all the seven stipulations are provided for in the sections cited above. The words of Article XXX, "civilized Indians from tribes known by the general name of the Kansas Indians, being

Indians north of the Indian Territory," manifestly correspond to the words of the fifth stipulation, "the friendly tribes now in Kansas and elsewhere." In spite of this fact, however, the court below has held that Articles XXX, XXI, and XXVII were not intended to carry out the fifth stipulation, and the reasons advanced in support of this view will have to be considered in connection with the next point in the argument.

(2.)

The cession of the "leased district" in 1866 was absolute. (See the seventh assignment of error.)

The treaty proposed at Fort Smith in 1865 contained, as has been already seen, one provision which was outside the scope of the seven stipulations, because it related to a matter peculiar to the Choctaws and Chickasaws. This was a provision for removing the restriction as to the Indians who could be settled on the "leased district." Similarly, the treaty of 1866 contained the following provision:

> ARTICLE III. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district.

In comparing the above provisions of the treaty of 1866 with the treaty proposed by the commissioners in 1865, it will be readily seen that the main difference is that, instead of removing the restriction as to the Indians who could be settled on the leased district—this change in the terms of the lease being made without any new

consideration other than the general resumption of the old treaty relations—the Choctaws and Chickasaws sold outright all their remaining interest in that district, in consideration of $300,000, which sum was to be treated as a special guaranty fund to secure compliance with the stipulation as to a suitable provision for the freedmen. The reason for this new arrangement effected by the treaty of 1866 may be gathered from the peculiar circumstances of the Choctaws and Chickasaws at that time.

From the Rebellion Records, the transactions at the Fort Smith council, and the treaties subsequently made, it appears that the only slaveholding tribes, and the only ones whose treaties with the Confederacy had been really made by the duly constituted authorities of the tribes, and who had actively participated in the rebellion, were the Choctaws and Chickasaws, Creeks, Cherokees, and Seminoles, so that it was to these tribes alone that the third, fourth, and fifth stipulations applied. Of these stipulations the third was by far the most onerous, as it involved not merely the abolition of slavery, but the "incorporation into the tribes" of all the emancipated slaves "on an equal footing with the original members," or a suitable and equivalent provision for them; in other words, either a gift to the former slaves of a share in the tribal property or else some equivalent provision out of the tribal funds.

This compulsory endowment of the former slaves was no small matter, and it was undoubtedly intended as a punishment for the Indians' participation in the rebellion.

To the Choctaws and Chickasaws it was especially onerous, not only because they seem to have had, either actually or proportionately, the most slaves, but because they were more deeply imbued with the slaveholding sentiment than were the other tribes. Their alliance with the Confederacy was avowedly entered into in consequence of their possession of slave property, which they wished to retain. The action of their legislatures shows an intense aversion to admitting their slaves to an equality with themselves as members of their tribes. In this respect, therefore, the Choctaws and Chickasaws differed from the three other tribes, and another point of difference was that they had "leased" to the United States a portion of the land originally granted them. None of the other tribes had done this, and as the United States, in 1865–66, wished to remove some, at least, of the restrictions upon its use of the leased district, it was necessary that the Choctaw and Chickasaw treaty should contain at least one provision not common to the others.

Judging by the provisions ultimately made in the treaty of 1866, the chief objection of the Choctaws and Chickasaws to the treaty proposed in 1865 would seem to have concerned the provision for the emancipated slaves. By the proposed treaty the former slaves, whether admitted to the tribal rights or not, would have to be provided for out of the tribal property, and to the extent of that provision the tribal property, or at least the Indians' share in it, would be diminished. The only way for the Indians to avoid surrendering either a part of their income, or, what would come to the same thing, a part of their income-producing assets, was to realize on

certain nonincome-producing assets, viz, their remaining rights in the leased district, and so to raise the means of providing for their former slaves.

This was done accordingly, the United States taking advantage, and very properly, for reasons which will be considered below, of its control over the fund so raised, to insure the fair treatment of the emancipated slaves, and that the requisite provision for them should ultimately be made. This double object, the turning of a hitherto inactive asset into cash and the disposition of the money so obtained, was therefore provided for in Article III of the treaty of 1866.

This article relates to two matters. First, the cession of the leased district in consideration of $300,000, and, secondly, the disposition of the fund. The first matter is disposed of in a very few words, viz:

> The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district.

The rest of the section has absolutely nothing to do with this cession whatever, but concerns exclusively the disposition of the proceeds. The language of the cession is simple, and clearly imports an absolute conveyance of whatever remaining interest the Choctaws and Chickasaws had in the land. The United States, as the paramount power, already possessed the right of sovereignty, and also, under the treaties of 1830 and 1855, the reversion of the land itself, in case the Indians became extinct or abandoned it. Furthermore, by the treaty of 1855, the United States had acquired, in consideration of

$800,000, the right to permanently settle the Wichita and other tribes upon the land, except the tribes of New Mexico and certain others. All that remained to be acquired by the United States was the right to use the land for any purposes it might see fit, and to exclude the Choctaws and Chickasaws from settling upon it. When those rights were acquired the United States became possessed, as against the Choctaws and Chickasaws, of an absolute and indefeasible title to the land, without regard to the use that was made of it, and this was what the cession of 1866 brought about.

The reason why the United States retained a measure of control over the disposition of the $300,000 was because it was necessary to insure the making of some adequate provision for the freedmen in accordance with the third stipulation of the Fort Smith council, the Choctaws and Chickasaws not having made this provision, as the other slaveholding tribes had done. The Seminole treaty, besides prohibiting slavery, provided:

> And inasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil and no recognized civil rights, it is stipulated that hereafter these persons and their descendants, and such others of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens. (14 Stats., 756.)

The words "who have no interest or property in the soil" make it clear that "all the rights of native citizens" include rights in the tribal property as well as civil rights. The Creek treaty expressly stated that the freedmen

"shall have and enjoy all the rights and privileges of native citizens, *including an equal interest in the soil and national funds.*" (14 Stats., 786.) While the Cherokee treaty was not so explicit in its language, there can be no doubt that the words "shall have all the rights of native Cherokees" (14 Stats., 801) referred to the property rights of the members of the tribe, and not merely to their civil rights.

These treaty provisions, being "the law of the land" for the several tribes as well as for the United States, effected the participation of the freedmen in the property rights of their former masters without the need of any action of the tribal legislatures. The Choctaws and Chickasaws, however, merely agreed in their treaty that the freedmen should have certain civil rights, not including that of citizenship, and that while they remained in the Choctaw and Chickasaw nations they should, unless they supported themselves by hiring, "be entitled to as much land as they may cultivate for the support of themselves and families." (14 Stats., 770.) Any further provision in compliance with the third stipulation required the action of the Choctaw and Chickasaw legislatures, as Article III clearly shows. In point of fact, it is matter of history that these tribes did not wish to admit their freedmen to a share in the tribal property, but wished to get rid of them, and it was absolutely necessary for the United States to make sure that whatever course was pursued the freedmen should be fairly treated.

In adopting the course provided for in Article III, the United States did not treat the Choctaws and Chickasaws

any less favorably than it did the other slaveholding tribes, but rather the reverse, since the former were only required to give their freedmen 40 acres apiece, or, in default of that, to forfeit their respective shares of the $300,000, while the latter were required to admit their freedmen to equal ownership with themselves in the tribal property.

The facts as to the actual disposition of the $300,000 are that the Choctaws have now received all of the $225,000 promised them, and the Chickasaws a portion of their $75,000. They could at any time receive the balance if they would consent to make provision for their freedmen. The payments were made under different appropriation acts, as follows:

Article XLVI modified to some extent the provisions of Article III in regard to the control retained by the United States over the $300,000, and provided that $200,000 should be advanced to the Choctaws and Chickasaws on account of the $300,000, and the moneys to be paid under Articles XXX and XXXVI for land in the Choctaw and Chickasaw districts to be occupied by the Kansas Indians, the said $200,000 to be repaid out of either of the said funds or any other moneys of the Choctaws and Chickasaws. Accordingly this was done under the act of July 26, 1866 (14 Stats., 259). The same act appropriated $15,000, "or so much thereof as may become due to the Choctaws and Chickasaws," for interest at 5 per cent under Articles III and XLVI. So far as the first year's interest was concerned only $5,000, the interest on the balance of $100,000, was due, but the full amount was paid. The act of April 10,

1869, § 1 (16 Stats., 39), made a second appropriation of $15,000 for interest, stated to have been due August 8, 1868, although this exceeded the interest then due on the balance of $100,000. The act of May 17, 1882, § 1 (22 Stats., 72), appropriated $10,000 out of the fund of $300,000 for the education of the freedmen, provided that, if before the actual disbursal of the money either the Choctaws or the Chickasaws passed the laws called for by Article III, their proportion of the $10,000 should be paid to the tribe directly. This proviso operated as an extension of the period, viz, two years after the ratification of the treaty, within which these laws should have been passed, if the Choctaws and Chickasaws were to have the benefit of the fund of $300,000. Finally the Choctaws having, on May 21, 1883, enacted the requisite laws in regard to their freedmen (Choc. Laws, 1894, p. 335), their delay in so doing was waived by the act of March 3, 1885 (23 Stats., 366), and the balance due them of the sum of $225,000, their proportion of the $300,000, was ordered to be placed to their credit on the books of the Treasury. This balance ($52,125) was computed as follows (Rec., 263):

Balance due Choctaws after payment of $150,000 in 1866		$75,000
Deduct excess of interest for first year paid under appropriation of 1866 ($11,250—$3,750=$7,500)		7,500
Balance due after deduction		67,500
Deduct excess of interest for second year paid under appropriation of 1869 ($11,250—$3,375=$7,875)	$7,875	
Deduct appropriation of 1882	7,500	
		15,375
Balance of principal due		52,125

Interest was paid for the first two years only, because Article III provided that unless the Choctaws and Chickasaws enacted the necessary laws within two years the money should not be paid to them. They not having done so, "the residue" referred to in Article XLVI became "affected by" Article III, and hence no further interest was required to be paid upon it. In consequence of the Choctaws' ultimate, though late, compliance with Article III, Congress in 1885 waived the condition as to compliance within two years, as far as payment of the principal was concerned, and paid over the balance then due, but Congress did not waive its right to withhold the interest.

The payments to the Chickasaws on account of principal aggregate $57,625, as follows:

Paid under Article XLVI and appropriation of 1866	$50,000
Excess of interest for first year, paid under appropriation of 1866	2,500
Excess of interest for second year, paid under appropriation of 1869	2,625
	55,125
Add amount expended under appropriation of 1882, for education, etc., of freedmen	2,500
Total expended	57,625

This leaves $17,375 unpaid on account of the Chickasaws' share of the $300,000, but as the Chickasaws have practically annulled the law which they enacted in regard to their freedmen, they are not yet entitled even to the $55,125 which they have received. This, however, is a matter that does not strictly enter into the present case.

When, therefore, the court below says that it must inquire how it came about that the Choctaws and Chickasaws "should, for a consideration of $300,000, part with all interest in nearly 8,000,000 acres of land, worth about $8,000,000 (according to the value put by the grantee at the time upon land adjoining the ceded territory), and at the same time bargain to give from other possessions tracts of more than 300,000 acres to get the money, or failing to yield these tracts to third persons, who by the arrangement were to become the beneficiaries, leave themselves in position to surrender indefinitely land enough for 8,000 people to cultivate, besides conferring on them other rights"[1] (Rec., 406), the answer of the United States to this inquiry is, first, that it had previously acquired, by what was termed a lease, for a consideration which was satisfactory to the Choctaws and

[1] This last clause, "leave themselves in position to surrender indefinitely land enough for 8,000 people to cultivate, besides conferring on them other rights," is rather obscure. It is evidently intended to express, however, the consequences of the possible failure of the Choctaws and Chickasaws to "yield these tracts to third persons," i. e., to provide for their freedmen, as required by the third stipulation, out of their land east of the ninety-eighth meridian, and hence, as the only possible consequence of such failure would be a surrender of the leased district without ultimately receiving the $300,000, this must be what is referred to; though why the "leased district" should be described as "land enough for 8,000 people to cultivate" does not appear. It can not be that the court below thought that the Government intended to use the "leased district" for the settlement of the *circa* 8,000 freedmen of the Choctaws and Chickasaws, in case they were not provided for by the tribes themselves, because the view of the court below is that the Government intended and agreed to use it exclusively for "the friendly tribes in Kansas and elsewhere."

Chickasaws, the right to permanently use the whole district for Indian settlement, subject only to a right of settlement on the part of the Choctaws and Chickasaws, which they had never made use of, so that what the latter parted with in 1866 was not "all interest" in the district, but a mere right of settlement, the value of which was problematical, since it could only apply to such part of the district as might be unoccupied when they should seek to avail themselves of the right, and would be practically extinguished if the district were wholly occupied before they attempted to settle therein; and, secondly, that all the slaveholding tribes were required to do as much for their freedmen as were the Choctaws and Chickasaws, if not more, and that the control retained over the $300,000 was necessary in order to insure due compliance with what was required.

That the Choctaws and Chickasaws were required, as the other tribes were, to provide for their freedmen, was one of the conditions of their restoration to the treaty-rights which they had forfeited by their rebellion; it was in the nature of a punishment for the offenses which they had committed. It can not, when rightly considered, be regarded as an unjust requirement, nor as indicating in any way that the cession of the "leased district" was in trust and not absolute. It had, in fact, nothing whatever to do with the character of that cession, and the propriety of treating the consideration for the cession as a guaranty fund, to insure compliance with the requirement as to the freedmen, was the same whether the cession was absolute or in trust. No argument as to the

character of the cession can possibly be drawn from the disposition of the proceeds.

That $1,100,000 was an insufficient consideration for an absolute cession of all interest in the district between the ninety-eighth and one hundredth meridians and the Canadian and Red rivers, so that a trust must be presumed on account of such insufficiency, the court below does not state. All that it says as to the consideration is the suggestion that a cession of all interest in that district for so small a sum as $300,000 would warrant an inquiry into the object of the parties. In speaking of a cession of "all interest" for $300,000, the court seems to have forgotten about the $800,000 paid eleven years before, and to have regarded $300,000 as the sole consideration. To maintain, therefore, as the United States does maintain, that the sum of $1,100,000 (i. e., $800,000 for the partial interest acquired in 1855 and $300,000 for all the interest that remained in the Choctaws and Chickasaws) is not so small as to raise a presumption that a cession even of nearly 8,000,000 acres, absolute on its face, was really in trust for a particular use of the land, does not contravene anything that is stated in the opinion of the court below or can fairly be implied from that opinion.

As to the sum of $1,100,000, the only question that can arise is whether the parties regarded it as reasonable at the time. The sum of $800,000, paid for the so-called "lease" in 1855, was fixed by the Choctaws and Chickasaws themselves. The Government refused to pay $200,000 in addition for the quitclaim, but as regards the

lease it agreed to the Indians' terms without deduction. (Sen. Mis. Doc. No. 31, Thirty-fourth Congress, first session, pp. 63–64.) There can therefore be no question as to the reasonableness of this sum at the time when it was agreed upon. As to the $300,000, there is no evidence to show that it was inadequate for a complete extinguishment of the rights which the Choctaws and Chickasaws had retained in the "leased district," rights which they had made no use of in the course of eleven years, and which, if not soon made use of (and there is no indication that they would have been), were likely to be extinguished altogether by the complete occupation of the district by other Indians under the terms of the lease.

The reasons which the court below gives for holding that the cession of 1866 was not absolute, but in trust, are not succinctly stated in the opinion, but if the latter be carefully studied they will be found to be the following:

1. That the Choctaws and Chickasaws understood the cession as a trust, and that the treaty must be construed as they understood it. (Rec., 406–410.)

2. That Congress declared, in 1891, that the cession was in trust. (Rec., 410–414.)

3. That "so many things" were annexed to the cession as to involve contradiction and inequality unless the cession be treated as in trust. (Rec., 414–417.)

4. That the cession is the only provision in the treaty which embodies the fifth stipulation presented at the Fort Smith council, which stipulation contemplates a cession for a particular purpose. (Rec., 417–420.)

5. That an absolute cession involves an abandonment of the purpose of the lease, and violates the stipulations and policy of the Government. (Rec., 420, 421.)

6. That the Government about this same time acquired land from the Cherokees, Creeks, and Seminoles in trust for Indian settlement. (Rec., 421–424.)

7. That it has repeatedly been admitted by officers of the United States that the cession was in trust. (Rec., 424–427.)

These reasons will now be discussed in their order.

(a.)

The first reason advanced by the court in support of its conclusion is that the Choctaws and Chickasaws understood the cession as a trust, and that the treaty must be construed as they understood it. The opinion says:

> The question resolves itself at last into the understanding of the parties, and especially the understanding of the Indians in respect to the meaning of an uncertain agreement arising out of the transfer of an immense domain for a nominal consideration, the incorporation of a large body of Indians as well as freedmen into the body politic of the plaintiff nations, and the receipt by them of a small sum stipulated to be paid for uses not necessarily relating to the advantage of the parties, but for those whom the treaty provided were to be incorporated. (Rec., 410.)

The expression "a nominal consideration" shows that the learned judge had in mind only the $300,000 mentioned in the treaty of 1866, and overlooked the $800,000 paid under the treaty of 1855. The error of this oversight has already been discussed and need not be again

adverted to. The references to the agreement as "uncertain" and to the consideration as one "not necessarily relating to the advantage of the parties, but for those whom the treaty provided were to be incorporated," i. e., the freedmen, will be discussed below. The important words to be now considered are "the understanding of the Indians." Now, the learned judge has, it is submitted, simply *assumed* that in 1866 the Indians understood the cession to be in trust, without any real proof of it whatever. That in 1890 they claimed that the cession had been in trust, and that they have so claimed ever since, is true, but that those who were living in 1866, twenty-four years before, believed so *then* is a mere matter of assumption or inference. If the majority of the court below have made up their minds, upon the evidence, that the cession was intended to be in trust, then they may be justified in supposing that the Indians so believed, but the existence of such a belief can not be assumed at the start and then this assumption treated as a substantial reason for holding that the cession was in trust.

It is submitted that neither the record nor any public document discloses any statement of either the Choctaws or the Chickasaws prior to 1890 to the effect that the cession of 1866 was in trust. In point of fact only three statements of theirs in regard to that cession can be found which appear to have been made before that date. The first is the Choctaw act of November 20, 1867, in regard to certain claims under the treaty of 1866, the third section of which speaks of "the forced sale of the 'leased district,' lying west of ninety-eighth degree west longi-

tude, for about 2½ cents per acre, for objects of negro colonization upon their borders." (Choc. Laws, 1869, p. 478.) This assertion of the supposed object of the cession is wholly inconsistent with their present claim, which is that the "leased district" was ceded in trust for Indian settlement exclusively, so that in case any of the land came into the possession of a negro, or any other person than one belonging to the friendly tribes, who, in 1866, were "in Kansas or elsewhere," the trust would be violated. Moreover, there was absolutely nothing on which to base the idea that the "leased district" was sold "for objects of negro colonization." The United States never proposed to buy, for any such purpose, either the "leased district" or any other land in which the Choctaws or Chickasaws had any interest, nor did the latter ever offer to part with any land for such a purpose. It was provided that they should either give their freedmen some of their own land (not colonizing them, but allowing them to remain permanently where they were), or else that the United States should remove them and provide for them out of the consideration given for the cession of all the remaining interest of the Choctaws and Chickasaws in the "leased district," but no use of that district for the colonization of either these freedmen or any other negroes had ever been suggested, nor has it apparently ever been suggested since that time. This statement, having nothing to support it, may, therefore, be disregarded. If any importance be attached to it, it should be observed that it says nothing about any trust, and distinctly controverts the present claim of the Choctaws.

The next statement is found in the Chickasaw protest of 1872, which contains these words:

> It is believed that the only rights given up by the treaty of 1866 are the right to hold slaves, the right to the leased district, so called, between the ninety-eighth and one hundredth meridians of west longitude, upon certain conditions therein set forth, and the unrestricted right of self-government. * * * (House Ex. Doc. No. 141, Forty-second Congress, third session, p. 3.)

The protest here quoted from was directed against a bill, then before Congress, to provide a territorial government for the Indian Territory, and thus to deprive the Chickasaws of the right of separate self-government secured to them by treaty. Such a protest would certainly not minimize the rights of the Chickasaws, but would present them as fully as possible, so that whatever rights the Chickasaws claimed to have in the leased district would be sure to be set out in full. What was said was that "the right to the leased district" (i. e., whatever right the Chickasaws had therein after it had been leased) was "given up by the treaty of 1866," "upon certain conditions *therein* set forth," i. e., set forth in that treaty. The only conditions "therein set forth" in connection with the cession of the leased district did not concern the character of the cession, but only the disposition of the sum of $300,000, the consideration therefor. What has been done in regard to this sum has already been shown, but that does not in any way affect the absoluteness of the cession. Hence this Chickasaw protest clearly concedes that the cession was an absolute one.

The third statement occurs in a memorial of the Chickasaws to the President in regard to their freedmen. It is not dated, but as it accompanies another memorial, dated October 4, 1887, it was probably made about the same time. It says:

> Article III of the treaty of April 28, 1866, contains the following provisions:
>
> (1) The Choctaws and Chickasaws agreed to sell and cede to the United States, for the sum of $300,000, the territory west of the ninety-eighth meridian, known as the "leased district." (Senate Ex. Doc. No. 166, Fiftieth Congress, first session, p. 11.)

Precisely the same words are used on page 17 of the same document, in a statement dated April 22, 1884, made by Halbert E. Paine, then and now the attorney for the Chickasaws.

This statement of the Chickasaws and of their attorney does not quote the precise words of the treaty, but is obviously intended to give the substance of the provision referred to, according to the Chickasaws' idea of its tenor and effect. They say "sell and cede" (an expression even more forcible, if anything, than the single word "cede" to denote an absolute transfer of all property rights), and they do not make the slightest reference to any trust or condition whatever affecting the title of the United States to the district so sold and ceded. The absence of any such reference is as significant as is the use of the unequivocal words "sell and cede."

In the absence, then, of any statement on the part of

the Choctaws or Chickasaws contemporaneous with the treaty of 1866, or less than twenty-four years subsequent thereto, that the cession of the leased district was in trust for Indian settlement, it is clear that the learned judge of the court below must have simply assumed that they so believed at the time the cession was made, unless it can be shown that the persons acting in behalf of the United States stated, at or before that time, that the cession was to be in trust.

The Choctaws and Chickasaws were told, in 1865, that a portion of the lands, hitherto owned and occupied by them, must be set apart for the friendly tribes in Kansas or elsewhere, upon terms to be agreed upon; but article 4 of the treaty proposed in 1865 shows that this referred to lands east of the "leased district," no change being suggested as to the latter, except the removal, without considerations, of one of the conditions of the lease. The provisions of article 4 of the treaty proposed in 1865 are substantially contained in Articles XXX, XXXI, and XXXVII of the treaty of 1866, where it is arranged that such lands as the Choctaws and Chickasaws were to part with, east of the "leased district," were to go exclusively for Indian settlement by members of tribes such as the fifth stipulation referred to, while the cession of the "leased district" (or, strictly speaking, of the remaining interest of the "lessors" therein) appears to be a wholly distinct transaction, for which a distinct consideration was to be paid. There is therefore no evidence that the Choctaws and Chickasaws were told, before or at the time the treaty of 1866 was made, that the cession

of the "leased district," though absolute on its face, was really in trust for Indian settlement, nor anything to warrant the assumption that they so understood.

As the "leased district" had originally been "leased" for Indian settlement, and part of it had already been used for that purpose, there was reason to expect, in 1866, that this use of it would continue for some time; but the evidence discloses no reason whatever for any belief, then or subsequently, that the United States did not possess an absolute title to the district, as against the Choctaws and Chickasaws, whatever might be its title as regards the Indians whom it settled in the district.

The court below strives to justify its assumption that the Choctaws and Chickasaws believed in 1866 that the cession was in trust for Indian settlement (or, perhaps, its inference of such a belief from the fact that these Indians *now* claim that the cession was of that nature) by laying great stress on the words of Mr. Justice McLean in *Worcester* v. *Georgia* (6 Pet., 515, 582), when he said that—

> the language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

The requirement that words should be considered as used only in "their plain import, as connected with the

tenor of the treaty," is not peculiar to Indian treaties, being manifestly nothing but a statement of the general rule that each part of an instrument must be construed with reference to the whole. Moreover, the statement that "the language used in treaties with the Indians should never be construed to their prejudice," but as "understood by this unlettered people," is merely an application to a particular class of documents of the general rule that the intention of the parties must prevail, the same rule which, as applied to the Quapaw treaty of 1818 and the Choctaw treaty of 1820, excludes the possibility of any cession of land west of the one hundredth meridian having been made by either treaty. In reaching the intention of the parties it must be borne in mind, in such a case as that which was presented in *Worcester* v. *Georgia*, that one of the parties was unlettered—unaccustomed to precision of statement and ignorant of technical or formal terms of law—and the language used must be interpreted as such a party would naturally have understood it.

This rule is obviously one of relative application. In the case of the early Cherokee treaties, which were before the court in *Worcester* v. *Georgia*, the rule needed to be applied to the fullest extent, the Cherokees being undoubtedly an "unlettered people" at the time the treaties were made. In *Choctaw Nation* v. *United States* (119 U. S., 1), involving the Choctaw and Chickasaw treaty of 1855, the rule was referred to by the court, but it was obviously not at all as applicable to the comparatively educated Choctaws and Chickasaws of 1855 as to the

totally illiterate Cherokees of 1800. In fact, the rule, as applicable to that case, took this form:

> The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.

In the case of the treaty of 1866 the parties may fairly be said to have dealt very much on an equal footing. It is true that the recent treason and rebellion of the Choctaws and Chickasaws put them at the mercy of the United States, and entitled it to demand of the Indians concessions which would not have otherwise been asked; but the Indians were in a position to understand thoroughly every feature of the treaty and to protect themselves against the possibility of even an unintentional imposition. They had long ceased to be an "unlettered people," although one of the Chickasaw commissioners seems to have been unable to write his name. A Choctaw statute of 1842 relates to public schools, and one of 1846 forbids the appointment or election of any person as a judge unless he can read the English or Choctaw language. In the Laws of the Choctaw Nation (edition of 1869, p. 451) the very next law after that approving the treaty of 1866 is one requiring the district school trustees, under the direction of the superintendent trustee, to establish and maintain a neighborhood school in each neighborhood where there are children of proper age to attend the school.

As early as 1834 the general council of the Choctaw Nation enacted written laws in substantially the same form as that employed by Congress and the State legislatures, and the subject-matter of even the earliest of these statutes is the same as that with which civilized legislatures have always had to deal, viz, prohibition of the introduction of ardent spirits, theft, wills, infanticide, fences, injuries by stock, marriage, divorce, slavery, forest fires, etc. This general council appears to have acted from the first under a written constitution, which was superseded by another in 1842, this being superseded in its turn by the more elaborate constitution of 1850, which, with its declaration of rights, its careful separation of the executive, legislative, and judicial departments of the government, and its detailed provisions for each department, was certainly fitted to be the fundamental law of a civilized community. (Choc. Const. and Laws, ed. of 1852.)

In 1860 another and still more elaborate constitution was adopted by the Choctaws, a constitution which, except in a few details peculiar to an Indian nation, did not in the main differ from those then in force in the several States of the Union. (Choc. Laws, ed. of 1869.)

The Chickasaws were, in 1866, in much the same condition as the Choctaws, and entitled to be regarded as a civilized community, as appears from their constitution and laws, edition of 1867. The Secretary of the Interior's report for 1865 (pp. 207–8, 440–1, 465) describes both these tribes as well advanced in education and civilization.

Moreover, whatever was the precise condition of the Choctaws and Chickasaws in 1866 in regard to civilization, they were represented in the negotiations preliminary to the treaty of 1866 by the eminent lawyer John H. B. Latrobe, of Baltimore, who subscribed as witness to the treaty. In his letter of April 4, 1866, to the Indian Commissioner, Mr. Latrobe said:

> Having gathered from the Choctaw and Chickasaw delegates the ideas of the Secretary, I have, with a view to something more definite than can be reached by general conversation, taken the office draft of a treaty as a basis and attempted to make it express, with here and there an alteration, the wishes of the parties. At all events, the points of difference can now be narrowed down, until, I trust and believe, they will disappear. Thinking I may, perhaps, be useful to our friends now, and perhaps facilitate your labors in this connection, I will be happy, if you find it altogether proper and agreeable, to call on you at your office at any hour you may name on any evening, or should your convenience be promoted it will give me great pleasure to see you at your house.
>
> I think I see, now, an early agreement on all the knotty points. (Rec., 189.)

With Mr. Latrobe as their counsel it is impossible that the Choctaw and Chickasaw delegates should not have thoroughly understood just what the provisions of the treaty covered, especially as those provisions had been the subject of much discussion before an agreement was finally reached. It is therefore absolutely preposterous for the claimants to seek to put forced constructions upon the treaty, or to change the plain language of its terms,

on the ground that as "an unlettered people" they can not be supposed to have understood all that it meant. They could with precisely the same justice plead that they should not be bound by any of the proceedings in this court on the ground that they are not all of them trained lawyers, but have to appear by counsel.

Besides, even if the claimants were in a position to claim the full benefit of Mr. Justice McLean's words in *Worcester* v. *Georgia* in the construction of the treaty of 1866, it would not support their contention. The doctrine applies where "words are made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty." In the present case the vital words are "hereby cede to the United States," and the most "extended meaning" that they can have, viz, as divesting the claimants of all estate, right, title, or interest whatever in the ceded district, is merely the same as "their plain import as connected with the tenor of the treaty." There is absolutely nothing in the treaty, from one end to the other, nor in any of the circumstances under which it was made, nor in any contemporaneous statements or transactions, to give these words any other meaning. The facts were that the claimants had previously, for a substantial consideration, parted with most of their interest in the country between 98° and 100°; that they were now called upon to make provision for their former slaves; and that the only means of so doing without diminishing either their regular annuities or the reservations which they actually occupied was by disposing of their remaining interest in the previously "leased" district. That interest was scarcely

susceptible of being divided in any way except territorially, and the words used exclude the idea of any such division, while there is no record of any proposition to divide it in any way whatever. The most natural disposition to make of this interest was to sell the whole of it outright for what it would bring, and there is no reason to suppose that the United States would have consented to purchase less than the whole. The words of grant, taken by themselves, can mean nothing else than a cession of the entire interest, and there is absolutely nothing in the circumstances under which they were used to warrant the theory that the cession was intended to be anything less than entire.

(b.)

The second reason of the court below for holding that the "leased district" was ceded in trust is that Congress so stated in 1891. In the argument before the court below the counsel for the Choctaws and Chickasaws went much beyond this, contending that the statement in the act of March 3, 1891, § 15 (26 Stats., 1025), that the Cheyenne and Arapahoe Reservation, a portion of the "leased district," adjoining the Wichita Reservation, had been "ceded in trust by article three of the treaty" of 1866, was conclusive as a legislative construction of the character of the cession of the whole "leased district," and therefore a determination in the claimants' favor, binding on the court, of the issue as to the lands now in question. The court below did not sustain this contention, holding very properly that the jurisdictional act

repealed that of 1891 as far as concerns the construction of the cession of 1866, but it further held, however, that the act of 1891 was "valuable as showing by way of argument that a trust in favor of the claimants was created by the treaty of 1866 on all the lands included in the cession, and as showing that if Congress regarded the matter in that light the claimants probably understood the matter in the same way when they executed it." (Rec., 412.)

It is submitted that the act of 1891 can not even have the moderate value which the court below puts upon it. If it has no binding force as law, in regard to this matter of the character of the cession, then its only value must be as showing that a majority of the members of the Senate and House, as individuals, believed that the cession was in trust, but their opinion carries weight only in proportion to their knowledge of all the facts of the case, so that the really important matter is the character of the representations made to Congress, and upon which it acted. In the second place, the opinion of Congress in 1891 is no fairer criterion of the opinion of the appellees in 1866 than it is of the opinion of anyone else. One may argue that inasmuch as a Congress composed of presumably reasonable men held such an opinion, other reasonable men might be expected to take the same view, but this amounts to no more than to say that the view that the cession of 1866 was in trust is a reasonable view to take, and hence that the appellees, or anyone else, may reasonably be supposed to have taken it in 1866, or at any other time. Whether the view is reas-

onable or not, however, depends upon whether it is borne out by the facts as they existed in 1866, for unless the alleged trust existed then, when the treaty was made, it can not possibly have existed subsequently.

Treating the statement in the act of 1891, then, as a collective expression of opinion on the part of the individual members as to the character of the cession of 1866, the weight to be attached to the opinion so expressed necessarily depends on the extent to which the members of the Senate and House held it and upon the grounds on which it was based, both of which matters may properly be inquired into without indulging in any assumptions of misinformation or improvident action.

The opinion was certainly very far from being unanimously held. In 1890 both the Choctaws and the Chickasaws presented memorials to Congress (House Rept. 3147, Fifty-first Congress, first session; Sen. Mis. Doc. 107, *id.*), and bills to pay their alleged claims were introduced into both Houses. The House bill (H. R. 12106) called for an appropriation of $6,211,714.65 to be paid to the Choctaws and Chickasaws in extinguishment of all their alleged right, title, and interest in and to the leased district, not including Greer County, the ownership of which was then in dispute, being $1.05 an acre for 6,201,633 acres, less the $300,000 paid under the treaty of 1866. (21 Cong. Rec., 10321.) The Senate bill was apparently a duplicate; but neither passed, and only the House bill was debated, meeting with strong opposition. (22 Cong. Rec., 183–191, 312.)

In the expiring days of that Congress, on February 28, 1891, when the Indian appropriation bill was before

the Senate, and shortly after the Cheyenne and Arapahoe agreement had been inserted therein as an amendment, the second paragraph of section 15 (the paragraph already cited in full, on which the claimants rely as a legislative interpretation of the cession of 1866) was inserted as a further amendment, calling for an appropriation of $2,991,450. (22 Cong. Rec., 3525.) After some opposition the amendment was adopted; but when the House refused to concur in the Senate amendments this particular amendment was singled out as the one which should under no circumstances be agreed to. (22 Cong. Rec., 3684.) In spite of this the bill, as amended, was passed in the last hours of the session.

In view of the opposition developed in the House to the bill to pay the whole Choctaw and Chickasaw claim, and also the opposition to the payment of the particular portion of that claim covered by the act of 1891, it is fair to infer that the provision in the latter act would never have passed had it not been inserted by the Senate in the last days of the session. As a collective expression of opinion, therefore, it carries very little weight. It carries still less weight when the arguments advanced in support of it are examined. These are found in House Report No. 3147, Fifty-first Congress, first session, and Senate Mis. Doc. No. 107, of the same session. The House report was made upon the memorial of the Choctaws and Chickasaws in regard to the "leased district." This memorial, annexed to the report, started out with the proposition that the land granted to the Choctaws in 1820 included "a tract containing over 6,000,000 acres west of one hundredth meridian, in what is now called

the 'Panhandle of Texas,'" and that "on February 19, 1821, the United States ceded this latter tract, of exceeding 6,000,000 acres in the Panhandle, belonging to and paid for by the Choctaws, to the King of Spain as part compensation for the Florida purchase." That these statements were wholly erroneous, and that no such land was ever granted to the Choctaws, has already been sufficiently shown. This error was the corner stone of the whole memorial.

The memorial further stated that the $800,000 were paid under the treaty of 1855 for the relinquishment of the 6,000,000 acres as well as for the lease of the "leased district," thus belittling the consideration paid for the lease. It also misrecited the fifth stipulation presented at the Fort Smith council, as follows:

As presented at Fort Smith council.	*As quoted in the Choctaw memorial.*
A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government.	A part of the Indian country to be set apart to be purchased for the use of such Indians from Kansas or elsewhere as the Government may desire to colonize therein.

This erroneous version of the fifth stipulation did not, it is true, originate with the memorial. It appears in the Indian Commissioner's report for 1865 (House Ex. Doc. No. 1, Thirty-ninth Congress, first session, vol. 2, p. 202), in a brief résumé of the proceedings at the Fort Smith council, wherein all the seven stipulations are very much abbreviated, obviously for the purpose of condensation

merely. While this abbreviated statement is certainly very carelessly drawn, in that it departs from the language of the original in several particulars, its wording would be unimportant were it not that it was insisted in the court below that it referred from the first to the cession of the "leased district," and must be read into Article III of the treaty of 1866 as an authoritative declaration of the purposes for which that cession was made. There is, however, nothing to be found in the report in which this form of the fifth stipulation first occurs to indicate that it referred to the cession of the leased district at all, that cession not having been proposed when the report was made. As already stated, the treaty "agreed upon" in 1865, referred to in the report, did not cover any cession or "purchase" of the leased district, but merely a removal of the restriction as to the tribes for which it could be used. It was not till the next year, after the Indian delegates came to Washington, that a sale of the leased district was proposed and agreed upon.

The memorial went on to state that "on the basis above set forth," i. e., on the basis of the misrecited fifth stipulation, the leased district was ceded "on a nominal consideration of $300,000, every dollar of which, by the same article (third) of the treaty, was to be given to the negroes whom the Government agreed to move out of the limits of these nations." In view of the gross misstatement of the operation of Article III to the provision to be made for the negroes, it is not surprising that the memorial failed to point out that in so far as the $300,000 might be used for the benefit of the negroes, it relieved

the Choctaws and Chickasaws of their obligation to provide for them.

These statements of the memorial then led up to the following:

> This cession was made as a trust for the sole and only purpose of providing homes for friendly Indians at a nominal cost to the Government, who had the responsibility of their care. This cession was not intended either by the Choctaws and Chickasaws, nor by the United States, to convey to the Government the fee-simple title patented to the Choctaws. The tenth and forty-fifth articles of the treaty of 1866 reenact the former guaranties that this country should not be subject to homestead settlement, nor included within the limits of a State or Territory.

The memorial referred to the authorities for the construction of Indian treaties as understood by an "unlettered people," to various expressions of opinion by Government officers, supposed to support the memorialists' construction, and to the treaties with the other civilized tribes, and it concluded with a petition that the commission appointed under the act of March 2, 1889, § 14 (25 Stats., 1005), to negotiate for the cession of Indian lands, might be authorized to negotiate with the Choctaws and Chickasaws for the leased district. It was from beginning to end an artfully drawn and very misleading instrument.

The memorial was referred to the Committee on Indian Affairs, who, on September 22, 1890, submitted the report in question, accompanying the bill already referred to (H. R. 12106), to appropriate $6,211,714.65 in payment of the Choctaw and Chickasaw claim.

The report, instead of correcting any of the misstatements of the memorial, reasserted them all, as if they were indisputable facts, and added one new misstatement, viz, that the patent made pursuant to the Choctaw treaty of 1830 had—

> * * * covered the lands in question [i. e., the leased district] *as well as a large tract west of the one hundredth meridian.* The exact amount your committee can not fix, because of two different treaties that differ in boundaries. However, the amount is not less than 2,000,000 acres, and may be much more.

Even the memorial, with all its errors, had not stated that the patent, which was issued March 23, 1842, granted any land west of the one hundredth meridian, which was at that date the western boundary of the United States from the Red River to the Arkansas. The most that the memorial claimed as to the tract west of the one hundredth meridian was that the treaty of 1820 had ceded it, and that it had been wrongfully ceded to Spain in 1821. That the committee should have erred so grossly as to state, in the very first sentence of the report, that the Government had in 1842 issued a patent for "not less than 2,000,000 acres, and may be much more," west of the one hundredth meridian, i. e., outside the limits of the United States, is a significant comment on the spirit as well as the diligence with which the report was made. After that error nothing else could cause surprise.

The report contained a communication from the Acting Commissioner of Indian Affairs, who admitted that

the claim of the Choctaws and Chickasaws might be open to some question, but on the whole decided in its favor, except that he held that the $800,000 paid for the lease, and so much of the principal and interest of the $300,000 as had been paid, should be deducted. He also held the memorial to be premature, no movement to dispose of the leased district having yet been made. He failed to call attention to any of the misstatements of the memorial. On the whole, this communication, as well as the committee's report, might fairly be regarded as a brief in support of the claim.

The Senate document (Mis. Doc. 107, Fifty-first Congress, first session) contained the petition of the Chickasaws, with a brief in support thereof drawn by their present counsel. Both petition and brief laid great stress on the original cession of land west of the one hundredth meridian to the Choctaws, and of the relinquishment of the claim for that land being the exclusive matter for which the $800,000 were paid under the treaty of 1855. One statement of the petition merits special attention, viz:

> By the same treaty [of 1820] the United States ceded and conveyed to the Choctaw Nation, in exchange, a territory west of the Mississippi. * * * The land so conveyed west of the ninety-eighth meridian was bounded on the north by the Canadian River, on the east by the ninety-eighth meridian of west longitude, on the south by the Red River, *and on the west by a straight line drawn from the source of the Red River, in a northwesterly course, to the point where the Canadian River crossed the one hundred and third meridian of west longitude.*

This complete alteration of the language of the treaty—substituting the source of the Red River for the supposed source of the Canadian as the point where the line should be drawn for the western boundary, and running that line northwestwardly to where the Canadian crossed the one hundred and third meridian—is most significant as showing a complete misapprehension of what was really ceded by the treaty of 1820.

These two documents clearly show that the arguments presented to Congress in 1890–91 in support of the Choctaw and Chickasaw claim were based upon an erroneous construction of the treaty of 1820, and, consequently, of that of 1855, while the bearing of the stipulations of 1865 upon the treaty of 1866 was also erroneously stated. Hence the action of Congress in making the appropriation of March 3, 1891, was manifestly due to misinformation, and in no way constitutes a precedent to be followed. In connection with that action, however, the court below points out (Rec., 411) that the next Congress did not disturb what had been done, in spite of the President's message on the subject. That matter may, therefore, be briefly reviewed.

On February 18, 1892, the President sent to Congress a message in regard to the appropriation of 1891, saying:

> If this section had been submitted to me as a separate measure, especially during the closing hours of the session, I should have disapproved it; but as the Congress was then in its last hours, a disapproval of the general Indian appropriation bill, of which it was a part, would have resulted in consequences so far-reaching and disastrous that I felt it my duty to approve the bill.

he message stated that the Choctaw agents were to
e received 25 per cent of the amount appropriated for
tribe, and that although that agreement had been
ified the tribe should be protected against extortion;
t the President, "after a somewhat careful examina-
of the question," did not believe that the Cheyenne
Arapahoe Reservation, in the leased district, had been
ded in trust," as stated in the act, and that, at all
nts, a considerable proportion of the $800,000 paid
der the treaty of 1855 should have been deducted.
n. Ex. Doc. No. 42, Fifty-second Congress, first ses-
n.) This message bore fruit the following year in
e proviso to the joint resolution of January 18, 1893
7 Stats., 753), and also three years later, when the pres-
t claim was referred to this court for decision instead
being met by an appropriation, as in the case of the
aim for the Cheyenne and Arapahoe Reservation. The
propriation for that claim, however, had been made
d could not be unmade, except presumably for fraud,
r such mistake as would virtually have the effect of
raud, and nothing of that sort was set up by the mes-
age. It is not surprising, therefore, that the message
id not affect the payment of the appropriation.

The message led, however, to further memorials from
he Choctaws (Sen. Mis. Doc. No. 95, Fifty-second Con-
gress, first session) and the Chickasaws (Sen. Mis. Doc.
No. 82, same session), and to reports upon the message
and memorials in both Houses of Congress. The memo-
rials contained all the erroneous statements of the prior
memorials, as did also the reports. The Senate report
(Sen. Rep. No. 552, Fifty-second Congress, first session)

relies at the start on the mistaken theory that the treaty of 1820 ceded to the Choctaws a large tract west of the one hundredth meridian, which was subsequently ceded to Spain, and that the $800,000 was paid in 1855 for the relinquishment of the Choctaws' claim for that tract and not for the lease. It is also significant that the report purports to take its statement of the stipulations presented at the Fort Smith council from "a report made to Congress in this case by the Indian Office September 13, 1890" (the report is given in full in House Report No. 3147, Fifty-first Congress, first session, at pages 6 to 15); but, instead of quoting the fifth stipulation correctly, gives it in the altered form in which it appears in all the Choctaw and Chickasaw memorials, the inaccuracies of which have already been referred to.

The House report (House Rep. No. 1661, Fifty-second Congress, first session) can not claim even the merit of colorable originality, being word for word the Senate report over again, excepting only that, having been presented two months later, it referred to the opening of the Cheyenne and Arapahoe lands to settlement as an accomplished fact, and that it omitted the reference to Mr. Cannon's and Secretary Noble's statements. (Sen. Rep., p. 28.) Both reports conclude by recommending the adoption of a resolution that "for reasons set forth in the report * * * it is the opinion of the Senate ["House of Representatives," in the House report] that there is no sufficient reason for interference in the due execution of the law referred to," i. e., the appropriation of March 3, 1891. Both Houses ultimately adopted the resolution,

though with considerable dissent. In the Senate this was done May 9, 1892 (23 Cong. Rec., p. 4093), and in the House December 16, 1892 (24 Cong. Rec., p. 178).

Without going into every detail of the reports and memorials in regard to these claims, it may be said, in brief, that they show conclusively that Congress was misinformed as to the true boundaries of the cession to the Choctaws in 1820, and consequently as to the real object for which the $800,000 was paid under the treaty of 1855; so that, starting with mistaken ideas on these two points, Congress, in so far as it was influenced by these documents, easily fell into error as to the circumstances attending the cession of 1866, and the real effect of that cession. Based on erroneous premises, as they manifestly are, the conclusions stated in the reports can not carry the weight that would ordinarily attach to such documents. To whatever extent the members of either House of Congress really believed in the Choctaw and Chickasaw claims, they must have done so in consequence of what appeared in these documents, i. e., they must have been deceived by these documents. As a collective expression of the opinion of Congress in regard to the Choctaw and Chickasaw claims, therefore, the provision appropriating $2,991,450 in the act of 1891 carries no weight, either singly or in connection with the resolution in regard to the President's message, the appropriation being practically the enactment of the Senate alone, and of a misinformed Senate at that, while the adoption of the resolution, though the act of each body, may fairly be ascribed to the same misinformation. The court below

must, therefore, be regarded as in error in considering the action of Congress in 1891 as any reason whatever for concluding that the cession of 1866 was in trust.

(c.)

The third reason which the court below gives for its conclusion is that "so many things" were annexed to the cession, and that the terms of the treaty involve contradiction and inequality. The opinion says:

> Following the cession is a proviso relating to the disposition and uses of the fund. Then come numerous articles covering many subjects with much circumstantiality of detail. (Rec., 414.)

These articles are briefly referred to, after which the opinion goes on to say:

> Why *so many things* should be annexed to a simple cession of land, if the transfer was meant to become absolute, does not appear. * * * There is, at least, enough of *contradiction and inequality* to create the belief that as the parties did not see fit to make the cession for so much money to be paid and stop at that, something else was intended by one party or the other, or by both. (Rec., 415.)

This reason of the court below has already been considered somewhat, in the first part of this brief, in discussing whether there was anything in the treaty to warrant the court below in resorting to explanations and qualifications of the plain words of cession instead of taking them just as they stood. It was there shown that neither Articles X and XLV, nor Articles III and XLVI, nor any other part of the treaty, were at all inconsistent with

an absolute cession. That discussion was of course confined to what appeared on the face of the treaty itself; but if it be assumed that the court below may have been warranted in going behind the plain language of the treaty in its search for the true interpretation, something remains to be said in explanation of the provisions of Article III as to the control and disposition of the $300,000, so as to make it clear that they can not possibly affect the character of the cession. The Choctaws and Chickasaws had already been told that they must make a treaty containing, *inter alia*, substantially the following stipulation, the third of the series:

> 3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage and for their incorporation into the tribes *on an equal footing with the original members, or suitably provided for.*

It appears from Article III that the Choctaws and Chickasaws were to be more favorably treated, as regards the provision to be made for the freedmen, than were the Creeks, Cherokees, and Seminoles. These latter were required by their treaties to admit their freedmen to "all the rights," both property and political, of the native citizens of the tribes. In their case "incorporation into the tribes on an equal footing with the original members" was to be literally required. The Choctaws and Chickasaws, on the other hand, were not required to receive the freedmen into their tribes unless they chose to. If they did so choose, they were not required to grant them equal

property rights with themselves, but only to give them 40 acres apiece; while, if they preferred not to admit them to tribal membership, the United States was to remove the freedmen, who in that event would receive no land at all, but only the $300,000 (the consideration for the cession of the leased district). If the Choctaws and Chickasaws admitted the freedmen to citizenship, any individuals of the latter who preferred to remove were to receive $100 apiece out of the $300,000, instead of any share in the tribal rights or property.

This arrangement made the burden of the third stipulation proportionately lighter for the Choctaws and Chickasaws than for any of the other tribes, and there is no reason to suppose that the terms would have differed had the United States held no "lease" of any part of the Choctaw and Chickasaw land, and had the latter made no cession of any land whatever. Had there been no money coming to them from the United States on account of a cession, any money provision that would have had to be made for the freedmen would have been made out of the annuity moneys in the hands of the United States, and this whether the amount to be paid the freedmen was the full sum of $300,000, received in lieu of all other property and rights, or $100 apiece for such individuals as preferred not to become Choctaw or Chickasaw citizens. It could have made no possible difference in the terms whether the money came from one fund or another—from the sale of property or from annuities. It had to be the money of the Choctaws and Chickasaws, as they, not the United States, were the parties called upon to provide "suitably" for their freedmen.

It is manifest, therefore, that while the fact that the United States was to have in its hands a particular fund of $300,000, belonging to the Choctaws and Chickasaws, made it convenient to use this particular fund for carrying out the arrangement made with them in pursuance of the third stipulation, this had absolutely nothing to do with the source whence this fund was derived, or with the character of the interest acquired by the United States under the cession for which the fund was the consideration. The reasons for applying the fund in this particular way were precisely the same whether the cession was absolute or in trust.

The discussion of the effect of the provision in regard to the fund realized from the cession can not be completed without alluding to what the court below says in another part of the opinion, as follows:

> Stripped of all technical considerations, the practical effect of the claim for the absoluteness of the cession is such as to involve the taking by the white man, for a consideration to be applied to the benefit of the black man, some millions of acres of land belonging to the red man; the transfer so operating as to enable the whites to keep the land and the red people to get the consideration only by surrendering its equivalent to the blacks. That the Government took the ceded land followed by some sort of a use in the grant in those making the cession seems probable, unless the intention existed to wrong the grantors, and that we can not any more believe than we can to entertain the suggestion that it was the policy of the United States to take this land from the claimants because of their participation in the rebellion. (Rec., 420.)

It is submitted that this is wholly erroneous. Aside from the important fact, wholly omitted in this statement, that the Government already possessed, as against the Choctaws and Chickasaws, a very large and potentially exclusive interest in this land, it is indisputable that the Choctaws and Chickasaws were required, under the fourth stipulation, to make a suitable provision for their freedmen, 8,000 or more in number, the money value of which provision, if made in land, would probably considerably exceed $300,000. They would have had to do this, even if the "leased district" had not been ceded at all, so that the fact that they were to "get the consideration" for the cession "only by surrendering its equivalent to the blacks" did not impose any additional burden upon them, nor involve the probability of any "use in the grant in those making the cession, unless an intention existed to wrong the grantors."

(d.)

The fourth reason given for the conclusion of the court below is that the fifth stipulation called for a setting apart of land "for the friendly tribes now in Kansas and elsewhere," and that no such setting apart is provided for in the treaty outside of Article III, so that "the fifth stipulation is either implied from the language of the third article or omitted altogether from the treaty." (Rec., 418.)

The fifth stipulation is as follows:

> A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be

agreed upon by the parties and approved by the Government, or such as may be fixed by the Government.

These words are very important, as they have frequently been misquoted, and it was insisted in the court below that the misquotation was the correct version. The only lands referred to were such as were already "occupied" by the tribes who were to make the treaties, and nothing was said about a purchase of the lands, which were merely required to be "set apart," "on such terms as may be agreed upon by the parties," i. e., by the tribes who owned and occupied them and the tribes for whom they were to be set apart. These terms were to be approved by the Government, and in case of need fixed by it, if "the parties" failed to agree. There is not one word to indicate a purchase by the Government. If the "terms" involved a purchase in any instance, as was possible, such purchase was manifestly to be made by "the friendly tribes in Kansas and elsewhere," not by the United States. It might fix the terms, and, as treasurer of the tribes, pay over the money in the event of a purchase, but it was not the purchaser.

In the treaty proposed in 1865 this stipulation was incorporated in the following form:

> ART. 4. The Choctaw and Chickasaw tribes of Indians hereby agree to open their country to the settlement of friendly Indians from Kansas and elsewhere, upon such terms as may hereafter be agreed upon by the respective parties and approved by the Government, and the Government may settle such

friendly Indians on a portion of said territory *east of the ninety-eighth degree of west longitude*, not necessary for the use of said Choctaw and Chickasaw tribes, as it may desire, not exceeding one-third of the whole remaining territory, for a fair and equitable consideration, to be fixed by the Government. (Rec., 453.)

The right to use the "leased district" for the settlement of any Indian tribes or bands without restriction was provided for at the same time in another section, but even if the proposed treaty had been silent as to the "leased district," it would still have been clear that, according to that treaty, the fifth stipulation was not to be carried out in that district, but in the "territory east of the ninety-eighth degree of west longitude."

To anyone bearing in mind the language and evident meaning of the fifth stipulation, as well as what had been proposed in 1865, the embodiment of the stipulation in the following articles of the treaty of 1866 becomes apparent:

ARTICLE XXX. The Choctaw and Chickasaw nations will receive into their respective districts east of the ninety-eighth degree of west longitude, in the proportion of one-fourth in the Chickasaw and three-fourths in the Choctaw Nation, civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory, not exceeding ten thousand in number, who shall have in the Choctaw and Chickasaw nations, respectively, the same rights as the Choctaws and Chickasaws, of whom they shall be the fellow-citizens, * * * and among others the right to select land as herein provided for Choctaws and Chickasaws [i. e., one quarter section for

each person, male or female, adult or minor, in severalty, see Articles XV, XXXIII]. * * *

ARTICLE XXXI. And whereas some time must necessarily elapse before the surveys, maps, and selections herein provided for can be completed so as to permit the said Kansas Indians to make their selections in their order, during which time the United States may desire to remove the said Indians from their present abiding places, it is hereby agreed that the said Indians may at once come into the said Choctaw and Chickasaw nations, settling themselves temporarily as citizens of the said nations, respectively, upon such land as suits them and is not already occupied.

ARTICLE XXXVII. In consideration of the right of selection heretofore accorded to certain Indians other than the Choctaws and Chickasaws, the United States agree to pay to the Choctaw and Chickasaw nations, out of the funds of Indians removing into said nations, respectively, under the provisions of this treaty, such sum as may be fixed by the legislatures of said nations, not exceeding one dollar per acre, to be divided between the said nations in the proportion of one-fourth to the Chickasaw Nation and three-fourths to the Choctaw Nation. * * * (14 Stats., 777, 778.)

These provisions cover, but with greater particularity of detail, precisely what was covered by the proposed treaty of 1865 in its fourth article. The phrase "civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory," is obviously equivalent to the words of the fifth stipulation, "the friendly tribes in Kansas and elsewhere," the words "known by the general name

of the Kansas Indians" excluding the idea of any limitation to the tribes actually residing in Kansas, and the civilized Indians to the north of the Indian Territory being the only ones who could be described as friendly to those within that Territory. Practically it may be said that the tribes referred to were those within what was called the Central Superintendency, the office of which was at Atchison, Kans., or at least to the civilized tribes within that superintendency, which at that time included the Shawnees, Kickapoos, Miamis, Kaskaskias, Weas, Peorias and Piankeshaws, Kansas, Ottawas, Sacs and Foxes, Chippewas, Delawares, Wyandots, and Pottawatomies. The Pawnees, Otoes and Missourias, and Iowas until recently within that superintendency were probably also referred to. (See House Ex. Doc. No. 1, Thirty-ninth Congress, first session, p. 543.)

It is needless to say that the Indians referred to in Article XXX did not include the Wichitas and affiliated bands, they not being "Indians to the north of the Indian Territory," but having merely taken refuge temporarily in Kansas, whence they returned in 1865.

To limit to 10,000 the number of the Indians to be received was certainly not unreasonable, some limit being manifestly needed, and it is clear that Articles XXX, XXXI, and XXXVII, which constituted an agreement to set apart a portion, up to 1,600,000 acres, of "the lands hitherto owned and occupied by" the Choctaws and Chickasaws, the "terms" being fixed at $1 an acre, were a full embodiment of the fifth stipulation.

The opinion of the court below, however, is that "the fifth stipulation meant *tribal* occupancy, and a future

agreement with reference to this kind of an occupancy, and there is no such agreement to be found in article 30." (Rec., 417.) In insisting that a stipulation to set apart land "for the friendly tribes now in Kansas and elsewhere" means that the Indians who should settle on the land set apart should retain their own separate tribal organization and not be received into the Choctaw and Chickasaw tribes, the learned judge overlooks two things, first, that the stipulations were not final statements of precisely what the provisions of the treaties were to be, but were to be "substantially" contained in them (and that this substantial embodiment might permit a considerable departure from the strict language of the stipulations has already been seen in regard to the fourth one), so that the stipulation as to land for Indian tribes does not necessarily mean that their particular tribal organizations were to be retained, and, second, that the fourth article of the proposed treaty of 1865, the article which manifestly embodied the fifth stipulation, did not use the words "tribes," but spoke of "the settlement of friendly Indians from Kansas and elsewhere," an expression which would cover any kind of settlement, including incorporation into the tribes whose country was opened to such settlement. This objection to regarding Articles XXX, XXXI, and XXXVII as the embodiment of the fifth stipulation can not, therefore, be sustained.

The opinion also objects that as the fifth stipulation speaks of "friendly tribes now in Kansas and elsewhere" it can not be embodied in Article XXX, which provides

for "civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory." Again, the learned judge has forgotten that the stipulations were to be embodied "substantially," and not word for word. The expression, "Kansas and elsewhere," certainly includes "to the north of the Indian Territory," and Article XXX further describes the Indians who are to be settled as "known by the general name of the Kansas Indians," a description clearly within the application of the fifth stipulation. The objection amounts to this, that the Indians mentioned in Article XXX are only a portion of those mentioned in the fifth stipulation; but as the fifth stipulation applied to the land of other tribes besides the Choctaws and Chickasaws, it was perfectly reasonable to define in some measure the extent to which that stipulation was to be carried out in the case of these two particular tribes.

The opinion further objects that the settlement provided for in Article XXX is connected with a scheme for a survey of the lands of the Choctaws and Chickasaws, and their division in severalty, the adoption of which scheme was dependent on the will of the Choctaw and Chickasaw legislatures, as provided in Article XI, and that the fifth stipulation did not contemplate giving the tribes whose land was to be set apart any right to decide whether or not this should be done. It is submitted that a careful perusal of the treaty will show that this objection can not be sustained.

It is true that by Article XI the proposed survey and division of the land in severalty was not to take place

unless the legislative councils of the Choctaw and Chickasaw nations agreed, and that the right of selecting lands in severalty, secured to the Kansas Indians under Article XXX, was necessarily dependent on the action of those councils, but the right of these Indians to be received into the country and to settle down there was absolute, whether the councils agreed to the proposed plan or not, as the following provisions show:

ARTICLE XXX. The Choctaw and Chickasaw nations *will receive* into their respective districts east of the ninety-eighth degree of west longitude, in the proportion of one-fourth in the Chickasaw and three-fourths in the Choctaw Nation, civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory, not exceeding ten thousand in number, who shall have in the Choctaw and Chickasaw nations, respectively, the same rights as the Choctaws and Chickasaws, of whom they shall be the fellow citizens, * * * and among others the right to select land as herein provided for Choctaws and Chickasaws. * * *

ARTICLE XXXI. And whereas some time must necessarily elapse before the surveys, maps, and selections herein provided for can be completed so as to permit the said Kansas Indians to make their selections in their order, during which time the United States may desire to remove the said Indians from their present abiding places, it is hereby agreed that the said Indians may *at once* come into the said Choctaw and Chickasaw nations, settling themselves temporarily as citizens of the said nations, respectively, upon such land as suits them and is not already occupied.

The words "will receive," in Article XXX, involve a positive declaration of readiness to do a certain thing in the future, a positive agreement to receive these Indians whenever the United States should send them there, whatever the legislative councils may decide as to the plan for dividing the land. Could there be any possible doubt as to this, the words "at once" in Article XXI would remove the doubt. The Kansas Indians were (subject to the control of the United States, of course) to be received into the Choctaw and Chickasaw districts at once, and to settle themselves as citizens upon such land as suited them and was not already occupied. The United States was free to decide when it would send the Kansas Indians there, or whether it would in the end send them there at all, but it clearly had a right to do so "at once," upon the final ratification and proclamation of the treaty, without waiting for the legislative councils to act on the proposed plan.

Seeing, then, that the Kansas Indians could have been brought into the Choctaw and Chickasaw country before the legislative councils acted, there is no warrant for saying that the right to bring them there was in any way dependent on the action of those councils. The right to select land in severalty was so dependent, but not that of settling on the land as citizens. Presumably the United States commissioners had been assured that the legislative councils would approve the plan proposed, as otherwise it would not have been covered by the treaty at all, but whatever the degree of confidence with which they expected its adoption, they certainly did not make the

admission of the Kansas Indians dependent on such adoption.

The fact that no Kansas Indians ever were settled among the Choctaws and Chickasaws, in accordance with the fifth stipulation and Articles XXX, XXXI, and XXXVII can not be taken to show that such settlement was to be dependent on the adoption of the scheme for dividing the land in severalty. It shows that the Government ultimately found that it had enough other land at its disposal whereon to place the Kansas Indians, for certainly none of them were ever left waiting to make their settlements until such time as the scheme would be adopted. Speculations may differ as to just why no Indian settlement ever took place under Articles XXX, XXXI, and XXXVII, but when the matter is properly looked into, the fact that those articles were incorporated into the treaty in pursuance of the fifth stipulation presented at Fort Smith, does not seem to admit of a doubt.

After stating that "for the reasons set forth, articles 30, 31, and 37 do not satisfy the requirements of the ultimatum presented at Fort Smith," the opinion goes on to say:

> The fifth stipulation is implied from the language of the cession, because as to the land west of the ninety-eighth degree it was to be set apart and presumably conveyed to carry out the purpose resting unmistakably in writing in the statement [i. e., the seven stipulations] of the president of the council at Fort Smith, and in the unsigned treaty offered by the commissioners of the United States before the adjournment of the council. If the purpose of the cession was not explicitly stated in the treaty the conditions were present upon which it was demanded

> and acceded to, and having been acted on under these circumstances the cession and the demand for it must be construed together as the thing the parties intended to consummate. (Rec., 419.)

This reference to the unsigned treaty, as showing that "the fifth stipulation is implied from the language of the cession" in Article III of the treaty of 1866 evidently shows that the learned judge forgot all about the fourth article of the unsigned treaty, a fact which appears also from another part of the opinion, as follows:

> There is nothing in the record to indicate that the Choctaws and Chickasaws had any information as to the purpose of the Government *except as embraced in the fifth proposition and the fifth article* of the unsigned treaty submitted at Fort Smith. These gave the Indians to understand that the purpose was only to extend the rights of the United States in the land beyond the treaty of 1855, and this purpose was also understood by the United States. (Rec., 403.)

As the *fourth* article of the unsigned treaty clearly and unequivocally embodies the fifth stipulation, using even some of the identical language, while the fifth article merely frees the use of the "leased district" from certain restrictions, and this without any consideration whatever, this statement of the learned judge is clearly erroneous. The unsigned treaty shows, as clearly as anything written can show, that the purpose of the Government in 1865 was to apply the fifth stipulation to "a portion of" the Choctaw and Chickasaw territory "east of the ninety-eighth degree of west longitude, not necessary for the use of said Choctaw and Chickasaw tribes," and to do

this "for a fair and equitable consideration, to be fixed by the Government," while the "restriction as to the character of the tribes" who could be settled on the "leased district" was to be done away with, this modification of the terms of the lease being something wholly outside of the "demand" of the fifth stipulation, and being without the fragment of any further consideration, apparently because it was in no way injurious to the Choctaws and Chickasaws.

The learned judge's idea of the connection between the fifth stipulation and the cession of the "leased district," therefore, being manifestly due to his overlooking the fourth article of the unsigned treaty, must be regarded as wholly erroneous, and the conclusion must be that the court below has erred in supposing that the fifth stipulation was not substantially embodied in Articles XXX, XXXI, and XXXVII.

(e.)

The fifth reason of the court below for holding that the "leased district" was ceded in trust is stated as follows:

> The theory that the cession became absolute involves the United States in the plan of deliberately abandoning the original lease of the ceded territory. By that lease the Government already had all the rights it wanted in the land except the privilege of putting Indians there not named in the lease. The effect of the abandonment of the lease would include an abandonment of the very purpose for which the lease was taken, for if the leased land was to become a part of the public domain it ceased to be Indian country. Every stipulation that the country should

be kept intact as Indian country would thus be violated as well as every policy of the Government reversed. (Rec., 421–422.)

It is submitted that the mere fact that an absolute cession entitled the United States, as far as concerned the Choctaws and Chickasaws, to cease using the district for Indian settlement, does not warrant the inference that in 1866 the United States had any intention of ceasing so to use it. As regards the Wichita and affiliated bands, the Government was bound to continue such use of the district. Those Indians had already been settled in the district, and although the rebellious Choctaws and Chickasaws had driven them north into Kansas, they had a right to return and remain permanently, or until some other equally just arrangement should be made with them. That the country was not already filled up with other Indian tribes was, like the expulsion of the Wichitas, a result of the rebellion of the Choctaws and Chickasaws, which had prevented the Government from carrying out its policy under the lease, but the Government had still every motive for continuing to use the land in the manner originally intended, but without any restrictions or limitations in favor of the Choctaws and Chickasaws. There can be no possible doubt that in 1866, and until recently, this whole district has been more fit for Indian settlement than for any other purpose, especially in view of the Government's settled policy of keeping Indians on reservations in the Indian country and of keeping white settlers out of those reservations; a policy which has only within the last few years been supplanted on any extensive scale by the other and more-advanced policy

of distributing a portion of Indian land in severalty, with restrictions on alienation, and of selling the balance for the benefit of the Indians. The absolute purchase of the leased district, the extinguishment of the remaining interest of the Choctaws and Chickasaws therein, was not an abandonment, but an extension "of the very purpose for which the lease was taken." By such purchase the Choctaw and Chickasaw right of settlement was terminated, so that thereafter the land could be used exclusively for such Indians as the Government should see fit to settle upon it, and whenever the policy of maintaining Indian reservations should come to an end the Government should be entitled to dispose of the land as best suited its own interests and those of the Indians settled thereon, without any interference by the Choctaws and Chickasaws or accountability to them. Accordingly the United States ultimately established three reservations (one for the Cheyennes and Arapahoes, another for the Kiowas, Comanches, and Apaches, and a third for the Wichita and affiliated bands), which together covered the entire "leased district," except the portion claimed by Texas and know as Greer County. But for the accident of the dispute over the title to Greer County, it also would certainly have been used as an Indian reservation, its location being favorable for carrying out the policy of concentrating the reservations, as far as practicable, into one Indian country, rather than scattering them through the regions opened to white settlement.

In the portion of the opinion last above quoted the learned judge appears to think that if the Government substituted an out-and-out purchase for a lease, it would

necessarily have ceased to use the land for Indian purposes, and have made it "part of the public domain," i. e., open to white settlement. He gives no reason why a continued use of this land for settlement by such Indians as the Government might wish to place there (a use begun in 1859 and only interrupted by the rebellion of the Choctaws and Chickasaws) should be inconsistent with the extinguishment of all right, title, and interest therein on the part of *other* Indians, for whose settlement it was *not* desired to use the land, and it is submitted that no valid reason can be given. In fact, it is safe to say that any man of ordinary intelligence would hold that if the Government wished to use any land for Indian settlement, the only wise course for it to pursue would be first to extinguish all outstanding titles to it (just as it extinguished the Quapaw title in 1818, before ceding to the Choctaws the land which it gave them in 1820) in order that in future it would only have to deal with the actual occupants of the land, and would not have to reconcile the conflicting interests of such occupants and outsiders. For the purpose of Indian settlement an absolute cession, as, it is submitted, the cession of 1866 was, extinguishing all claim of the Choctaws and Chickasaws to the land, was a most sensible and businesslike substitute for the rather indefinite "lease" of 1855.

The suggestion of the learned judge that "every stipulation that the country should be kept intact as Indian country would thus [i. e., if the cession were absolute] be violated," is, it is submitted, merely begging the

question. Under Articles X and XLV the stipulations of former treaties were renewed only "in so far as they are consistent with the provisions of" the treaty of 1866. Prior stipulations for the permanent retention of the country as Indian country were clearly inconsistent with an absolute cession, and, as to the land so ceded, could no longer be invoked by the Choctaws and Chickasaws, even though the United States might see fit to retain the land as Indian country for an indefinite time. If these stipulations continued to apply to the "leased district," this could only have been *because* the cession was not absolute, but the character of the cession is the very matter in dispute.

As to Article XLIII, it provides that no white person, with certain exceptions, "shall be permitted to go into *said territory*," unless he be a formally naturalized Choctaw or Chickasaw. The provision is obviously limited to "said territory," and the meaning of this term is made clear by referring to the prior sections of the treaty. The "territory" referred to must be the same as is referred to in Article XLII in the words "their limits," i. e., those of the Choctaw and Chickasaw nations; and in Article XXXIX in the words "the Choctaw or Chickasaw country." It is beyond dispute that these words in Articles XXXIX and XLII refer to the country east of the ninety-eighth meridian, and not to the "leased district," and the same must be true of the words "said territory" in Article XLIII. The United States agreed that white men should not go into the Choctaw and Chickasaw territory, but made no such agreement in this

treaty of 1866, as regards the "leased district." In Article II of the Kiowa and Comanche treaty of October 21, 1867 (15 Stat., 582), there is precisely such an agreement as to so much of what had been the "leased district" as was then given to the Kiowas, Comanches, and Apaches for a reservation, as appears from the following:

> And the United States now solemnly agrees that no persons except those herein authorized to do so, and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservation in discharge of duties enjoined by law, shall be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation, for the use of said Indians.

Now, if the United States was already bound, under Article XLIII of the Choctaw and Chickasaw treaty of 1866, to keep unauthorized persons off the district in which this reservation was located, the above agreement was useless; but as the treaty-making power can not be presumed to have entered into useless agreements, the inference must be that it was then believed that Article XLIII of the treaty of 1866 had no reference to this district.

It is to be observed that the Government's acquisition of an absolute title to this land as against the Choctaws and Chickasaws did not make it public land subject to entry under the preemption law, because the Wichita and affiliated bands still had a title to a part of it in consequence of their settlement there in 1859, while, as a

matter of fact, the whole district was still reserved for Indian purposes. The preemption laws in force in 1866 granted the right of entry subject to "conditions, restrictions, and stipulations." (See act of June 2, 1862, § 1, 12 Stats., 413.) By the treaty of 1855 the United States had acquired the right to use the "leased district" for Indian settlement, and this right of the United States having once come into existence, could not be destroyed by mere acquisition by the United States of an absolute title. The act of September 4, 1841, section 10 (5 Stats., 456), excepts from liability to preemption all "lands included in any reservation by any treaty, law, or proclamation of the President of the United States, or reserved for salines or for other purposes," and this provision is among the "conditions, restrictions, and stipulations" to which the right of preemption was subject by the act of June 2, 1862. (12 Stats., 413.) This broad language clearly covers the case of the "leased district." After the cession of the remaining interest of the Choctaws and Chickasaws in the land, it continued to be, as it had been before, reserved for Indian settlement, and it could not become the subject of preemption until such time as the Government might cease to so reserve it.

Moreover, in addition to the specific appropriation of a portion of the district for the settlement of the Wichita and affiliated bands, the whole district had been appropriated to the use and occupation of the Comanches and Kiowas by the treaty of October 18, 1865, proclaimed May 26, 1866, a month and a half before the Choctaw and Chickasaw treaty of 1866 was proclaimed.

By the Comanche and Kiowa treaty (14 Stats., 717) the bounds of the reservation granted to those Indians were subject to future change by the President, and it was ultimately very much contracted by the treaty of October 21, 1867 (15 Stats., 581), but the existence of that treaty of 1865, apart from anything else, sufficiently explains why acquisition of an absolute title by the United States in 1866 did not subject the "leased district" to the right of preemption.

In this connection it may be well to notice another part of the opinion, where it is said:

> There is no evidence that it was the understanding that white people were to be excluded merely from the home country of the Choctaws and Chickasaws. What evidence we have points to the conclusion that the parties supposed the guaranty on this subject related to the exclusion of the whites from all Choctaw and Chickasaw territory. The unsigned treaty asked for a modification of the terms of the ninth article of the treaty of 1855, under which Indians were admitted and whites excluded. The modification sought the admission of other Indians only. Everything suggested in the negotiations related to the freedmen who happened to be in the country and to Indians who did not happen to be there; but all propositions were in line with previous treaties, which guaranteed the exclusion of white men and white men's government, with absolutely nothing to apprise the Choctaws and Chickasaws that the guaranties were meant for a part only of their territory. (Rec., 424.)

That the question of the admission of white men to the "leased district," whether immediately or in the

future, may not have been discussed in 1866 is possible, as the Government had no intention of admitting them *at that time;* but there is no evidence whatever pointing to the conclusion that the parties supposed that any of the guaranties of prior treaties would continue to relate to this district after its cession. The learned judge says that "all propositions were in line with previous treaties, which guaranteed the exclusion of white men and white men's government," and yet here we nave not merely a proposition, but a formal provision of the treaty, providing for an absolute cession, which was not at all in line with previous treaties, in that it terminated all the rights of the Choctaws and Chickasaws in regard to the district ceded, including the right to have white men excluded from it. He also speaks of "everything suggested in the negotiations." There is no evidence whatever as to what was suggested in the negotiations of 1866. The seven stipulations are a matter of record, and so are the negotiations of 1865, which did not go very far; but what took place in 1866 is not known, except from the results as they appear in the treaty. The greater part of the treaty is devoted to providing for the details of a system of government and land ownership not covered by the seven stipulations nor by the negotiations of 1865, and this being so, the fact that the cession of the "leased district," a matter which did not concern the other civilized tribes, was also outside of the stipulations and negotiations of 1865 need not cause surprise. The learned judge's idea that the treaty of 1866 was confined to the matters covered by those stipulations and negotiations is wholly without foundation in fact.

(f.)

The sixth reason of the court below for holding the cession to have been in trust relates to the treaties made about the same time with the Seminoles, Creeks, and Cherokees. The opinion says:

> That a use should have been retained to the Seminoles, the Creeks, and the Cherokees in the lands ceded by them while an implied trust did not result to the Choctaws and Chickasaws is incredible when we consider the purposes for which all the lands were wanted under the ultimatum addressed to all alike. (Rec., 421.)

If the Creek, Seminole, and Cherokee treaties, and what was done under them, be carefully studied, it will be seen that they furnish no warrant for concluding that the Choctaw and Chickasaw cession of the "leased district" was in trust. The cessions made by the Creeks and Seminoles were expressly stated to be for the settlement of Indians and freedmen, and although the effect of the language used was to create a quasi trust estate, and to entitle the Creeks and Seminoles to payment for so much of the land as was *not used for the purposes stated*, their reversionary rights were confined to that portion of the land. By the Cherokee treaty (Article XVI) there was no actual cession nor any trust, but future cessions to Indian tribes were provided for, and the United States ultimately bought outright the land which remained after such cessions occurred. These three treaties will be considered in succession.

The Creek treaty of June 14, 1866, provided as follows:

> ARTICLE III. In compliance with the desire of the United States to locate other Indians and freed-

men thereon, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain, * * * and in consideration of said cession of the west half of their lands, estimated to contain 3,250,560 acres, the United States agree to pay the sum of thirty (30) cents per acre, amounting to $975,168. (14 Stats., 786.)

The use of this land for Indian settlement was as follows:

	Acres.	Acres.
Assigned to Seminoles	200,000	
Assigned to Sacs and Foxes	479,668.05	
Assigned to Pawnees	53,005.94	
Total assigned lands		732,673.99
Partly appropriated to Indian uses:		
Cheyenne and Arapahoe Reservation	619,450.59	
Iowa Reservation	228,417.67	
Kickapoo Reservation	206,465.61	
Set apart for Pottawatomies	222,716.32	
Total so partly appropriated		1,277,050.19
Total assigned or partly appropriated		2,009,724.18
Leaving unassigned and unappropriated		1,392,704.70
Total land		3,402,428.88

Accordingly, the Creeks were paid 95 cents per acre (i. e., $1.25 less the 30 cents paid in 1866) for the 1,392,704.70 acres which had not been in any way used for the purposes for which the cession was expressly made, and 75 cents per acre for the 1,277,050.19 acres partly appropriated to Indian settlement, the reduction of 20 cents per acre being estimated as a fair value of such partial use, while for the land actually assigned to Indians for their settlement the Creeks received nothing, such assignment being in fulfillment of the purpose for which the

land had been ceded. (Sen. Ex. Doc. No. 98, Fifti Congress, second session.) The total amount paid w $2,280,857.10. (Act of March 1, 1889, 25 Stats., 75 see also document last cited.)

The Seminole treaty of March 21, 1866, provided follows:

> ARTICLE III. In compliance with the desire the United States to locate other Indians and free men thereon, the Seminoles cede and convey to th United States their entire domain, being * * In consideration of the said grant and cession their lands, estimated at 2,169,080 acres, the Unite States agree to pay said Seminole Nation the sum $325,362, said purchase being at the rate of fifte cents per acre. (14 Stats., 756.)

The words, "in compliance with the desire of th United States to locate other Indians and freedme thereon," clearly state the object of the cession, and ac cordingly a tract of 353,127.10 acres was assigned to th Pottawatomies and a tract of 1,189,194.15 acres to th Cheyennes and Arapahoes, leaving 495,093.37 acres un assigned. In point of fact, however, the Pottawatomie and Cheyennes and Arapahoes had been so well provide with land in addition to these tracts that but a smal portion of each tract could be regarded as having bee actually used "to locate other Indians thereon," withi the intent of the treaty. Accordingly when, in 1889 the Seminoles asked compensation for land not so used (Senate Ex. Doc. 122, 50th Congress, second session) th extent to which the land had been so used was computed as equivalent to 20 cents an acre on the whole assigned acreage, and the following settlement was made:

	Acres.
Acreage estimated in 1866	2,169,080
Actual acreage	2,037,414.62
Excess in estimate	131,666.38
1,542,321.25 acres, assigned to Indians, at 90 cents per acre	$1,388,089.12
495,093.37 acres wholly unappropriated to Indian uses, at $1.10 per acre	544,602.70
	1,932,691.82
Deduct cost of 131,666.38 acres, excess in estimate, at price paid in 1866	19,749.80
	1,912,942.02

Accordingly this amount was appropriated by the act of March 3, 1889, section 12 (25 Stats., 1004), and the United States acquired an absolute title as against the Seminoles.

The case of the Cherokee lands was different. Article XVI of the treaty of July 19, 1866 (14 Stats., 799), the only article which has anything to do with the present discussion, effected no cession of lands whatever, but merely provided that all or any portion of a certain district might thereafter be purchased for Indian tribes, and paid for by them, such purchases to be absolute, and not involving any trust for the Cherokees. The article reads as follows:

> ARTICLE XVI. The United States may settle friendly Indians in any part of the Cherokee country west of 90°, to be taken in a compact form in quantity not exceeding one hundred and sixty acres for each member of each of said tribes thus to be settled; the boundaries of each of said districts to

be distinctly marked, and the land conveyed in fee simple to each of said tribes to be held in common or by members in severalty as the United States may decide.

Such lands thus disposed of to be paid for to the Cherokee Nation at such price as may be agreed on between the said parties in interest, subject to the approval of the President; and if they should not agree then the price to be fixed by the President.

The Cherokee Nation to retain the right of possession of and jurisdiction over all of said country west of 96° of longitude until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied.[1]

Under the provisions of this article, the following purchases were made:

By the Osage and Kansas Indians, 1,570,196 acres, at 70 cents an acre, or in the aggregate $1,099,137.41 (Senate Ex. Doc. No. 56, Fifty-second Congress, first session, p. 13). This purchase was confirmed by the act of June 5, 1872 (17 Stats., 228).

By the Pawnees, a certain tract, the purchase of which was authorized by the act of April 10, 1876, section 4 (19 Stats., 29).

By the Poncas, a certain tract, under the authority of the act of May 27, 1878, section 1 (20 Stats., 76).

[1] Besides the land in Indian Territory west of the ninety-sixth meridian, the Cherokees had also land in Kansas, which, by Article XVII of the same treaty, was ceded and conveyed to the United States in trust to sell the same for the benefit of the Cherokees, the proceeds of all sales to be applied as provided in Article XXIII. The cession of these lands, however, being solely for sale as public lands, and not "for the friendly tribes in Kansas and elsewhere," had absolutely nothing to do with the fifth stipulation, which was embodied in Article XVI only.

By the Otoes and Missourias, a certain tract, under the authority of the act of March 3, 1881, section 5 (21 Stats., 380).

By the Tonkawas, a certain tract.

All of these purchases aggregated 2,121,928.80 acres, and the purchase money $1,827,526.87, but after they had all been made, 6,022,574.11 acres remained within the district mentioned in Article XVI of the Cherokee treaty of 1866, which 6,022,754.11 acres had not yet been sold by the Cherokees under that article. This unsold portion of the land was what the United States bought for about $8,300,000 under the act of March 3, 1893, section 10 (27 Stats., 640). The United States paid a little more than $1.25 per acre for this land, because the Indians demanded more, on the ground that they had not been paid enough by the tribes to whom the 2,121,928.80 acres had been sold, and this demand was yielded to in order to settle the matter. All this is clearly shown in Senate Executive Document No. 56, Fifty-second Congress, first session, page 13. The Cherokee treaty of 1866 had provided that after any of the land in question was sold to and occupied by other Indian tribes, the Cherokee "jurisdiction and right of possession [was] to terminate forever as to each of said districts thus sold and occupied," and this provision took effect as to such land. The United States afterwards bought outright the unsold balance, and paid an extra price for it to satisfy the Cherokees, who thought they had been cheated in the previous sales; but there was no trust in their favor to a single acre of this land, any more than there would have been in any land bought of

the Choctaws and Chickasaws under Article XXX of their treaty, had any purchases been made under that article.

It is therefore clear that the court below has erred in holding that what was done in the case of the Creeks, Seminoles, and Cherokees has any bearing on the character of the cession of the "leased district." The Creeks and Seminoles sold to the United States in 1866, for a small price, certain lands to which they had an absolute title, saving only the reversionary rights of the United States, and this sale was expressly made for a certain definite purpose. No further compensation was ever claimed by or paid to the Creeks and Seminoles on account of such part of the land as was actually used for this purpose, but the balance of the land, not having been so used, was ultimately bought outright by the United States for the price at which public lands are ordinarily sold, less the amount originally paid. The Cherokees sold no land whatever to the United States in 1866, but agreed to sell any part of a certain portion of their country to other Indian tribes, and did ultimately so sell a certain quantity of the said land, for which they received nothing further, except as a gift from the United States, to compensate them for alleged unfair treatment in their bargains with the other Indian tribes. The United States ultimately bought from them the unsold part of this portion of their country. Such transactions can furnish no warrant for a claim by the Choctaws and Chickasaws for additional compensation on account of land in which, when ceded, their title was already subject to rights of permanent settlement by other Indians

who had been or should be placed there by the United States, and the cession of which land was absolute in terms.

(g.)

The seventh reason of the court below for holding that the cession was not in trust relates to certain supposed admissions to that effect on the part of the United States. These matters will now be referred to in chronological order, so as to present each matter in its proper relation to previous matters, although this order is not followed by the court below.

(1.) The Delaware treaty of July 4, 1866 (14 Stats., 793). The preamble to this treaty states that "the United States have, by treaties negotiated with the Choctaws and Chickasaws, with the Creeks, and with the Seminoles, Indian tribes residing in said Indian country, acquired the right to locate other Indian tribes within the limits of the same," and by Article IV "the United States agree to sell to the said Delaware Indians a tract of land ceded to the Government by the Choctaws and Chickasaws, the Creeks, or the Seminoles, or which may be ceded by the Cherokees in the Indian country." The court below holds that "this language implied that the Government got as much of a title from one tribe as from another, no more and no less, and all for the same purpose." (Rec., 424.)

It is indisputable that the language treats the several cessions of land alike as far as concerns the Delawares, or, in other words, that it implies that the United States can give them an equally valid title under any of the

cessions, but it by no means follows that the title of the United States was of precisely the same character under all of them. The Seminole and Creek treaties (14 Stats., 755, 785), which have already been considered above, ceded land expressly for Indian settlement, and under them the United States could undoubtedly make the contemplated sale to the Delawares. It could do the same as to any part of the district ceded by the Choctaws and Chickasaws (except, of course, the land already assigned to the Wichita and affiliated bands, which land could not justly be taken away from them without their consent) whether that district had been ceded absolutely or for a special purpose. As far as concerned the power to grant lands to the Delawares, the rights of the Government under the Creek, Seminole, and Choctaw and Chickasaw treaties were equal; and this is in no way inconsistent with the fact that the Government's rights in the land ceded by the Choctaws and Chickasaws were such as to permit of its doing (if it preferred) something else with the land which it could not do with that ceded by the Creeks and the Seminoles.

It is to be observed that Article IV of the Delaware treaty refers to an expected cession by the Cherokees, whose treaty (14 Stats., 799) was made fifteen days later, and had presumably been already drafted, so that its provisions must have been known to the commissioners who executed the Delaware treaty, as also to the Senate, who had the two treaties before it at the same time. If the reasoning of the court below be correct, the Government's title under the Cherokee treaty must have been

the same as under the Creek and Seminole treaties, whereas in point of fact the United States had no title to lands whatever under the Cherokee treaty, but merely a right to settle friendly Indians in the Cherokee country, and whatever cession might take place would really be made to such Indians and not to the United States. This shows that the mere fact that the Delawares might have received Creek, Seminole, Cherokee, or Choctaw and Chickasaw land does not mean that the United States had precisely the same title to such land in the case of one tribe as in that of another.

(2.) The acts in regard to the further colonization of Indians in the Indian Territory. The opinion (Rec., 424) refers to a supposed general act on this subject passed in 1871, but it is submitted that no such act was passed. What the learned judge had in mind was, doubtless, certain provisions forbidding certain specified tribes whose presence in the Indian Territory would, for special reasons, have been undesirable, to be placed there by Executive action (act of February 28, 1877, as to the Sioux and Northern Cheyennes and Arapahoes, 19 Stats., 254; act of February 17, 1879, § 1, in regard to the Indians of Arizona and New Mexico, 20 Stats., 313), but it is not apparent what bearing these special provisions as to particular tribes, applying equally to all the unoccupied portions of the Indian Territory, can have on the character of the cession of the "leased district," especially as at that time the only unoccupied part of the leased district was Greer County, which was supposed to be a part of Texas.

(3.) Secretary Schurz's communication of May 1, 1879. The material portions of this communication are as follows:

> * * * The title acquired by the Government, by the treaties of 1866, was secured in pursuance and furtherance of the same purpose of Indian settlement, which was the foundation of the original scheme. That purpose was the removal of Indian tribes from the limits of the political State and Territorial organizations, and their present permanent location upon other lands sufficient for the needs of each tribe. These lands being ample in area for the purpose, it has become a settled policy to locate other tribes thereon as fast as arrangements can be made; and provision has been constantly made, by treaties, agreements, and acts of Congress, to effect these objects.
>
> That purpose is expressly declared in the said treaties. The cessions of the Creeks and Seminoles are stated to have been made "in compliance with the desire of the United States to locate other Indians and freedmen thereon." These words must be held to create a trust equivalent to what would have been imposed had the language been "for the purpose of locating Indians and freedmen thereon."
>
> The lands ceded by the Choctaws and Chickasaws were, by article 9 of the treaty of June 22, 1855, "leased to the United States, * * * for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein." The treaty of 1866 substituted a direct purchase for the lease, but did not extinguish or alter the trust. (Sen. Ex. Doc. No. 20, Forty-fifth Congress, first session, p. 17.)

The court below relies on these statements as in support of its position, but is far from being satisfied with

hem. It complains that the concluding statement "is naccurate as a legal proposition;" that "Secretary Schurz eems to have confused the matter of an express trust with a trust implied in law." It concludes, however, that whatever he said he must have meant a trust "in favor of the Choctaws and Chickasaws, and in them alone," and not "for the benefit of other Indians who had no interest in the ceded territory." (Rec., 425.)

It is submitted that the confusion is in the mind of the learned judge. He is so convinced that the land was held in trust for the Choctaws and Chickasaws that he wholly loses sight of those who were in any event the real beneficiaries or *cestuis que trustent*, viz, the Indians who were or were to be settled on the land. Whatever view the Secretary may have had as to possible reversionary rights of the Choctaws and Chickasaws (as to which he is silent), one thing is clear, that when he spoke of a trust he meant a trust in favor of the Indians who were or might be placed on the land. He was writing about the purposes for which the United States then (in 1879) held the Indian Territory, and its duties toward the Indians then located therein, but not about the rights of the tribes from whom any portion of the Territory had been obtained. His reference to the "trust" on which the so-called "leased district" was held meant, in the first place, a trust for the benefit of the Wichitas and other tribes whom the United States had placed there prior to 1866, which trust arose from the fact that as the only right of the United States prior to 1866 to locate Indians in the leased district was acquired for their *permanent* settlement, the United States could not afterwards use its subsequently acquired absolute title in

order to dispossess them. Secondly, as to Indians settled on the land after the cession, the Secretary meant that such settlement had been practically a declaration of trust in their favor. They were given a right of permanent and exclusive settlement on so much of the land as was included in their respective reservations. Whether the Secretary also held that the Choctaws and Chickasaws had a reversionary interest in the land (a point on which he was silent) is purely a matter of speculation. If he did, then he had not studied out the matter carefully. He was not a party to the treaty of 1866, and his knowledge of its provisions was not acquired at the time it was made. To set up his supposed opinion, thought to be implied in a statement made thirteen years after the treaty, as evidence that a provision of the treaty meant something that it did not express, would be simply preposterous.

(4.) President Hayes's proclamation of February 12, 1880, in regard to the Indian Territory. (21 Stat., 798.) This stated the purposes for which the United States at that time held the Indian Territory, and that the lands were not open to settlement. It in no way undertook to define the rights either of the United States or the Indians in regard to the Territory or any portion of it. It is undeniable that the "leased district" was then held for Indian settlement, all of it being then used for the purpose except Greer County, which was supposed to belong to Texas, but this undeniable fact does not mean that any Indians had rights in the district except those settled thereon. The same remarks apply to President Arthur's proclamation of July 1, 1884. (23 Stat., 835.)

(5.) The report of the Acting Commissioner of the Land Office of April 25, 1881 (Sen. Ex. Doc. No. 111, Forty-seventh Congress, first session, p. 2–4), containing the following statements:

> The lands to which the United States holds the legal title within the Indian Territory are reserved lands by treaty stipulations and acts of Congress, and are not, and never have been, public lands subject to general occupation.
>
> * * * * *
>
> The treaties by which the United States reacquired title to any of the lands in the Indian Territory, or obtained the conditional right to control the disposal of any of said lands, were treaties with the Seminoles of March 21, 1866; with the Choctaws and Chickasaws of April 28, 1866; with the Creeks of June 14, 1866; and with the Cherokees of July 19, 1866.
>
> * * * * *
>
> The Choctaw and Chickasaw cession of April 28, 1866 (14th Stats., 769), was by the tenth section thereof made subject to the conditions of the compact of June 22, 1855 (11th Stat., 613), by the ninth article of which it was stipulated that the lands should be appropriated for the permanent settlement of such tribes or bands of Indians as the United States might desire to locate thereon.
>
> The lands embraced in the Choctaw and Chickasaw cession were also included in a definite district established by the stipulations of the treaty of 1855, pursuant to the act of Congress of May 28, 1830, the United States reengaging by the seventh article of said treaty to remove and keep out from that district all intruders.
>
> * * * * *

> The title of the United States to lands in the Indian Territory is, as heretofore shown, subject to specific trusts, and is not within the lawful power of either the legislative or executive departments of the Government to annihilate such trusts, or to avoid the obligations arising thereunder.
>
> Such trusts are for the benefit of Indian tribes and Indian freedmen.

As regards the statement that Article X of the treaty of 1866 subjected the cession of the previously leased district to the conditions of the compact of the treaty of 1855, it has been shown above that there is nothing in the language of that article to suggest any such effect, much less to require it; and the opinion of an officer of the Land Office, expressed fifteen years after the date of an Indian treaty, as to what had been intended by that treaty, does not seem entitled to any extraordinary weight. As to the statement that the lands were "subject to specific trusts," the Acting Commissioner was evidently considering exclusively the obligations to the Indians or Indian freedmen then occupying the land, and it does not appear that he meant to indicate that the Choctaws and Chickasaws retained any title to or interest in the leased district.

(6.) The statement of the Secretary of the Interior, February 14, 1884, that "those lands" (i. e., all the lands in the Indian Territory to which the United States had title) "were acquired * * * to be held for Indian purposes, and to some extent for the settlement of the former slaves of some of said nations." (Sen. Ex. Doc. No. 109, Forty-eighth Congress, first session, p. 1.) This relates merely to the objects which the

Government had in view in acquiring the lands in the Indian Territorry other than those occupied by the Five Civilized Tribes, and has no bearing whatever upon the consequences of a future change of policy as to the disposition of those lands.

(7.) The statements in the reports of Commissioner Price, of January 26, 1885 (Sen. Ex. Doc. No. 50, Forty-eighth Congress, second session, p. 20), and of Acting Commissioner Belt, of September 13, 1890, (H. Rept. No. 3147, Fifty-first Congress, first session). The former merely quotes Secretary Schurz's statement of May 1, 1879, which has already been referred to and explained above. The latter accompanied the Choctaw and Chickasaw memorial of 1890 (referred to above in connection with the act of March 3, 1891, § 15), but did not attempt to correct a single one of the many misstatements of that paper. Evidently the Acting Commissioner accepted all the promises of the memorial, without ever seeking to verify them, and was thus led to accept the conclusions also; yet even then his acquiescence was given hesitatingly, and against his better judgment, for he admitted that the cession of 1866 might, after all, have been intended to be absolute. Had he studied out the matter for himself, instead of accepting the memorial as gospel truth, he would probably have seen reason to believe that the words of cession meant just what they said, and did not need to be qualified or explained away.

(8.) The statement of Secretary Vilas, of February 18, 1889, in regard to the cession by the Seminoles. (Sen. Ex. Doc. No. 122, Fiftieth Congress, second session.) The Seminole treaty, as already shown above, expressly

recited the purpose of the cession, and to construe the cession as intended to be made for that purpose only, in other words, to give the recital the effect of a condition, was plainly in accordance with the rule requiring all parts of a treaty to be construed with reference to each other. The construction given to the Seminole cession is no precedent whatever for a construction of the cession of the "leased district," the latter having been made without any qualifying recital whatever.

The opinion of the court below undertakes to find in the various statements above quoted a "continuous executive and legislative construction" (the departmental construction being also found to be "nearly contemporaneous with the execution of the treaty itself") to the effect that the cession of the "leased district" in 1866 was in trust for the permanent settlement of the friendly tribes in Kansas and elsewhere, which construction is evidently regarded as of great weight in the interpretation of the language of the cession, so that the contrary opinion of Secretary Noble, that the cession "gave an absolute title to the United States" (letter of May 6, 1891, Sen. Ex. Doc. No. 42, Fifty-second Congress, first session, p. 18), may fairly be disregarded. It is submitted that these statements are very far from being as unequivocal and consistent as the opinion supposes, and that in so far as they are contrary to the statement of Secretary Noble in 1891, their weight is certainly no greater than that of that statement.

If the statements relied on by the court below be analyzed, their purport will be found to be as follows:

One statement that the United States had a right to

locate other Indian tribes in the "leased district," a statement in no way inconsistent with the possession of an absolute title. (Delaware Treaty, 1866.)

Two statements that the "leased district" was held for the purposes of Indian settlement (proclamations of 1880 and 1884), both statements being made at a time when all the land which was believed to be within that district was actually in use for that purpose, a fact in no way inconsistent with an absolute title as regards the Choctaws and Chickasaws.

One statement that the object of the United States in purchasing the "leased district" was to use it for Indian purposes (Secretary Teller, 1884), a statement not inconsistent with an absolute title as against the vendors.

Two statements that the cession of the "leased district," while substituting a direct purchase for a lease, had not altered "the trust" (Secretary Schurz, 1879; Commissioner Price, 1885), statements which are most fairly understood as referring exclusively to a trust in favor of the Indians who had been settled on the land, and having its origin in such settlement only.

One statement in regard to the dissimilar language of the Seminole treaty (Secretary Vilas, 1889), such statement not having been made with reference to the cession of the "leased district," nor having the remotest connection therewith.

One statement that the "leased district" was subject to specific trusts and that the title thereto was subject to the provisions of Article X of the treaty of 1866. (Acting Commissioner Holcomb, 1881.) The "trusts" may most fairly be understood as trusts in favor of the Indians

settled thereon, trusts not inconsistent with an absolute title as against the Choctaws and Chickasaws; while the view as to the bearing of Article X is not called for by the language of that or any other article of the treaty.

One admission of reversionary rights in the Choctaws and Chickasaws (Acting Commissioner Belt, 1890), a hesitating admission, apparently induced by overreliance on an *ex parte* memorial.

Of all the statements relied on in the opinion of the court below, therefore, two only contain anything really inconsistent with an absolute cession by the Choctaws and Chickasaws in 1866. One of these, made in 1881, fifteen years after the cession, merely assumes that the cession was subject to the provisions of Article X, but makes no attempt to support the assumption by evidence or argument. The other, made in 1890, twenty-four years after the cession, is too closely connected with the Choctaw and Chickasaw memorial to carry weight as expression of independent judgment. Both statements were made by subordinates, acting in the absence of the real heads of their bureaus, and the later one was dissented from by the head of the Department. It is submitted that there is no such "continuous executive and legislative construction of the objects of the treaty," in support of a conditional cession, as the learned judge has supposed. That neither the Choctaws nor the Chickasaws ever put forward, prior to about 1890, their present claim of a reversionary interest on the termination of a supposed trust has been already shown above. The evidence of a supposed contemporaneous understanding, on both sides or on either, that the cession was not absolute, is simply nonexistent.

III.

IF THE CESSION OF 1866 WAS IN TRUST, THAT TRUST WAS FOR PERMANENT SETTLEMENT OF FRIENDLY TRIBES, AND THE TRIBES SETTLED IN THE CEDED DISTRICT ACQUIRED THE USUAL INDIAN TITLE TO THE LANDS OCCUPIED BY THEM, SO THAT THE ALLOTMENT OF A PORTION OF THE LAND WITHIN THE WICHITA RESERVATION AMONG THE INDIANS SETTLED THEREON, AND THE SALE OF THE BALANCE FOR THEIR BENEFIT, WOULD NOT VIOLATE THE TRUST. (See the eighth assignment of error.)

The rights of the cestuis que trustent not defined by the court below.

Even if it be conceded, for the sake of the argument, that the cession of 1866, though absolute in its terms, was in trust, it does not at all follow that the court below rightly apprehended the nature of that trust, or that the decree is calculated to properly enforce the terms of the trust. As to the nature of the trust the court below says very little, at least as regards the rights of the *cestuis que trustent*, the most important thing about the trust, in the eyes of the court, being evidently the rights of those who had ceded the land in trust, and who had a reversionary interest therein, in case the purposes of the trust should be abandoned. This is a serious departure from the usual position of a court of equity, in which the interests of the *cestuis que trustent* are held to be of primary importance, the possible reversionary interests of the creator of the trust being wholly subordinated to them.

The court below holds that the cession of 1866 entitled the United States "to settle Indians permanently on the lands mentioned in the agreement" (meaning, presumably, the third article of the treaty), but does not undertake to define the rights acquired by Indians so settled. It "can not say that the allotment of 160 acres to each one of the defendant Indians is unreasonable in the establishment of the Wichitas and the affiliated bands as permanent settlers" (Rec., 428), and the decree confirms this allotment; but nothing is said to show whether a larger allotment might not have been upheld had the Wichita agreement of 1891 provided for it, and the inference is that such an allotment might also have been found to be not unreasonable. The Choctaws and Chickasaws, on the other hand, deny that the Wichita and affiliated bands are entitled to any allotments whatever, and they have taken a cross appeal, assigning for error that portion of the decree which sustains this very modest provision for the Indians now on the reservation. It will therefore be necessary to consider whether this portion of the decree was warranted by the supposed trust, as well as whether that trust necessarily limits the disposition of the land and its proceeds to that ordered by the decree.

The trust was for the permanent settlement of friendly tribes.

The first point to determine is the nature of the trust. The first document which throws light on its character is the treaty of 1855, by which the district was "leased"

o the United States "for the permanent settlement" of Indians from a certain region, "which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the President for their government: *Provided, however*, The territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore." The "rights and interests of the Choctaws and Chickasaws," here referred to, must have meant their right of settlement, their interest in the land as settlers or possible settlers, and all civil and political rights and interests of such of them as might settle on the land, and of the government of the Choctaw Nation in regard to them. Such rights and interests could not, of course, extend to any land in actual use for the permanent settlement of Indians placed there by the United States, the "exclusive control" of the United States over such Indians necessarily extending to the land actually occupied by them.

Although the treaty uses the word lease, there was certainly no lease in the ordinary sense of the term. A lease for "permanent settlement" is a permanent lease, entitling the lessee to use the premises permanently, and where, as in the present case, a gross sum is paid for the lease, and not a periodical rental, the only possible condition of reentry would be the lessee's use of the premises for other purposes than such permanent settlement. Whether such a conveyance is really a lease at all is not material, because in 1866, on payment of a new consideration, a cession was substituted.

The next document is the fifth stipulation, providing that the land should be "set apart for the friendly tribes now in Kansas and elsewhere," or, as stated in the annual report of the Indian Commissioner, "set apart to be purchased for the use of such Indians, from Kansas or elsewhere, as the Government may desire to colonize therein."

The proposed treaty of 1865 does not throw any light on the matter, as that treaty provided for applying the fifth stipulation to the country east of the leased district, and for continuing the lease, merely removing all restrictions upon the character of the tribes who could be settled on the land.

If the cession of 1866 was made, as the court below holds, in pursuance of the fifth stipulation of 1865, then it was undoubtedly for the settlement or colonization of Indians, "the friendly tribes now in Kansas and elsewhere," and such settlement or colonization was intended to be permanent, as had been intended under the lease. The cession was, in the language of Secretary Schurz, "a direct purchase," in trust, for the permanent settlement of such Indians, and necessarily terminated all rights of settlement and other rights and interests of the Choctaws and Chickasaws in the district, except only reversionary rights contingent on a breach or termination of the trust.

The words "permanent settlement" mean the usual Indian right of occupancy.

The trust being for the permanent settlement of these Indians, it remains to inquire what is meant by "permanent settlement."

It is settled law that from and after the extension of the sovereignty of the United States, or of Great Britain, or of any of the nations from whom the United States obtained land by treaty, over any part of this continent, the Indians occupying lands in such part of the continent held such lands by virtue of such occupancy, having the right to the exclusive enjoyment of these lands, including hunting grounds, in their own way, and for their own purposes, until they abandoned them, or made a cession to the Government, or an authorized sale to individuals. (*Cherokee Nation* v. *Georgia*, 5 Pet., 1, 17; *Mitchel* v. *United States*, 9 Pet., 711, 746.) In conformity with this view of the law, it has been the invariable practice of the United States, in either acknowledging the right of Indian tribes to the lands on which they were found, or in granting land to them, to acknowledge the existence of or to grant, as the case may be, an estate of this character, i. e., an exclusive right of enjoyment during occupancy, but no right of alienation except to the United States or by its authority. The act of May 25, 1830, sec. 3 (4 Stats., 411), provided that grants made to Indians in exchange for other lands should always convey a title of this character.

The various treaties differ considerably in the words used to grant or describe such an estate, but that the estate contemplated by them was, in all cases, of this one character there can be no doubt. The variety of wording may be seen by a reference to some of the treaties, as follows:

> "The United States allot all the lands contained within the said lines to the Wiandot and Delaware

nations, to live and to hunt on." (*Wiandot*, etc., treaty of 1785, 7 Stats., 17; see also *Choctaw* treaty of 1786, id., 21; *Chickasaw* treaty, id., 25; *Shawnee* treaty, id., 27. The *Wyandot* treaty of 1789, id., 29, contains the same language with an express prohibition on alienation except to the United States.)

"The United States solemnly guarantee to the Creek Nation all their lands within the limits of the United States westward and southward of the boundary described." (*Creek* treaty of 1790, 7 Stats., 36; see also *Cherokee* treaty of 1791, id., 40; *Creek* treaty of 1814, id., 124; *Kickapoo* treaty of 1819, id., 201; *Florida* treaty of 1823, id., 224; *Cherokee* treaty of 1828, id., 311; *Miami* treaty of 1838, id., 569; *Creek* and *Seminole* treaty of 1856, 11 Stats., 700.)

"The Indian tribes who have a right to those lands are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States." (*Wyandot* treaty of 1795, 7 Stats., 52; see also *Sac* and *Fox* treaty of 1804, id., 85.)

"The United States will in future consider the Delawares as the rightful owners of all the country which is bounded," etc. (*Delaware* treaty of 1804, 7 Stats., 82.)

"The said Wyandott Indians and their descendants shall hold the land so long as they or their descendants shall occupy the same." (*Wyandot* treaty of 1818, 7 Stats., 181; see also *Osage* treaty of 1825, id., 240; *Seneca* and *Shawnee* treaty of 1832, id., 412.)

"The commissioners of the United States, in behalf of said States, do hereby cede to said nation a

tract of country," etc. (*Choctaw* treaty of 1820, 7 Stats., 211; see also *Shawnee* treaty of 1825, id., 284.)

"In fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it." (*Choctaw* treaty of 1830, 7 Stats., 333; see also *Seneca* treaty of 1831, id., 349; *Seneca* and *Shawnee* treaty of 1831, id., 352; *Shawnee* treaty of 1831, id., 356; *Ottawa* treaty of 1831, id., 360; *Kaskaskia* and *Peoria* treaty of 1832, id., 404; *Creek* treaty of 1833, id., 419; *Quapaw* treaty of 1833, id., 425.)

"They holding it by the same title and in the same manner that other Indian titles are held." (*Sac* and *Fox* treaty of 1830, 7 Stats., 330; see also *Winnebago* treaty of 1832, id., 371; *Chippewa*, etc., treaty of 1833, id., 431; *Sioux* treaty of 1851, 10 Stats., 949; *Sioux* treaty of 1851, id., 954; *Menomonee* treaty of 1854, id., 1064.)

"As their home, to be held as *all* Indians' lands are held." (*Winnebago* treaty of 1846, 9 Stats., 878; see also *Menomonee* treaty of 1848, 9 Stats., 952; *Otoe* and *Missouria* treaty of 1854, 10 Stats., 1038; *Omaha* treaty of 1854, id., 1043; *Miami* treaty of 1854, id., 1093; *Ponca* treaty of 1858, 12 Stats., 997.)

Besides such phrases as the above, the word "permanent" is frequently used in describing Indian titles, especially toward the year when the "leased district" was acquired by the United States. For instance:

> "Shall be conveyed and forever secured by the United States to the said Delaware Nation as their *permanent* residence." (*Delaware* treaty of 1829, 7 Stats., 327.)
>
> "As their *permanent* place of residence as long as they remain a tribe." (*Kickapoo* treaty of 1832, 7 Stats., 391.)

"The United States cede to the Piankeshaw and Wea tribes for their *permanent* residence." (*Piankeshaw*, etc., treaty of 1832, 7 Stats., 410.)

"For a *permanent* home on which they can settle." (*Ioway*, etc., treaty of 1836, 7 Stats., 512.)

"Until they shall procure a *permanent* settlement." (*Winnebago* treaty of 1837, 7 Stats., 545.) In this instance the permanent settlement was to be upon land granted to be held "by the same title and in the same manner that other Indian titles are held."

"As a *permanent* home for all the New York Indians." (*N. Y. Indians* treaty of 1838, 7 Stats., 551.)

"For a *permanent* and perpetual residence for them and their descendants." (*Sac* and *Fox* treaty of 1842, 7 Stats., 596.)

"The aforesaid tribe shall be allowed to occupy temporarily that portion of the above-described tract, * * * * it being understood that this described tract of land shall be deemed and considered an Indian reserve, until a suitable selection shall be made by the direction of the President of the United States for their *permanent* residence." (*Rogue River* treaty of 1853, 10 Stats., 1018; *Cow Creek* treaty of 1853, id., 1027; see also *Molel* treaty of 1855, 12 Stats., 981.)

"At any time hereafter when the Delawares desire it, and at their request and expense, the President may cause the country reserved for their *permanent* home to be surveyed * * * and may assign such portion to each person or family as shall be designated by the principal men of the tribe." (*Delaware* treaty of 1854, 10 Stats., 1050; see also *Willamette* treaty of 1855, id., 1145.)

"There shall be, and hereby is, reserved and set apart a sufficient quantity of land for the *permanent*

homes of the said Indians." (*Chippewa* treaty of 1855, 10 Stats., 1165; see also *Winnebago* treaty of 1855, id., 1172.)

"The President * * * may further at his discretion cause the whole or any portion of the lands hereby reserved * * * to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege and will locate on the same as a *permanent* home." (*Dwamish* treaty of 1855, 12 Stats., 927; see also *S'Klallams* treaty, id., 933; *Makah* treaty, id., 939; *Walla Walla* treaty, id., 945; *Yakama* treaty, id., 951; *Nez Percé* treaty, id., 957; *Middle Oregon* treaty, id., 963 *Qui-nai-elt* treaty, id., 971; *Flathead* treaty, id., 975; *Nez Percé* treaty of 1863, 14 Stats., 647.)

The treaties above referred to, taken in connection with the decisions already cited, and the act of 1830, show conclusively that down to the time when the trust, which the court below has held exists in the present case, was created, while there was no one form of language used to describe the nature of the estate granted to Indian tribes, there was but one species of such estate, and further that the words "permanent residence," "permanent home," "permanent settlement," and the like, were frequently used in reference to precisely this character of estate. In the case of the treaty with the New York Indians, where the words "permanent home" were used, this court recently decided that the estate granted was such that even a forfeiture could not be enforced by Executive action, and that where the land had been sold by Executive order the proceeds of sale must be paid to the Indians. (*New York Indians* v. *United States*, 170 U. S., 1.)

The Indian right of occupancy in any particular land confined to one tribe, band, or confederacy.

In every case of the settlement of Indians on land under the treaties above referred to, and apparently in every other instance of such settlement, the Indians so settled, whether a tribe, band, or confederacy, were given a perfect Indian title, free from all conflicting or limiting interests on the part of other Indians. In the case of the intertribal treaties between the Menomonees and the New York Indians (Sen. Doc. 189, Twenty-seventh Congress, second session) the grantees acquired an interest in common with the grantors, an interest such as they would have had if both parties had belonged to one tribe or confederacy; but even that arrangement, though giving to neither party any controlling interest as against the other, had to be abandoned (see the Menomonee treaties of 1831 and 1832, 7 Stats., 342, 405), and the practically invariable rule was that but one tribe or confederation had any interest whatever in any particular land, and that interest was an Indian right of permanent occupancy. The right to hunt and trap in "the Great Prairie west of the Cross Timber," shared in common by the Comanches, Wichita and affiliated bands, Cherokees, Muscogees, Choctaws, Osages, Quapaws, Kiowas, Katakas, and Tawakaros under the treaties of 1835 and 1837 (7 Stats., 474, 533) is scarcely an exception to the rule, as it involved no right of occupancy, and was of course intended to cease as to any of the tribes (except those whose reservations extended into the Great Prairie) whenever it

should be thought best to confine such tribe to a particular reservation.

This rule was dictated by the most obvious expediency. Different tribes might possibly occupy a reservation in common without disputes arising between them, but to have made the rights and interests of one tribe at all subordinate to those of another would have resulted in very serious complications.

No departure from this rule can be found even in the case of the cessions for the special purpose of Indian settlement, made by the Creek treaty of June 14, 1866, or the Seminole treaty of March 21, 1866 (14 Stats., 786, 756). As has been already seen above, whatever portion of the land so ceded was actually appropriated for the settlement of Indians was retained by the Indians settled thereon, and no further payment was made to the Creeks or Seminoles on account of such land. The land for which they received additional compensation under the acts of March 1, 1889, and March 2, 1889 (25 Stats., 757, 1004), was merely what had not been actually appropriated to Indian settlement.

The trust contemplated the acquisition of the usual Indian right of occupancy.

Accordingly, when the United States, in 1855, "leased" of the Choctaws and Chickasaws a district for the permanent settlement of the Indians from a certain region, subject to a right of settlement by the Choctaws and Chickasaws, who were to remain under the Choctaw government, it is not to be supposed that the rights of such Indians

as were placed thereon for permanent settlement were in any way new, or abnormal, or different from the rights of any other Indians in the lands occupied by them. There is nothing whatever to indicate that the United States had adopted, even by way of experiment, any new Indian policy, different from that previously pursued, and in fact the familiar and almost technical words "permanent settlement" exclude the possibility of such an idea. These words, or the equivalent words "permanent home," "permanent residence," etc., had been repeatedly used in treaties in reference to an Indian right of occupancy, sometimes described as an estate in fee simple, subject to a reversion on abandonment or the tribes becoming extinct. *A fortiori* when the United States in 1866, for a further consideration, procured a cession of the previously leased district for the permanent settlement of friendly tribes in Kansas or elsewhere, the title of such tribes as were settled on the district was the same Indian title. The words "permanent settlement" meant as to them precisely what these or similar words had always meant, and in point of fact nothing less than an Indian right of occupancy could properly be described as a "permanent settlement." The difference between the "lease" and the cession was that under the former the Choctaws and Chickasaws had a right of settlement in the district, and such of them as settled there would continue to be under their own government, while under the latter, the "direct purchase," as Secretary Schurz called it, they had no such right. This is the only difference that can be pointed out between the lease and the cession, if the theory of a trust be maintained. The title of such Indians as the

Government placed in the district was as valid and as permanent under the lease as under the cession.[1]

The Indian right of occupancy includes a right to allotments in severalty and to the proceeds of sales of unallotted lands.

While an Indian right of occupancy involves a limited right of alienation only, viz, to the United States or with its approval, this latter right has always been recognized as a substantial one, so that practically in all cases except

[1] The words of the Choctaw delegation in their letter of April 24, 1855, "We can not consent to the sale or alienation beyond our ultimate control of one foot of our country. It would be death to us or to any Choctaw who should propose or assent to it," occur in a discussion of the proposed concession by them of "a complete and unincumbered title to that portion of the Choctaw country embraced in the Chickasaw district," and these words were used solely in reference to that proposed concession. It can not be assumed that the delegation would have used similar language in regard to that "limited portion of the western part of our country," as to which they had said that they were willing that "the Government shall have the permanent use" of it, and which was ultimately leased. (See Sen. Mis. Doc. No. 31, Thirty-fourth Congress, first session p. 60.) An agreement for the permanent use of land by another party, even if for a specified purpose, places the land beyond the "ultimate control" of the owner, at least as long as the purpose is carried out. Still, under the terms of the "lease" as ultimately agreed upon, the Choctaws were allowed complete control over so much of the "leased district" as the Government did not actually use, so that the possibility of holding the above declaration of the Choctaws applicable to that district became unimportant. In 1866, at all events, no such declaration was made, and while the cession may have been only for the permanent settlement of Indians, there can be no doubt that all "ultimate control" by the Choctaws or Chickasaws ceased as to at least so much of the country as was actually used for such permanent settlement.

where a cession of territory has been required of Indians as an indemnity for expense or losses caused by them, a consideration has always been given them whenever they have relinquished any part of their lands to the Government; and in many cases it has been provided that the entire net proceeds of the lands ceded, less the amount of certain expenses incurred by the United States for their benefit, should be paid over to them, or held in trust for them. Moreover, it has long been the established practice that when a tribe or several of its members have progressed so far in civilization as to outgrow the tribal system of land ownership, a sufficient portion of the tribal land should be allotted among all or a portion of the members of the tribe, as the case might be, in severalty, each allotment to be held by the allottee in fee simple, though usually with a temporary restraint upon alienation, and also that when such allotments are made to all the members of a tribe, any land remaining, over and above what is required for the allotment, should be sold for the benefit of the tribe, subject to the usual reservations of land for schools and public purposes. In several instances citizenship has also been provided for, but the provision for ownership in severalty is much more frequently found than that for admission to citizenship. The first instance of this method of dealing with Indian lands seems to be found in article 8 of the Cherokee treaty of July 8, 1817 (7 Stats., 159), providing that every head of any Indian family who might wish to become a citizen of the United States should receive a life estate in 640 acres, with a reversion in fee simple to his children and a reservation of

dower to his widow. If any such head of a family removed from the land which he had received, it was to revert to the United States, but no restriction was placed on alienation by his children after his death. Other instances of the substitution of several ownership of land in fee simple, usually with a prohibition of alienation without the President's approval, for tribal ownership are found in the following treaties and statutes:

Miami treaty of October 6, 1818, articles 3 and 6. (7 Stats., 190.)

Cherokee treaty of February 27, 1819, article 3. (Id., 196.) This was supplementary to the treaty of July 8, 1817, already mentioned, and it provided, *inter alia*, for a declaration of an "intention to continue to reside permanently on the land reserved," thus showing that "permanent" residence was understood to mean a title in fee simple, conditioned on actual occupancy by the first owner during his lifetime.

Chippewa treaty of September 24, 1819, article 3. (Id., 204.)

Choctaw treaty of October 18, 1820, articles 4 and 9. (Id., 211, 212.)

Ottawa, *Chippewa*, and *Pottawatomie* treaty of August 29, 1821, article 3. (Id., 219.)

Quapaw treaty of November 15, 1824, article 7. (Id., 233.)

Choctaw treaty of January 20, 1825, article 4. (Id., 235.)

Osage treaty of June 2, 1825, article 5. (Id., 241.) Article 6 also provides for the sale of 54 tracts of a mile

square each for the purpose of raising a school fund for the Osages.

Kansas treaty of June 3, 1825, article 6. (Id., 245.)

Chippewa treaty of August 5, 1826, article 4. (Id., 291.)

Pottawatomie treaty of October 16, 1826, article 6. (Id., 297.)

Miami treaty of October 23, 1826, article 3. (Id., 300.)

Pottawatomie treaty of September 20, 1828, article 3. (Id., 318.)

Chippewa, *Ottawa*, and *Pottawatomie* treaty of July 29, 1829, Article IV. (Id., 321.)

Winnebago treaty of August 1, 1829, Article V. (Id., 324.)

Choctaw treaty of September 27, 1830, Article XIV. (Id., 335.) Grants in fee simple were to issue after residence upon the land to be granted for five years after the ratification of the treaty, coupled with an intention to become a citizen of the United States.

Pottawatomie treaty of October 27, 1832, Article III. (Id., 400.)

Chickasaw treaty of May 24, 1834, Article VI. (Id., 452.)

Miami treaty of October 23, 1834, Article III. (Id., 463.)

Cherokee treaty of May 23, 1836, articles 12 and 13. (Id., 483.) Citizenship was also provided for in this case. Owing to the determination of President Jackson that all the Cherokees should leave Georgia, these provisions for ownership in severalty were declared void by supplementary articles, but the rights so relinquished

were made the subject of further compensation to the Indians. (Id., 488.)

Miami treaty of November 3, 1838, article 12. (Id., 571.)

Act of March 3, 1839 (5 Stats., 349). Under this act the entire Brothertown Reservation in Wisconsin was divided among the individual Indians in severalty and they were admitted to citizenship.

Act of March 3, 1843 (Id., 645). This act provided for a similar division of a township in Wisconsin, occupied by the Stockbridge Indians, and for their admission to citizenship. It was repealed by the act of August 6, 1846 (9 Stats., 55), and the division in severalty was ordered to be made in a portion of the township only. By the treaty of November 24, 1848 (id., 955), the township was sold to the United States, but the allotments in severalty, made under the act of 1843, were to stand.

The treaty of February 5, 1856 (11 Stats., 663), made some changes in the disposition of the land, but similarly provided for allotments in severalty to those who wished them. Subsequently, a portion of the tribe having removed to another reservation, the act of March 3, 1865, §4 (13 Stats., 562), provided that any of the chiefs, warriors, or heads of families might enter a homestead under the homestead laws, and that all abandoned lands on the reservation should be sold for the benefit of such of the Indians as settled on the homesteads, who might also become citizens under certain conditions.

Wyandot treaty of April 1, 1850, Articles VI–X. (9 Stats., 990; see also treaty of 1855, 10 Stats., 1159.)

Sac and *Fox* treaty of May 18, 1854, article 3. (10 Stats., 1075.) Here the time and extent of the allotment were in the discretion of the President. A similar provision is found in the *Kickapoo* treaty of 1854 (id., 1079), *Kaskaskia, etc.*, treaty of 1854 (id., 1083), *Miami* treaty of 1854 (id., 1095), *Chippewa* treaty of 1854 (id., 1110), *Willamette* treaty of 1855 (id., 1145).

Ottawa and *Chippewa* treaty of July 31, 1855, Article I. (11 Stats., 622.)

Chippewa treaty of August 2, 1855. Article 1. (Id., 633.)

Mendawakaton, etc., Sioux treaty of June 19, 1858, Article I. (12 Stats., 1032.)

Sisseton, etc., Sioux treaty of June 19, 1858, Article I. (Id., 1037.)

Winnebago treaty of April 15, 1859, Articles I and II. (Id., 1101.)

Swan Creek, etc., treaty of July 16, 1859, Articles I and II. (Id., 1105.)

Kansas treaty of October 5, 1859, Articles I–IV. (Id., 1111.)

Delaware treaty of May 30, 1860, Articles I and II. (Id., 1129.)

Arapahoe, etc., treaty of February 18, 1861, Articles 2 and 3. (Id., 1164.)

Pottawatomie treaty of November 15, 1861, Articles I–IV (Id., 1191).

Ottawa treaty of June 24, 1862 (Id., 1237).

Kickapoo treaty of June 28, 1862, Articles I–IV (13 Stats., 623).

The above treaties and statutes show clearly enough
he established practice of ultimately changing the Indian
tle by occupancy (or, as some of the treaties express it,
heir right to a "permanent home," or "permanent res-
dence") into a fee simple title in severalty,[1] and also of
urchasing outright, or selling for the Indians' benefit,
he lands not allotted to them in severalty, so that the
"Dawes Act" of February 8, 1887 (24 Stats., 388), intro-
duced no new policy, but merely provided for carrying
ut the old-established policy by means of a uniform sys-
em, applicable to all cases. When, therefore, the United
States acquired, in 1855, the right to use the "leased
district" for the permanent settlement of Indians, in com-
non with the Choctaws and Chickasaws, and when, in
1866, that district was ceded to the United States for the
exclusive permanent settlement of Indians (assuming the
cession not to have been absolute), it is manifest that it
was intended and expected from the first that all Indians
permanently settled on the land should have the same
right to allotments in fee simple in severalty that had
always been recognized as belonging to all other perma-
nently settled Indians whenever their progress in civil-
ization warranted it; and also the same beneficial interest
in the unallotted portion of so much of the "leased dis-
trict" as had been set apart for their permanent settle-
ment as all other Indians had in their reservations. The

[1] Some idea of the extent of this practice may be obtained from the fact that the Census of 1890 (Indians, p. 28) reports 58,806 Indians who were citizens of the United States. As allotments of land in severalty were not always accompanied by citizenship, the number of Indians who had from time to time received such allotments must have been still greater.

words "permanent settlement" must have been un
stood to mean this, or their use was utterly anoma
and little less than a mockery. There is nothing w
ever to sustain the latter alternative.

*The Wichita and affiliated bands were given their res
tion for their permanent settlement, with the right to
ments in severalty, and to the proceeds of sales of unall
lands.*

When the Wichita and affiliated bands were first pl
on the "leased district," in 1859, two small reservat
containing together 154,240 acres, within the limi
the present Wichita Reservation, were given to t
and they were also allowed to hunt on any land wi
the district not yet specifically assigned to other Ind
During the rebellion they were driven into Kansa
the Choctaws and Chickasaws, but returned in Au
1867. They returned to the same general region w
they had previously occupied, but it does not appear
their occupancy was limited to the two small reserva
laid out in 1859. A southern boundary, the Wa
River, was established by the Kiowa and Comanche tr
of October 21, 1867 (15 Stats., 581), while a we
boundary, the meridian of 98° 40′, was establishe
the setting off of the Cheyenne and Arapahoe Reserva
by the Executive order of August 10, 1869. This
the Wichita and affiliated bands in a tract of 743
acres, bounded by the Canadian and Washita rivers
the meridians of 98° and 98° 40′, and in 1872 certai
their chiefs and delegates entered into the following ag
ment with the Commissioner of Indian Affairs:

Articles of agreement made and concluded at Washington City, District of Columbia, this nineteenth day of October, A. D. 1872, by and between Francis A. Walker, Commissioner of Indian Affairs, representing the United States, of the one part, and the undersigned chiefs, head men, and members of the Wichitas and affiliated bands of Indians duly authorized to act for their people, of the other part, witnesseth:

ARTICLE 1. The United States hereby give and grant to the said Wichitas and other affiliated bands, for a home, the tract of country bounded as follows, to wit: Commencing at a point in the middle of the main channel of the Washita River where the 98th meridian of west longitude crosses the same, thence up the middle of the main channel of said river, to the line of 98° 40′ W. L., thence on said line of 98° 40′ due north to the middle of the main channel of the main Canadian River, thence down the middle of said main Canadian River to where it crosses the 98th meridian, thence due south to the place of beginning.

ARTICLE 2. In consideration of the reservation provided for in the preceding article the said Wichitas and other affiliated bands hereby cede and relinquish to the United States all right, title, interest, or claim of any nature whatsoever, in and to any lands in Texas, Louisiana, Indian Territory, or elsewhere within the limits of the United States.

In his annual report for 1872 the Commissioner of Indian Affairs (p. 101) recommended the ratification of this agreement, but no action was taken by Congress upon this recommendation. Since the date of the agreement, however, the boundaries therein named have been officially maintained as those of the Wichita Reservation.

(Sen. Ex. Doc. No. 13, Forty-eighth Congress, first session, pp. 3, 56.)

As will be shown in the argument on the appeal of the Wichita and affiliated bands, the quitclaim in article 2 did not relate to any particular lands, and in fact its object was merely to prevent these Indians from thereafter asserting any pretensions to land outside the reservation. As the court below rightly holds, these Indians had no real claim to any other land, and in fact "paid nothing, either in money or in land as the equivalent of money" (Rec. 383), for the land given to them by this agreement. The agreement simply gave to these Indians "for a home" a tract of land which they had already been allowed to occupy, without any definite agreement, for thirteen years; and while it has never been formally ratified by Congress, and the Indians have, more or less informally, denied the authority of the chiefs and delegates who executed it, it has in point of fact been practically adopted and carried out by both sides ever since. The appropriation acts from 1873 to 1891, inclusive, all contain an appropriation "for subsistence of the Arapahoe, Cheyenne, Apache, Kiowa, Comanche, and Wichita Indians, and transportation of the same, who have been collected upon *the reservations set apart for their use and occupation.*" (Acts of Feb. 14, 1873, § 1, 17 Stats., 449; June 22, 1874, § 1, 18 Stats., 149; Mar. 3, 1875, § 1, id., 423; Aug. 15, 1876, § 1, 19 Stats., 195; Mar. 3, 1877, § 1, id., 290; May 27, 1878, § 1, 20 Stats., 84; Feb. 17, 1879, § 1, id., 33; May 11, 1880, § 1, 21 Stats., 128; Mar. 3, 1880, § 1, id., 498; May 17, 1882, § 1, 22 Stats.,

82; Mar. 1, 1883, § 1, id., 445; July 4, 1884, § 1, 23 Stats., 89; May 3, 1885, § 1, id., 377; May 15, 1886, § 1, 24 Stats., 41; Mar. 2, 1887, § 1, id., 460; June 29, 1888, § 1, 25 Stats., 330; Mar. 2, 1889, § 1, id., 994; Aug. 19, 1890, § 1, 26 Stats., 350; Mar. 3, 1891, § 1, id., 1004.)

The above statutes all declaring that the Wichitas (a term used, of course, to include the affiliated bands) had been collected upon a reservation "set apart for their use and occupation," and the only such reservation being that described in the agreement of 1872, it is evident that Congress recognized that reservation as the one upon which they had been given permanent settlement, and the rights accruing from such settlement.

As the Choctaws and Chickasaws were not parties to this agreement of 1872, of course it could not, even if adopted or ratified by Congress, have affected any of their rights. As regards them it is only of value as evidence that the United States gave to the Wichita and affiliated bands a particular tract of country "for a home," and the only question that can arise is whether this gift was in accordance with a trust for their "permanent settlement." Whether the gift was formal or informal, evidenced by an agreement or not, are immaterial questions in this connection. It is indisputable that the United States originally placed these Indians on a portion of this tract; that it subsequently permitted them to occupy the whole of it, and that in consequence the tract was treated by both parties as given to the Indians "for a home." As against the Choctaws and Chickasaws the

fact of the gift is sufficiently established, and wha
disposition may be made of that land, by virtue of
gift, must stand, unless it is in violation of the trus

The trust was for "the permanent settlement" of
such Indians as these, and there can be no doubt tha
gift was intended to be for their permanent settle
In the official correspondence and reports in rega
the original placing of these Indians on a portion o
"leased district," the words "permanent settlem
"domestication," "colonizing," "to permanently lo
"settling," "permanent home," etc., are repeatedly
in this connection (Ind. Commr's Rept., 1855, pp.
473; 1856, pp. 566, 726; 1857, p. 296; 1858, pp.
526), while the act of March 3, 1857 (11 Stats.,
183), appropriating money for this purpose, use
word "establishing." The superintendent in char
removing these Indians to their new location wa
structed to give them "to understand that it is to be
permanent home" (Sen. Ex. Doc. No. 13, Forty-ei
Congress, first session, p. 15), and there can be no d
that he did so, and that these Indians accepted the
as their permanent home. Hence when the agree
of 1872 purported to give this particular reservati
these Indians "for a home," all that it effected w
establish definite bounds to what had already been
the permanent home of these Indians by their estab
ment there in 1859. These bounds were enlarged be
those which had been at one time fixed, but practi
they appear to have been the bounds which were
ceded to these Indians ever since the establishmen
the reservations to the south and west. Even if

agreement of 1872 were a nullity, therefore, it is clear that these Indians held this reservation as "their permanent home," or place of "permanent settlement," granted to them by the United States. In other words, under the trust for which the land had been ceded, they had the same right of permanent occupancy as other Indian tribes have had from the earliest settlement of white men in this country, and as the Choctaws and Chickasaws had in the land granted to them, and the same incidental right of ultimate ownership in severalty, and of participation in the proceeds of surplus lands, as had been conceded in every previous case of terminating the tribal system of ownership.

As far as concerns the allotments, the decree is right.

In view of these considerations, the court below was requested to enter its decree in favor of the Wichita and affiliated bands for 160 acres of land apiece and for the proceeds of the sales of the surplus lands authorized by the jurisdictional act; and this, whether it should be held that the cession of the leased district was in trust or absolute. The decree, however, complied only with the first part of this request.

As to so much of the decree as provides that each member of the Wichita and affiliated bands shall receive 160 acres of the land in question, it is submitted that such a disposition of the land undoubtedly comes within the meaning of the words "permanent settlement of friendly Indians." This would be so even if the law of Indian tenure and the long-established practice in regard to Indian lands were left out of consideration. In fact,

if the giving of 160 acres to each Indian in fee simple, without the power of alienation or incumbrance for twenty-five years, be not the "permanent settlement" of such Indians on the land, it is hard to imagine what a permanent settlement can be. The word "permanent," when used of human affairs, can not be equivalent to eternal or perpetual. The most that it can mean is "capable of indefinite continuance." To settle Indians permanently in any district is to take such measures as will insure their remaining there for a reasonable length of time, and the possibility that they and their descendants will remain there indefinitely. To give a person 160 acres of land, holding it in trust for him for twenty-five years, so as to prevent his selling or encumbering it, but allowing him the otherwise unrestricted use of it during that period, and giving him a fee simple title at its expiration, is certainly going as far towards permanently settling that person on that land as can well be imagined.

It has repeatedly been held that where land or other property has been given to secure the permanent establishment of an institution in a particular place, this does not involve the grantee in a covenant to keep the institution there forever, or require him to surrender the property in case the institution is removed. (*Mead* v. *Ballard*, 7 Wall., 290; *Newton* v. *Commissioners*, 100 U. S., 548; *Sumner* v. *Darnell*, 128 Ind., 38; *Hardy* v. *Wiley*, 87 Va., 125.) Thus, in *Texas, etc., Railway Co.* v. *Marshall* (136 U. S., 393), the contract was that in consideration of $300,000 and 66 acres of land the

company "will permanently establish its eastern terminus and Texas office at Marshall, and will also establish and construct at said city the main machine shops and car works of said railway company." In construing this contract, Miller, J., said:

> It seems to us that the real essence of the contract was that the railroad company should, in its process of construction, make this city its eastern terminus, and should establish there its depot, its machine shops, and its car works, and that this should be done in the ordinary course of its business, with the purpose that it should be permanent. But it did not amount to a covenant that the company would never cease to make its eastern terminus at Marshall; that it would for all time continue to have its machine shops and car works there, and that whatever might be the changes of time and circumstances, of railroad rivalry and assistance, these things alone should remain forever unchangeable.
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> * * * * *
>
> It appears to us, so far from this, that the contract on the part of the railroad company is satisfied and performed when it establishes and keeps a depot, and sets in operation car works and machine shops, and keeps them going for eight years, and until the interests of the railroad company and the public demand the removal of some or all of these subjects of the contract to some other place. This was the establishment at that point of the things contracted for in the agreement. It was the fair meaning of the words "permanent establishment," as there was no intention at the time of removing or abandoning them. The word "permanent" does not mean forever, or lasting forever, or existing

forever. The language used is to be considered according to its nature and its relation to the subject-matter of the contract, and we think that these things were permanently established by the railway company at Marshall.

In the present case the United States has kept the Wichita and affiliated bands on their reservation for over forty years, except during the period when the Choctaws and Chickasaws and their Confederate allies compelled them to take refuge in Kansas in order to preserve their loyalty, and the United States now proposes to prevent the former Indians from parting with their allotments for twenty-five years after they have been selected and taken, after which time they are to have an unrestricted title in fee simple. This makes the settlement one of sixty-five years duration in any event, and as much longer as these Indians and their descendants may see fit. Such a settlement may surely be regarded as permanent, and the court below was certainly right in so holding.

The proceeds of sales of unallotted lands should have been awarded to the cestuis que trustent.

In entering its decree in favor of the Wichita and affiliated bands, awarding them 160 acres apiece, the court below has to a certain extent recognized that the trust was for the permanent benefit of these Indians, and that an allotment of land among them was clearly within the terms of the trust. Had the agreement of 1891 proposed to make larger allotments, even to allot the entire reservation among the Indians, leaving no surplus land whatever, such a disposition of the land would presuma-

bly have been upheld by the court below; for if it be once conceded that these Indians are entitled to enjoy this land permanently, it must also be conceded that they are entitled to have it given to them permanently, i. e., in fee simple, in severalty, whenever they become sufficiently civilized to be fit for ownership in severalty. There is certainly nothing peculiar about the particular size of the allotments, 160 acres, to make this plan of allotment a fulfillment of the trust, while a plan for allotments of 320 acres, or even more, would have been a breach of the trust. This matter has a practical bearing, as the surplus land has not yet been sold, and many of the Indians have come to the conclusion that larger individual allotments would better fulfill the requirements of their case. It is entirely possible that the Government may ultimately decide to increase their size. Although the court below holds, very properly, that the nature of the trust admits of the distribution of the trust land, or some of it, among the *cestuis que trustent* in severalty, it holds that to sell any of the land to outsiders for the benefit of the *cestuis que trustent* would be a breach of trust. This view of the court below is due to its failure to recognize the true nature of the trust, which was, as already shown, to give to such tribes as the United States should place upon the land a permanent settlement, or right of occupancy, thereon, i. e., a full Indian title to the land, such as the United States was in the habit of granting to Indians, with all the incidents of such title, including the same right to receive the benefit of the sale of their surplus land, over and above the quantity required for the allotments, that is conceded to other Indians when their

reservation system comes to an end. If the trust be looked at, as it certainly should be, if there was a trust at all, as intended for the conveyance of an Indian title to the beneficiaries, the cession of 1866 warrants not merely allotment of land among them in severalty, but also the sale of the surplus land for their benefit.

Even if the rights and incidents of an Indian title by occupancy could be disregarded, the fact that the trust was for the permanent settlement of friendly Indians, for their permanent benefit, would warrant their receiving the benefit of the lands sold, in spite of the fact that in consequence of the sale some or even all of these surplus lands may come into the hands of other parties than such as have been settled on them since 1859. Friendly Indians have been settled on this reservation for forty years, occupying it in common, and using it partly for civilized purposes and partly after the manner of Indians. To enable them to use it permanently after the manner of civilized people, it is necessary to divide some of the land up into individual holdings of convenient size, and to sell the surplus so as to obtain funds for the improvement of the allotted land, and the support of the Indians in greater comfort than would otherwise be possible. Such a disposition of the surplus land is obviously not merely for the benefit of the friendly Indians, but also in furtherance of their permanent settlement on the allotted land, for it is evident that an addition to their capital will enable them to do more with the allotted land during the twenty-five years that they will have to keep it than they could otherwise do, and will thus increase its value, while the more valuable the allotted land is to them at

xpiration of the twenty-five years, the more likely will be to continue to remain on it.

cording to any theory of a trust, the land was to be for the benefit of these friendly Indians to enable to be permanently settled. It has been so held for years, during which time these Indians have increased vilization, until now it is to their advantage to sell a on of the land for the improvement of their condi- as owners and occupants of the remainder, over h they are ultimately to have an unrestricted right isposition. Such a disposition of the land, regarded ll friends of the Indian as offering the wisest solution he Indian problem and the most practical means of ring the fair treatment and ultimate civilization of Indians, can not but be held to be a "permanent set- ent" of the Wichita and affiliated bands, and as such ot merely not a breach of the trust, if trust there be, is the best and truest fulfillment of the trust that erican philanthropy and statesmanship have been able devise.

trust did not mean that no part of the land should ever be owned by white men.

The Choctaws and Chickasaws contend, however, that use of this land for the permanent benefit of the chita and affiliated bands, as individuals and ultimate zens, is a breach of trust, the trust being solely for maintenance of these Indians collectively, as mem- rs of the Wichita and affiliated bands, without any hts in severalty, the maintenance of the old tribal nditions being, it is alleged, for the benefit of the

Choctaws and Chickasaws, who created the trust. It is submitted that this contention is utterly unreasonable.

In support of this contention they assert that the land ceded to them in 1820 and 1830 was ceded in order that they should live apart from the white men, that the United States promised to keep white men away from their land, and that it should not be included in any State or Territory of the Union, the obligation of which promises was reaffirmed in Article X of the treaty of 1866. Such reaffirmance, however, was only made in so far as the promises were "not inconsistent with" the new treaty, and even conceding that the cession of the leased district was in trust, the trust was for the permanent settlement of friendly Indians, which permanent settlement might ultimately require the inclusion of that district, or a portion of it within the bounds of a State or Territory, or even the sale of portions of the district to white men. The Choctaws and Chickasaws do more than assert that the cession of 1866 was in trust. They assert that the trust was of a special character, viz, for such a permanent settlement of friendly Indians that no portion of the district ceded should ever be included in any State or Territory, or be open to white settlement.

Inasmuch as the treaty of 1866 says nothing about any trust in this ceded district whatever, but the whole theory of a trust is deduced from the circumstances preceding and attending the cession, the utmost that the Choctaws and Chickasaws can with any color of fairness contend is that the cession was for the benefit of the Indians who were, or were to be, settled on the land, and that it was for these Indians alone to say whether the land should be

included in a State or Territory or be opened to white settlement. To go beyond this and assert that one object of the alleged trust was to prevent the Choctaws and Chickasaws from ever having any white men, or any Indians holding land in severalty, as neighbors to the west of them, and that in this particular the benefit of the Indians actually settled on the land was to be subordinated to the supposed benefit of the Choctaws and Chickasaws, who did *not* live on the land, is to make a bald assertion without a shadow of evidence to sustain it. No such condition was ever imposed upon the trust, if trust there was, when it was created, and it can not be attached to it now.

The presence of white men on the land in question would not injure the Choctaws and Chickasaws.

Even if it had been understood and intended, when the alleged trust was created, that no portion of the leased district should ever be occupied by white men or be under a State or Territorial government, the nonfulfillment of this intention at the present day would entitle the claimants to no compensation, because it would inflict no injury upon them. The Choctaws and Chickasaws are no longer the primitive beings they were in 1820 or 1830. Their advanced condition in 1866 has already been alluded to in connection with the treaty of that year; and on April 23, 1897, they entered into an agreement providing for a distribution of their lands in severalty, with temporary restrictions of alienation (as to a portion of the land the limitation is for one year only), and for the termination of

their tribal governments, the division of all tribal prop-
erty among them as individuals, and the acquisition of
citizenship at the expiration of eight years. This agree-
ment has been ratified by Congress and the Choctaw and
Chickasaw nations, and has now the force of law. (Act
of June 28, 1898, § 29; 30 Stats., 505–513; Ind.
Commr.'s Rept., 1898, p. 77.) The contention that
these people, who are about to abandon their tribal gov-
ernments, and whose very country is itself about to be
thrown open to white settlement, will be entitled to com-
pensation if some of the lands to the west of their own
are sold to white men for the benefit of Indians, rather
than remain occupied by Indians as a tribal community, is
the height of unreason.

The Choctaws and Chickasaws are about to destroy
voluntarily their separate national existence and to be-
come fused in the general mass of the citizens of the
United States—to receive white men into their midst
and to become white men themselves in all but shade of
skin and cast of feature, peculiarities which, in future
generations, will tend even to disappear altogether.
They are going to do this, moreover, because they be-
lieve it to be for their advantage. How, then, can it
injure them if their future fellow-citizens, without dis-
tinction of race or color, occupy the surplus lands to the
west of them?

In point of fact, the present contention of the Choc-
taws and Chickasaws goes beyond what they claimed
from the Southern Confederacy, and before the United
States had paid $300,000 for the cession of the lease

district. The lease, for which the United States had paid $800,000, was renewed to the Confederacy, without further consideration, for ninety-nine years, but it was provided that when the Choctaws and Chickasaws became a State of the Confederacy, provision for which event was made in the treaty, the Indians settled in the leased district should own their lands in fee, and further that—

> * * * When the said bands consent to a partition among themselves, each individual shall have and receive in fee, within the said leased country, as large a quantity of good land as shall or would be apportioned to each Choctaw or Chickasaw in partition of all the national lands, with the right, however, now and in all future time, to the said several bands so settled or to be settled in said leased district to hunt upon all the vacant and unoccupied parts of the same without let or molestation. (Conf. Stat., 314.)

In other words, the claimants agreed in 1861 to the ultimate division of a certain portion of the lands in the leased district in severalty among such Indians as should be settled there, and to the preservation of the balance as hunting grounds for those Indians and not for the claimants themselves. If the lease meant that the Confederacy should divide up the leased district lands in severalty among the occupants as individuals, why should not the cession of 1866 mean that the United States had the same right? And as to the unallotted balance of the lands, why should their being kept as hunting grounds for other Indians be more favorable to the claimants than the sale of the lands would be? In view of the

fact that the United States was required to pay $300,000 for a "cession" of the leased district, but no such consideration was required of the Confederacy, the arrangements entered into with the latter are in strong contrast with what the claimants now demand of the United States.

It may be observed in this connection that the provisions of the treaty with the Confederacy constitute valuable evidence of what the Choctaws and Chickasaws understood, in 1861, by a lease for the permanent settlement of other Indians. When they agreed that so much of the land as was required for allotments should ultimately be given to such Indians in fee in severalty and that the latter, and not the Choctaws and Chickasaws, should have a right to the balance as hunting grounds, they must have done so because they understood such a final disposition of the land to be the consequence of such a lease. Had the lease to the United States continued, they would presumably have agreed, without difficulty, to such a disposition of the land, understanding it to be within the terms of the lease; and this being so, why should the substitution of a cession, a "direct purchase," for the lease, for a new consideration of $300,000, entitle the Choctaws and Chickasaws to object to any disposition of the land whatever for the benefit of the Indians settled thereon, except a mere tribal occupancy after the manner of uncivilized Indians. Even if the Choctaws and Chickasaws had not agreed that their own surplus lands should be sold to white men, the hollowness of their pretense that a similar sale of lands in the Wichita

Reservation would be an injury to them would be readily seen from the fact that for some years past they have allowed white men to settle among them, building towns and railroads, and conducting large mining and business enterprises. The census of 1890 (Indians, p. 256) gives a report of population, which may be tabulated as follows:[1]

CHOCTAW NATION.

Choctaws		10,017
Other Indians, viz:		
Chickasaws	120	
Indians of other tribes	136	
Indian negroes and mulattoes	229	
White Choctaws	122	
Negro Choctaws	207	
Mixed bloods and squaw men	226	
		1,040
Persons of negro descent		4,406
White persons		28,345
Total population		43,808

CHICKASAW NATION.

Chickasaws, viz:		
Pure-blood Chickasaws	3,129	
White Chickasaws	681	
Negro and mulatto Chickasaws	131	
		3,941

[1] For some reason, which does not now appear, the population of the districts of the two nations has not been computed in precisely the same way. White and negro Choctaws are classified "other Indians," although white and negro Chickasaws are classified as Chickasaws. The expression "Indian negroes" in the Choctaw list, is indefinite, but appears to designate negroes who are members of other tribes.

Other Indians, viz:	
Choctaws	76
Indians of other tribes	19
White persons of other tribes	28
Negroes of other tribes	4
Persons of negro descent	
White persons	
Chinese	
Total population	

The Choctaw, Oklahoma, and Gulf Railroad r
100 miles through the Choctaw Nation, and the St
and San Francisco Railroad 135 miles. The M
Kansas, and Texas Railway operates 130 miles
in the Choctaw and Chickasaw nations, mainly
former, and the Atchison, Topeka, and Santa F
way 95 miles through the Chickasaw Nation.
evident that the 460 miles of road, built by per
of the Choctaws and Chickasaws, were not built s
afford traveling facilities to the 13,146 pure-blood
taws and Chickasaws, nor even to the entire
adopted Indian, half-blood, negro, and mulatto
tion, amounting to 24,371. It is perfectly evide
these railroads were built in consequence of the re
of a large number of white people in the count
with the expectation of bringing in others. Th
ence of 86,766 white persons in the country i
and probably many more at the present time, fu
the explanation of the 460 miles of railroad wh
Indians have permitted to be built.

Besides the existence of these railroads with
Choctaw and Chickasaw nations, which existe

fact of geography, it is also well known that important coal mines exist in the Choctaw country. Even in 1889 752,832 tons of coal, worth $1,323,807, were mined there, necessitating the employment of 1,862 persons. (Census of 1890, Indians, p. 262.) Since then the mining has greatly increased, and mines are now worked at Krebs, Lehigh, Coalgate, Alderson, Hartshorne, and elsewhere. (Rec., 335, 336.) It is also significant that the census of 1890 (Indians, p. 260) reports 76 post-offices in the Chickasaw Nation, and 73 in the Choctaw Nation.

The presence of railroads, mines, and post-offices indicates not merely the civilization of the Choctaws and Chickasaws themselves, and their adoption of the "white man's way," but also that the large number of white people who reside in that country do so by the consent of the Indians. At the trial in the court below, it was contended that the white population in the Choctaw and Chickasaw nations was there because of the failure of the United States to remove intruders. No evidence in support of this contention was introduced, but counsel for the United States called on the Secretary of the Interior for information on this point. In reply he transmitted a report from the Commissioner of Indian Affairs. (Rec., 330–337.) This report shows that the alleged intruders are mostly persons to whom the Indians have rented farming land on shares (Rec., 330), or who in other ways acquired rights of residence by permit or contract. (Rec., 332.) From time to time the Government has been asked to remove intruders, and many persons have been removed in consequence, but it has always happened that the majority of the persons complained of either could

not be identified by the Choctaw and Chickasaw authorities (Rec., 335), or else obtained permission to remain. (Rec., 332, 336.) It would seem that in many, if not most, cases the alleged intrusion merely meant neglect to pay the permit tax, and that when the complaint had the desired effect, and the tax was paid, the parties were allowed to remain. Certainly there is nothing in this report to indicate any substantial failure on the part of the United States to perform its duty of removing intruders, especially in view of the established practice of the Choctaws and Chickasaws to grant permits of residence to all white men who would pay the permit tax. The contention that the Choctaws and Chickasaws would be injured by the sale of portions of the Wichita Reservation to white men must fall to the ground.

CONCLUSION.

It is, therefore, submitted, in the first place, that the Wichita Reservation is the absolute property of the United States as against the Choctaws and Chickasaws, and in the second place, that if the title of the United States is not absolute, then it must be in trust for the sole purpose of granting an exclusive Indian title to the Wichita and affiliated bands, which title the United States has undertaken to grant, by placing these latter Indians on the reservation and supporting them there, so that an allotment of a portion of the reservation to these latter Indians individually, and the sale of the balance for their benefit, are in fulfillment of the trust. The court is therefore asked to reverse and set aside the

decree of the court below, and to remand the case to the said court with directions to enter a decree dismissing the petition of the Choctaw Nation and the Chickasaw Nation, and ordering the allotment of 160 acres of land in the Wichita Reservation to each member of the Wichita and affiliated bands, in accordance with, and under the restrictions of, the agreement of June 4, 1891, and also ordering the proceeds of all sales of the unallotted portion of the said reservation to be disposed of for the benefit of the said Wichita and affiliated bands in accordance with the provisions of section 6 of the act of February 8, 1887 (24 Stats., 388), commonly called the "Dawes land in severalty act," and further ordering the said Wichita and affiliated bands to execute a release to the United States of all right, title, interest, and claim, of any nature whatsoever, in and to any lands within the limits of the United States except those allotted to them.

The reasons for requiring a release from the Wichita and affiliated bands will appear in a brief, hereafter to be filed, upon the issues raised by the appeal of the said bands of Indians.

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Special Attorney.

JOHN W. GRIGGS,
Attorney-General.

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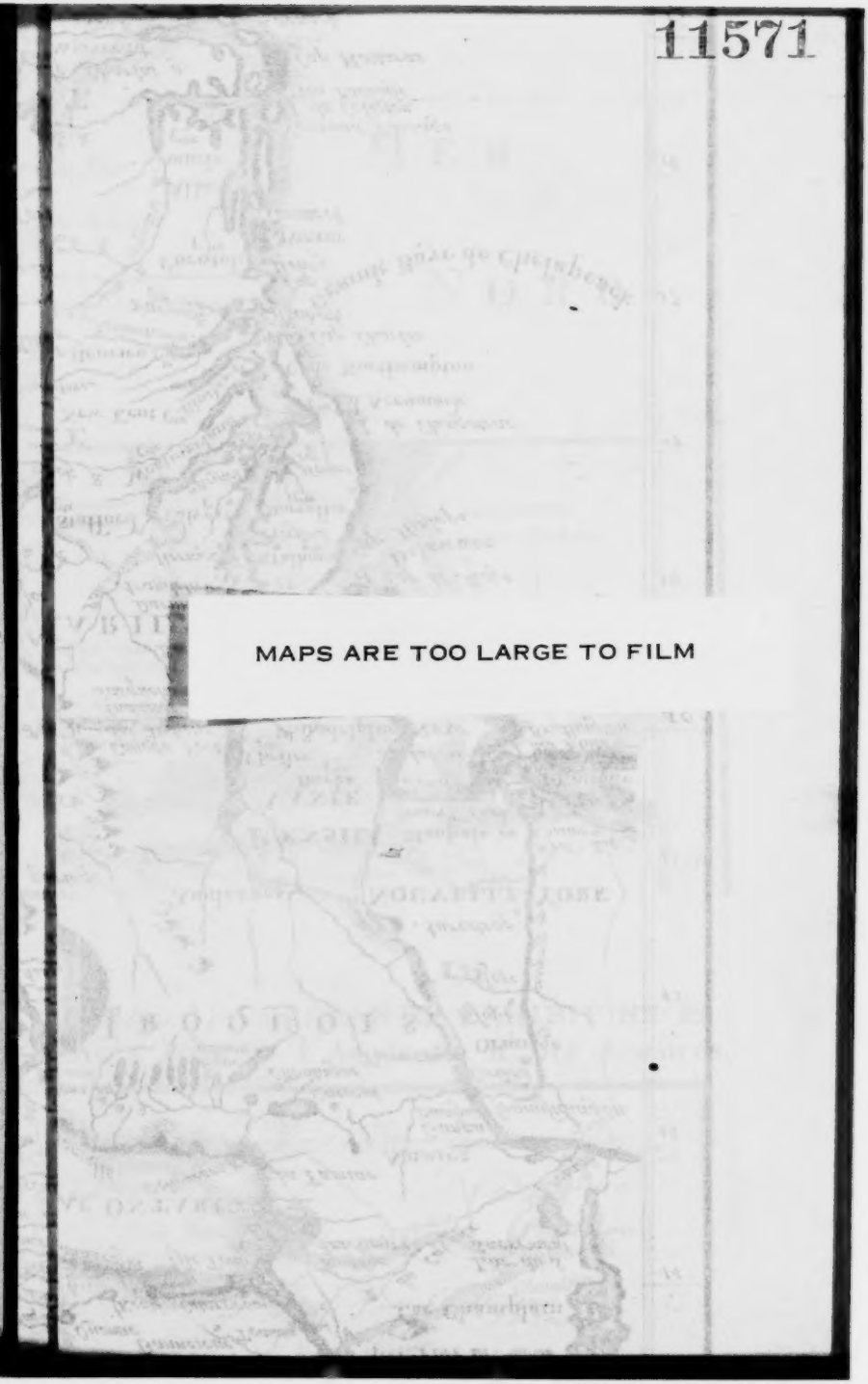
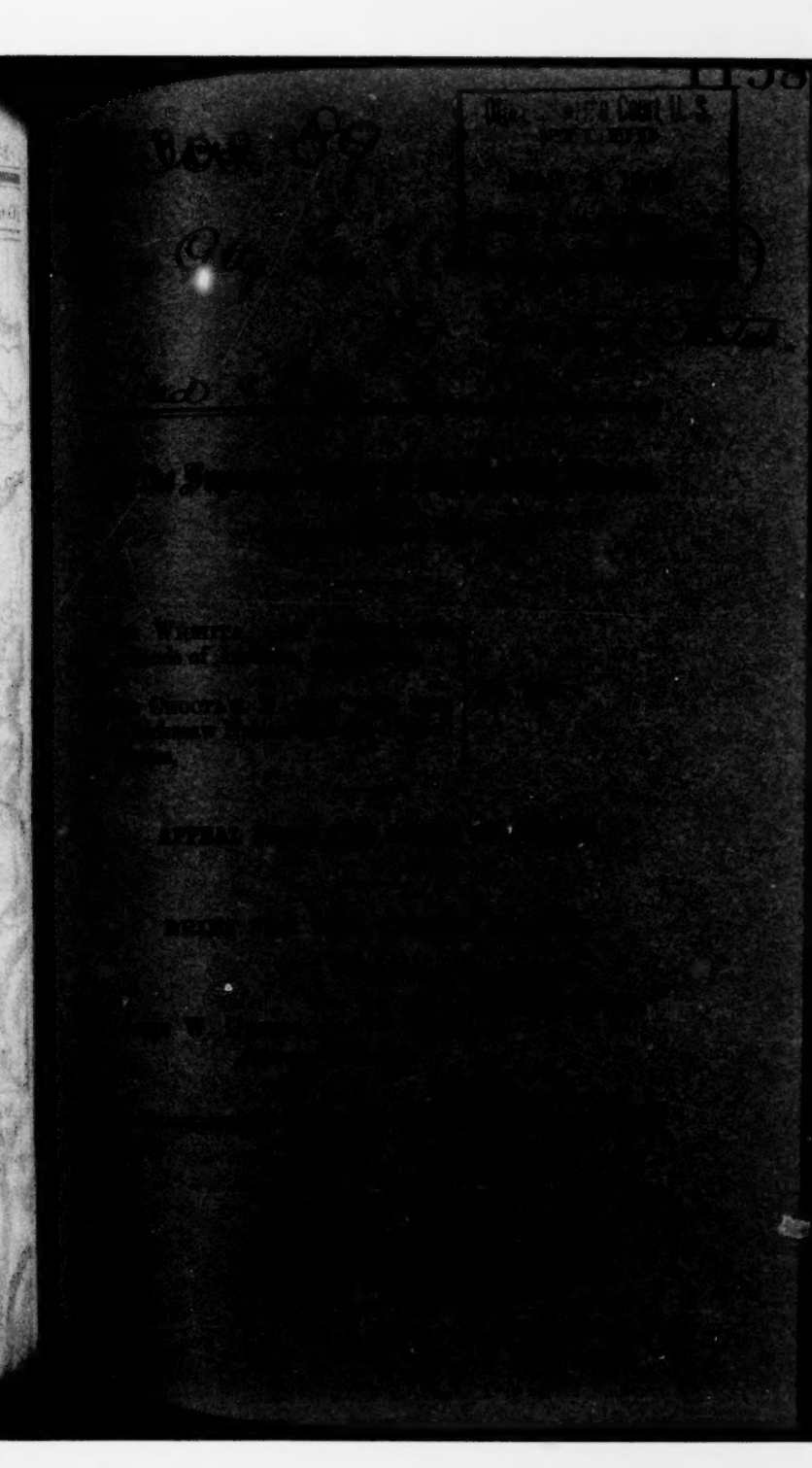


MAPS ARE TOO LARGE TO FILM



In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE WICHITA AND AFFILIATED Bands of Indians, appellants,
v.
THE CHOCTAW NATION AND THE Chickasaw Nation and the United States. } No. 338.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This case, like cases Nos. 337 and 339, arises under the act of March 2, 1895, § 1 (28 Stats., 876, 894–899), referring to the Court of Claims the claim of the Choctaws and Chickasaws to a certain tract of land known as the Wichita Reservation, and also the claim of the Wichita and affiliated bands of Indians to compensation in the event of the sale, by the United States, of the balance of

the land in the said reservation, over and above a certain area to be allotted to the Indians of the Wichita and affiliated bands in severalty. This Wichita Reservation is a portion of a larger district, commonly known as the Leased District, which was first leased and afterwards ceded to the United States by the Choctaws and Chickasaws by certain treaties.

The Wichita and affiliated bands were, as will be seen below, placed on a portion of this reservation by the United States in 1859, and they were afterwards allowed to occupy the whole of it. The Wichitas, however, base their claim upon their history, which may be summarized as follows:

The Wichita tribe of Indians, called in their own language Kitikitish, by the Spaniards Taovayase, and by the French Ouachita and Panis Piqués (tattooed Pawnees), were, as far as records go, first met with by white men in 1688, when they lived on or near the Washita River, in Louisiana. (Rec., 94.) In 1700 they moved 20 leagues farther west. (Rec., 147.) In 1719 they, or a portion of them, were found on a branch of the Arkansas, apparently the Canadian, not far from its mouth, in company with members of five Texas tribes and some Caddoes from western Louisiana. (Rec., 155–158.) After a partial destruction of their tribe by the Chickasaws, the Wichitas withdrew to the Caddo country (Rec., 98), and in 1758–59 they joined other tribes in a war against the Spanish at San Saba and elsewhere in Texas. (Rec., 203.) De Mesières, in 1778, reported that the Taovayase nation occupied two villages on either bank of the Red River, near where three forks of that

stream unite, and to the west of a mountain, apparently the Cross Timbers. (Rec., 210.) They had occupied one or both of these villages at least as early as 1759. Fragoso, in 1788, reported finding the Tahuayase villages west of a mountain, but did not mention the river. (Ho. Ex. Doc. No. 21, 50th Cong., 1st sess., p. 49.) In 1805 the two "Panis or Towiache" villages, said to be called Witchita and Towaahach, were reported to be up the Red River, 800 miles (340 by land) above Natchitoches, in Spanish territory, about 50 leagues below where they had been 40 years before. (Am. State Papers, Ind. Affs., Vol. I, p. 723.) Similar reports were made by various persons down to 1817, inclusive; but in 1821 Major Long reported that the Osages had recently driven the "Pawneys of the Red River" from their homes, and that they had settled near the head waters of the Brazos or the Colorado. (Rec., 203.) In 1834 Dodge and Catlin found a "Toyash" village on the North Fork of the Red River, near Elk Creek, and were told that the people had come from the south. (Am. State Papers, Mil. Affs., Vol. V, p. 381.) They abandoned this village not long afterwards.

The Wichitas were a seminomadic people, building round, grass-covered huts, and cultivating the ground, but changing their location every few years. (Rec., 214.) They had horses, and hunted on the plains a large portion of every year. The word "Wichita" is said to be Osage for "moving about," "migrating." (Rec., 222.) In 1843 there was a Wichita village on Cache Creek, 30 miles from its mouth (Rec., 234), but it does not appear how many of the tribe lived there, nor for how long, and

they are shown to have lived in Texas for some years before the annexation. (Rec., 100, 102, 126, 133.) In 1847 their principal village was on the Big Wichita, and they had another village nearer the Brazos. About 1850 they went to Rush Creek, in the Chickasaw country, along with a few of the Caddoes, Keechies, and Wacoes, where they were in August, 1852. In 1857 some of them returned to Texas, and had a village near the mouth of the Big Wichita. In 1858 the Wichitas and those with them took refuge at Fort Arbuckle for fear of the Comanches, and in 1859 they were placed on a reservation in the northeast corner of the present Wichita Reservation. (See Indian Commissioner's Reports, 1847–1859.)

Besides the separate claim of the Wichitas, as alleged aboriginal owners of the country, the Wichita and affiliated bands collectively claim the country under promises alleged to have been made to them in 1859. The affiliated bands (Wacoes, Tawakonies, Caddoes, Ionies, Keechies, Penetethka Comanches, and some Delawares) numbered in 1891 about 885 persons, the Wichitas being then numbered at 175, but by later reports 153. The former are remnants of tribes which either originally belonged in Louisiana and Texas or wandered there a number of years ago. In 1854 they were placed on small reservations in Texas (except a few Caddoes, Keechies, and Wacoes, who were then with the Wichitas), but in 1859, on account of the hostility of the Texans, they were removed to a small reservation on the False Washita, partly within the present Wichita Reservation.

(See Indian Commissioner's Reports.) Since that date their history has been that of the Wichitas.

This settlement of the Wichita and affiliated bands within the present Wichita Reservation was made in pursuance of instructions issued March 30, 1859, by the Acting Commissioner of Indian Affairs to the superintendent within whose charge the "leased district" lay, as follows:

> Fix upon a suitable location for the Wichitas, and make such examination of the country as will enable you to determine upon the proper places for locating and colonizing the Texas and other Indians, which it is intended to place within the district. In carrying out this policy, the different bands, so far as they can not be united, are to be located upon distinct reservations, with circumscribed limits, containing only so much land as may be necessary for their actual occupancy and use. * * *
>
> So soon as it may be practicable and safe for the Wichitas to remove to their new location, you will require them to go there, giving them to understand that it is to be their permanent home, and that none of them must leave their reservations without the permission of the agent. The same understanding must be impressed upon the other Indians.

On September 20, 1859, the superintendent reported as follows:

> In pursuance of instructions from your office * * * I selected, in the month of June last, reserves on the Fausse Wachita River, near the old Kechai village, and about 40 miles northeast of the eastern extremity of the Wichita Mountains, in the river valley, on the south side for the Comanches

> and other Indians from Texas; and on the north side, between the river and Sugar Tree Creek, for the Delawares and Caddoes, heretofore affiliated with the Wichitas or Ta-wai-hash; and for the latter and the bands of Kechais affiliated with them, I selected a reserve on the Canadian, some 25 miles west of those on the Fausse Wachita. (Sec. of Interior's Rept., 1859, pp. 382–3; 533, 633.)

He further reported that, for reasons stated, he had included pasture land in these reservations, making them much larger than was needed for cultivation. Their aggregate area was 154,240 acres, that of the present Wichita Reservation being 743,610 acres.

During the rebellion the Wichita and affiliated bands took refuge in Kansas, but returned in 1867. In 1872 certain chiefs and delegates of the Wichitas and affiliated bands entered into the following agreement with the Commissioner of Indian Affairs:

> Articles of agreement made and concluded at Washington City, District of Columbia, this nineteenth day of October, A. D. 1872, by and between Francis A. Walker, Commissioner of Indian Affairs, representing the United States, of the one part, and the undersigned chiefs, headmen, and members of the Wichitas and affiliated bands of Indians duly authorized to act for their people, of the other part, witnesseth:
>
> ARTICLE 1. The United States hereby give and grant to the said Wichitas and other affiliated bands, for a home, the tract of country bounded as follows, to wit: Commencing at a point in the middle of the main channel of the Washita River where the 98th meridian of west longitude crosses the same, thence up the middle of the main channel of said river, to

the line of 98° 40′ W. L., thence on said line of 98° 40′ due north to the middle of the main channel of the main Canadian River, thence down the middle of said main Canadian River to where it crosses the 98th meridian, thence due south to the place of beginning.

ARTICLE 2. In consideration of the reservation provided for in the preceding article the said Wichitas and other affiliated bands hereby cede and relinquish to the United States all right, title, interest, or claim of any nature whatsoever, in and to any lands in Texas, Louisiana, Indian Territory, or elsewhere within the limits of the United States.

(Sen. Ex. Doc. No. 13, Forty-eighth Congress, first session, pp. 3, 56.)

The tract of country described in this agreement had practically existed as the Wichita Reservation for some time. It was bounded on the east by the Chickasaw Nation, on the north by the Seminole session of 1866, on the west by the Cheyenne and Arapahoe Reservation, set off in 1869, and on the south by the Kiowa and Comanche Reservation, established in 1867.

In his annual report for 1872 the Commissioner of Indian Affairs (p. 101) recommended the ratification of the agreement, but no action was taken by Congress upon this recommendation. Since the date of the agreement, however, the boundaries therein named have been officially maintained as those of the Wichita Reservation, and annual appropriations have been made for the support of the Wichita and affiliated bands, residing thereon.

On June 4, 1891, an agreement was made between the United States and the Wichita and affiliated bands of Indians for the allotment to each of the said Indians, in

severalty, of 160 acres of a certain tract of land therein described (heretofore known as the Wichita Reservation), and for the sale of the balance thereof subject to the decision of Congress upon the claim of the said Indians for compensation for the said balance. This agreement was submitted to Congress January 6, 1892. (Sen. Ex. Doc. No. 14, Fifty-second Congress, first session.) By the Indian appropriation act of March 2, 1895, § 1 (28 Stats., 876, 894–899), the claim of the Choctaws and Chickasaws to this land, and that of the Wichita and affiliated bands to compensation for the unallotted portion, were referred to the court below for final adjudication, the United States being made a party defendant to the suit.

The case was tried in January, 1898, and on March 21, 1899, the court below entered its decree (Peele, J., dissenting), providing that the proceeds of the sale of the balance of the Wichita Reservation, over and above the allotments made or to be made to the members of the Wichita and affiliated bands, should be paid to the Choctaws and Chickasaws (Rec., 442); whereupon the Wichita and affiliated bands took this appeal (Rec., 443). The United States also appealed, and the Choctaws and Chickasaws took a cross appeal, but as those two appeals raise entirely different issues from those of the present appeal, they are considered in a separate brief.

BRIEF OF ARGUMENT.

In the brief for the United States upon the issues raised by its own appeal (case No. 337) and the cross appeal of the Choctaws and Chickasaws (case No. 339)

it has been stated that the United States conceded that the permanent settlement of the Wichita and affiliated bands upon the Wichita Reservation invested them with a full right of occupancy therein, and all the incidents of such right, so that they are now entitled to receive 160 acres apiece in severalty, and also the proceeds of the sales of the balance of the land whenever such sales are made as authorized by the jurisdictional act. If this were all that the Wichita and affiliated bands claimed, the United States would indorse the appeal of these Indians instead of opposing it, but as their appeal is based upon a claim for very much more than the full beneficial interest in the reservation, the attitude of the Wichita and affiliated bands is, as regards such basis of their claim, as antagonistic to the United States as is the attitude of the Choctaws and Chickasaws in regard to the Wichita Reservation.

It is true that in the present suit the Wichita and affiliated bands ask for judgment only in regard to the Wichita Reservation, yet they evidently intend, in case of an unrestricted judgment in their favor, to avail themselves hereafter of the sixth article of the agreement of June 6, 1891, reading as follows:

> It is further agreed that there shall be reserved to said Indians the right to prefer against the United States any and every claim that they may believe they have the right to prefer, save and except any claim to the tract of country described in the first article of this agreement. (28 Stats., 896.)

The position of the United States as to this claim is that the affiliated bands never had any rights of occupancy north of the Red River (no such rights south of

this river having ever been the subject of claims against the United States, but only against Texas); that if the Wichitas ever had any such rights they were confined to points outside the present Wichita Reservation, and had been lost by abandonment long before 1859; and that no land outside that reservation was ever given or promised to these Indians by the United States; but that since they have asserted a claim for more than this reservation, the decree in the present case should be so framed as to bar them from renewing the claim in any subsequent proceeding. The court below has undoubted jurisdiction to enter such a decree. The jurisdictional act directs the court to consider and determine "the rights" (i. e., of course, *all* the rights), "legal and equitable, of the United States," as well as of both the claimant and defendant Indians in the premises, "and to try and determine all questions that may arise in behalf of either party in the hearing of said claim." The claim of the Wichitas and affiliated bands to land outside the Wichita Reservation is such a question. First, because these Indians have based their claim to that reservation upon the larger claim to a district including not merely that reservation but an indefinite quantity of the surrounding country; and second, because that reservation was given to these Indians with the intention and understanding that no claim for any other land should be made against the United States. It being submitted that the agreement of 1872 not merely expressed the real intention of the parties, but also, though never formally ratified, had been practically adopted and acted upon by both sides, the court below was asked, in

behalf of the United States, to couple a decree in favor of the Wichita and affiliated bands with a requirement that they should execute a formal release of all other claims to land. Certainly any such decree should either require such a release or else the decree should positively declare that these Indians have no valid claim upon the United States for any land outside this reservation. Should the final decree leave this matter unsettled, the respective rights, legal and equitable, of the United States and these Indians in the premises would not be "determined" as required by the jurisdictional act.

In order that the court may be in a position to direct a complete decree to be entered, covering all the rights, legal and equitable, of all the parties to this suit, as the jurisdictional act requires, the whole claim of these Indians must be carefully considered. It is a twofold claim, as follows:

First. The Wichitas (153 in number) claim the entire "leased district" as their own territory by original and continuous occupancy.

Second. The Wichita and affiliated bands (about 1,060 in number) claim the entire "leased district" as their common territory by virture of promises alleged to have been made to them by the United States in 1859, when they were placed thereon.

These claims are certainly antagonistic, and if the second could be sustained the first would have to fall, because the Wichitas, having acquiesced in 1859, and ever since, to the admission of the affiliated bands to what the former claimed was their own exclusive territory, could not now be allowed to say that they alone should have

the benefit of the country and that the United States must make other provision for the affiliated bands. Apparently the Wichita claim is brought forward in order that if the claim based on the transactions of 1859 is decided against them, the Wichitas may still have a claim to fall back upon, even if the affiliated bands have not.

THE WICHITA CLAIM TO THE ENTIRE "LEASED DISTRICT."

The striking feature of this claim is not so much that it is the claim of 153 persons to 7,713,238.84 acres, as that, in view of the basis upon which it rests, there is no reason why it should be limited to that particular extent of country, or why the United States should be called upon to compensate these 153 persons if Texas is not also called upon to do so. By their own showing these 153 Wichitas have just as good a title to all the country between the mouth of the Canadian (at 95°) on the east, the one hundredth meridian on the west, the Red River on the south, and the Canadian and its north fork (or perhaps the Arkansas and the Cimarron) on the north, and to a territory of even greater extent in Texas, as they have to the 7,713,238.84 acres of the "leased district." In fact, to quote the words of their counsel in the court below, they recognize the "leased district" only "as a convenient form of designating, not the pristine home of the Wichitas, but rather a portion of it, in which the lands at issue herein happen to be situated." Hence it is not certain that the Wichita claim is even

limited to the "leased district," and whatever be its limits now there is no reason why it should be so limited in the future, unless the judgment of this court in the present case shall impose some limitations upon it. The great difficulty with the Wichita claim, if it have any foundation at all, is to find out where it really ends, because neither the United States nor any other nation has ever at any time made a treaty of limits with the Wichitas. The Choctaw and Chickasaw claim may be unreasonable and unjust, but it is at least definite. They claim every acre within certain definite boundaries, but not a foot outside, and their claim is based exclusively upon certain treaties with the United States. The claim of the 153 Wichitas, on the contrary, rests upon traditions of pristine habitat and the more or less inexact statements of explorers, while its geographical limits extend or recede according to the point of view of the individual who considers them.

From the Wichitas' point of view, the only possible boundaries of the country which they claim by right of pristine habitat are natural boundaries, i. e., such as really interposed a substantial barrier between the Wichitas and their enemies. The Cross Timbers make such a boundary on the east, though if, as appears to be the case, they claim the country westward from where La Harpe would seem to have found them in 1719, the northern part of their eastern boundary would be considerably east of the Cross Timbers. The country they really claim is nothing less than the "Great Prairie," which includes the "Staked Plain," and the general level of whose surface

is broken only by the Wichita Mountains, rising like an island from the sea of prairie. The mountains of Colorado and New Mexico bound this prairie on the west, but to the north and south are no natural boundaries nearer than the Arkansas and the Pecos, and the main reason for regarding these streams as boundaries is that we do not know of the Wichitas ever having crossed them.

That 153 individuals should claim the entire "Great Prairie west of the Cross Timbers" by right of pristine habitat is manifestly preposterous; but yet, unless their claim is restricted to the present Wichita Reservation, and to that in common with the "affiliated bands," there is absolutely no place where limits can be put to their claim short of the natural boundaries of the "Great Prairie." If their claim of pristine habitat is worth anything, it attaches as much to one part of this prairie as to another, for down to the year 1859, when the United States placed them on the reservation and undertook to keep them there, they were practically free to roam, and apparently did roam, over the whole prairie, and they could have built their villages of grass huts wherever they chose, without hindrance, on any spot not actually occupied at the time by the villages or camps of other Indians.

The very vastness of the Wichita claim, however, demonstrates it weakness, its lack of foundation, and this can not be remedied by concentrating the claim, so to speak, by restricting it to a smaller area. This court can not, for instance, entertain the claim of original occupancy, or "pristine habitat," as regards the Wichita Reservation alone; for unless this claim is valid as regards the whole prairie, it can not be valid as regards that reservation.

Looking, then, at the claim to the entire "Great Prairie west of the Cross Timbers," the first thing to notice is that it can not be an exclusive claim. The Comanches, Kiowas, and the affiliated bands are clearly shown by the evidence to have lived in and roamed over the Great Prairie just as the Wichitas did, and, in fact, the former, except two or three of the affiliated bands, made much more use of the prairie than did the Wichitas; and this not merely because the former were very much the more numerous, but because they were purely nomadic, and did not cultivate the ground at all. It is impossible to say which tribe was first on the prairie, and it would be immaterial in any event, for the priority gave no exclusive rights. Those who came later stood on the same footing as those who had preceded them.

The fact that the Wichitas, in common with other tribes, hunted buffalo in any part of this vast prairie did not constitute an occupancy of it by the Wichitas within the meaning of the doctrine announced in *Cherokee Nation* v. *Georgia* (5 Pet., 1, 17) as to the right of Indians to "the lands they occupy." The only lands which the Wichitas occupied at any time were those which they cultivated and where their villages stood, and their occupancy of these was not continuous, as they moved their village or villages from time to time. Hence the Wichita claim is really twofold, covering a right, in common with other tribes, to hunt in the "Great Prairie west of the Cross Timbers," and also an exclusive right of occupancy in whatever land they actually occupied, within the meaning of the doctrine of *Cherokee Nation* v. *Georgia*, in 1859.

While the right to hunt is not a right of occupancy, it is a substantial right, and it has been recognized, both by the United States and the Choctaws, as far as regards all that portion of the Great Prairie which was within the United States in 1835. The treaty of August 24, 1835 (7 Stats., 474), provided that the Comanches, Wichitas, the associated bands of both, the Cherokees, Muscogees (i. e., Creeks), Choctaws, Osages, Senecas, and Quapaws, each and all of them, had "free permission to hunt and trap in the Great Prairie west of the Cross Timbers, to the western limits of the United States." So much of that district as lay south of the Canadian had been acquired from the Quapaws by the United States in 1818 and granted to the Choctaws in 1820, while so much as lay north of the Canadian had been granted to the Cherokees in 1828. (7 Stats., 311.) As far, therefore, as treaty rights were concerned, the Cherokees and the Choctaws were those who granted this permission to hunt and trap, while the Wichitas and others, being parties to this treaty, were thereafter entitled to claim their hunting rights by virtue of the treaty alone, and could not set up any aboriginal right to such claim.

The Choctaw and Chickasaw agreement of January 17, 1837 (7 Stats., 605), was of course subject to the provisions of the treaty of 1835 as to that portion of the Choctaw country which lay west of the Cross Timbers, and the lease to the United States, made in 1855, was likewise subject to the same provisions. When, however, the United States, in 1859, settled the Wichitas and affiliated bands (who were presumably the same as the "associated bands" referred to in the treaty of 1835)

in a portion of the leased district, it was clearly understood that thereafter these Indians should remain within the bounds of their reservation (whatever those bounds were, a matter which will be considered below) and should not depart therefrom, whether to hunt on the Great Prairie or for any other purpose, without the agent's permission, so that their coming on to the reservation necessarily involved an abandonment of their rights under the treaty of 1835.

Whether these Indians were called upon to formally renounce their rights under that treaty or not does not appear, and such formal renunciation would have been wholly unnecessary. The reservation policy of the United States had been adopted for many years, and was perfectly well known to the Indians. It was an essential feature of this policy that when Indians were once placed on a reservation they had to stay there, and acceptance of the reservation was itself a renunciation of all right to hunt and trap outside its limits, except by permission of the Government.

What rights of occupancy the Wichitas had in 1859 depend on the history of the tribe, and also on its numerical strength. An Indian title is a title by occupancy, and when that occupancy ceases the title ceases. This occupancy may be less definite than that of white men, and what constitutes occupancy by a strictly nomadic tribe may differ from the occupancy of an agricultural tribe; but whatever country a tribe may fairly be said to occupy, to that alone it has a title. If that occupancy be terminated, either by voluntary abandonment (for instance, an abandonment due to failure of

game, failure of crops, the prevalence of disease, or natural restlessness, the mere influence of the nomadic instinct) or by forcible expulsion by another tribe, the title terminates also.

The tribes of the east, with which the colonies, and the United States also, at first, had to deal, were comparatively sedentary peoples. They were hunters, it is true, but they also cultivated the ground and built fairly permanent dwellings. They remained in the same places year after year (until the white men, by war or by treaty, gradually caused them in most cases to leave their homes for the forests farther west), and the bounds of the territory of each tribe or aggregation of tribes were fairly well defined. It naturally resulted that the opinions in the earlier cases dwelt specially upon the extinguishment of the Indian right of occupancy by a voluntary cession to the United States. Thus, in *Cherokee Nation* v. *Georgia* (5 Pet., 1, 17) Marshall, C. J., said:

> * * * the Indians are acknowledged to have an unquestionable and heretofore unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our Government; * * *

Clearly what the court had in mind, in using these words, was the condition of the sedentary tribes of the East, for these words could have no application to (nor had the court probably any knowledge of) the purely nomadic tribes of the West, who existed solely by hunting, had no more permanent dwellings than their tepees, and changed their habitat from time to time. These words would not even apply to the case of the tribes who may be described as seminomadic, viz, those who

cultivated the ground and lived in the same huts for a number of years, but who still, for one cause or another, changed their dwelling places and hunting grounds from time to time.

Whatever the court's knowledge, in 1831, of the different modes of Indian life, the words above quoted were strictly limited to the case of actual Indian occupancy. "The lands they occupy," not those they may have formerly occupied, are those as to which a voluntary cession was stated to be necessary. The occupancy contemplated by the court was obviously an actual one—not a theoretical or imaginary one—and it follows, as a corollary, that no matter how long a tribe may have occupied a certain region, yet, if at any time it ceases to occupy it, then "a voluntary cession to our Government" is unnecessary, and would cede nothing, because the right of occupancy would have already been extinguished.

In *Johnson* v. *McIntosh* (8 Wheat., 543, 590) the same eminent jurist seems to have had distinctly in mind the possibility of the legitimate acquisition of the possession. as well as the fee, of land formerly occupied by Indians, in consequence of a simple abandonment without any formal cession, for, after announcing that the legal doctrine of the right of the Indians to the occupancy, and of the United States to the fee, was the same that had prevailed in colonial days, when the fee was in the Crown, he said:

> As the white population advanced that of the Indians necessarily receded. The country in the immediate neighborhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed.

> The soil, to which the Crown originally claimed title, *being no longer occupied by its ancient inhabitants*, was parceled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the Crown, or immediately through its grantees or deputies.

The same idea of the consequences of an abandonment of occupancy as distinguished from a formal cession seems to have been in Chief Justice Marshall's mind, though without regard to the particular reasons for abandonment, when he said, in *Cherokee Nation* v. *Georgia*, already cited:

> They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases.

The effect of abandonment is directly stated by Baldwin, J., in another case:

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way, and for their own purposes, were as much respected, *until they abandoned them*, made a cession to the Government, or an authorized sale to individuals. *In either case* their right became extinct, the lands could be granted disencumbered of the right of occupancy, or enjoyed in full dominion by the purchasers from the Indians. * * * Such was the view taken by this court of Indian rights in the case of *Johnson* v. *McIntosh* (8 Wheat., 571), which has received universal assent (*Mitchel* v. *United States*, 9 Pet., 711, 746.)

That the statement quoted above from *Cherokee Nation* v. *Georgia* has been understood by the court as referring to a cessation of possession by abandonment merely is clear from the paraphrase of it, given in *United States* v. *Cook* (19 Wall., 591, 593), as follows:

> The possession, *when abandoned* by the Indians, attaches itself to the fee *without further grant.*

This last statement of the law having been quoted without criticism in *Beecher* v. *Wetherby* (95 U. S., 517, 526), may be taken as the settled doctrine of the court.

It follows from the doctrine above stated that in ascertaining whether the Wichitas had a right, in August, 1818, when the Quapaw treaty was made, to any part of what afterwards became the Wichita Reservation, the thing to be determined is whether the Wichitas actually occupied any portion of the reservation at that time. If they did not occupy it then, it is immaterial whether they may have occupied it at any previous time or not. Moreover, as the Indian right of occupancy in any land may be lost by abandonment, without any cession to the Government, it is clear that if a tribe which has no treaty of limits with the United States diminishes in numbers, this diminution works an abandonment of a portion of their land, for a smaller number of persons can not occupy the same quantity of land, after the Indian manner, that a larger number did. If a tribe makes a treaty of limits with the United States, it is entitled, as long as it exists, to all the land within those limits; but if its title depends merely on occupancy, it can not claim more than it occupies, a quantity which must to some extent depend on its population. Hence

the numerical strength of the Wichitas must be a factor in the case.

In discussing the history of the Wichitas in the court below their counsel referred first to their traditions, and then attempted to make the statements of travelers or historians accord with those traditions. It is submitted that by far the safer plan is to examine first the written accounts, and only to rely on tradition in so far as it accords with them. The latter plan will therefore be followed here.

The word Wichita is the Osage name for the tribe, and is believed to mean "moving about," "migrating" (American Antiquarian, Vol. XIII, p. 251, Rec., 222), the Wichitas calling themselves Kitikitish. The name Wichita or Washita, as given to certain streams in Louisiana, Arkansas, Texas, and the Indian Territory, and to the Wichita Mountains,* has evidently been given to those streams or mountains by other Indians or by

* The town of Wichita, in Kansas, takes its name from the temporary settlement of the Wichitas there during the rebellion, when driven from their reservation by the Confederates and their Indian allies. It therefore indicates nothing as to the early history of the tribe. The name Fausse Ouachita, or False Washita, given on the earlier maps of this century to the Washita River of the Indian Territory, is possibly due to the fact that the Washita River of Arkansas and Louisiana was long believed to rise near the source of the Arkansas. (See Senex's map, 1710, Rec., 79; Le Page du Pratz, Vol. I, p. 152, 1758; La Harpe's references to a stream which he supposed to be the "rivière des Ouachitas," 6 Margry, 286, 287, Rec., 154.) It is possible that some French voyageurs, going from the Arkansas to the Red River, came upon a stream which they believed to be the "rivière des Ouachitas," and followed it to its mouth, when they discovered their error and called it the Fausse Ouachita.

white men, and does not indicate that the Wichitas themselves called those streams or mountains by their tribal name.

If the word "Wichita" has the above meaning, it appropriately designates the tribe, as, although not strictly nomadic, like the tribes who dwelt in tepees and lived solely by hunting, the Wichitas were wholly without permanent homes until they were brought to the reservation in 1859. They built huts of a peculiar shape, and raised crops, but moved their village or villages every few years. Until Dodge and Catlin visited them in 1834, but little was known of them, and the attempt to resort to tradition where actual knowledge fails can not lead to any certain results.

The first historical reference to the Wichitas that has as yet been found is that of Tonti, under date of February, 1688, who states that the nation of the Nachitoches "makes but one people with two others, which are the Ouasita and the Capichis," whose chiefs met him along with those of the Nachitoches. Tonti does not state precisely where the Ouasita dwelt. (Découvèrtes en Amérique, Paris, 1697, p. 319; Rélation de la Louisiane, Amsterdam, 1720, p. 196; Rec., 94.)

The next record of the Wichitas is that Bienville found them on a branch of the Marne (Red River) in 1700 (4 Margry, 432, 434; Rec., 147), presumably where Senex's map of 1710 (Rec., 79) and De l'Isle's map of 1720 (Rec., 91) place them, viz, a short distance up the Ouachita River. In September, 1719, La Harpe came upon an encampment of "Touacaras, Toayas, Caumuches, Aderos, Ousitas, Ascanis, Quataguois, Quicasquiris, Honechas," on "the

southwest branch of the Alcansas River," i. e., evidently the Canadian,* not far above the mouth of its North Fork (6 Margry, 289; Rec., 156.) These names may be apparently identified as those of the Tawakoni, Tawéhash, Southern Comanche, Adái, Wichita, Caddo, Kiowa Apache, Kirikirish (=Kitikitish), and Waco tribes, the last on the theory that "Honechas" is a misprint for "Houechas," as indeed "Quicasquiris" is manifestly a misprint for "Quirasquiris." As La Harpe elsewhere used the spelling Ouachita, it is possible that by "Ousita" he did not mean Wichita, but it must be admitted that the other names are of tribes with which the Wichitas might naturally be found, and, in fact, "Quirasquiris" evidently refers to the Wichitas, whether "Ousita" does or not. La Harpe's statement (6 Margry, 293; Rec., 157) that these Indians told him "that they were allied with the two Ascanis and Ousita villages situated north-northwest from their dwellings, at 60 leagues distance," involves,

* In the court below counsel for the Wichitas assumed that this stream was the Cimarron, and that La Harpe had previously crossed the Canadian and its North Fork, supposing them to be branches of the Washita, and called by him its west and west-northwest branches. It is impossible to follow La Harpe's course or to calculate the distance he traveled with any certainty whatever, as his course was confessedly far from direct, while the daily computation of distance is by whole leagues, though it is most unlikely that an exact number of leagues, without fractions, was traversed each day. Taking La Harpe's account as it stands, however, his general course was about northwest by north, which would bring him to the Canadian a little above the mouth of its North Fork. Had he crossed the latter he would next have come to the Deep Fork, but no mention is made of any such stream; and as he went only a little more than 15 leagues (say 30 miles in a straight

however, a manifest error, both because the Ascanis and Ousita (Caddo and perhaps Wichita) tribes had already been mentioned as among those with whom La Harpe then was, and also because all authorities agree that the Caddos and Wichitas were never north of the Canadian.

The fact that so many tribes were found together indicates that they were outside their own proper territory and had joined for mutual defense against the Osages, in whose country they then were, and a small band of whom had met La Harpe only a fortnight before. (6 Margry, 284, Rec. 153.) Why this aggregation of southern tribes had left their proper homes does not appear, nor when they had left it, nor how long they stayed on the Canadian. Certainly they were not there in 1740, for the Mallet brothers, who mentioned the various bands of Indians they met on or near the Canadian, said nothing of any of those mentioned by La Harpe (see 6 Margry, 460–462), while Fabry, who wintered on the Canadian

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line, on a northerly course from what he called the west-northwest branch of the Washita to what he called the southwest branch of the Arkansas, the latter could not have been the Cimarron, as it is much more than 30 miles north of the North Fork of the Canadian at that point and for a considerable distance farther west. The Indians' statement that the river "formed two branches below their village" (Rec., 157) is intelligible when understood of the Canadian and its North Fork, but not when applied to the Cimarron, which has nothing that can properly be called a branch. Their further statement that their own stream ascended toward the setting sun to Spanish and "Padouca" villages was much nearer the truth when applied to the Canadian than when applied to the Cimarron, as the Mallet brothers came from Santa Fe by the Canadian in 1740 and met "Padokas" on the way (6 Margry, 461). The streams La Harpe took for branches of the Washita were perhaps the Push Metau and Sans Bois Creek.

in 1741–42, met Osages, but no other Indians. (6 Margry, 474–485.)

The fact that La Harpe reported the "Ousita" on "the southwest branch" of the Arkansas explains the appearance of the name "Ouachita" some distance up the Arkansas in De l'Isle's map of 1720 (Rec. 91), and in De l'Isle's Atlas Nouveau of 1741. (Claimant's exhibit No. 28, reproduced in brief for the United States in cases 337 and 339.) De l'Isle also placed this name near the Red River. All geographical statements of European map makers of the last century in regard to Indian tribes must be received with the greatest caution, as the information which came to them, usually very indirectly from the reports of explorers, was fragmentary and imperfect.

In the court below, counsel for the Wichitas assumed that Bienville found but a handful of the tribe, then leaving their Louisiana home forever, and that the removal mentioned by Le Page du Pratz, writing about 1758, was that referred to by Bienville. (See Rec., 98, 147.) There is nothing, however, in Bienville's journal to warrant this assumption. He states that at a certain place he found Wichitas who had abandoned their village and were on their way to the country of the Taensas, and that six days later he reached the Wichita village, where but about five lodges and sixty-six men were left. Bienville does not state how many Wichitas he met on their way to the Taensas country, nor that no other parties were on their way or had already arrived. There is no reason whatever for supposing that he met all of the tribe who were then in Louisiana, still less for limiting their number to a handful. There may have been hun-

dreds of them for anything that appears in Bienville. It is, moreover, certain that the migration referred to by him was not that mentioned by Du Pratz, because Bienville stated that the Taensas village was but 20 leagues west of the Wichita village (4 Margry, 434; Rec. 147), while Du Pratz stated that the Wichitas went very much farther off, even to the Caddo country, 300 miles west of the Mississippi, where they were safe from the Chickasaws.

Counsel for the Wichitas also contended that those of the tribe whom La Harpe found on the Canadian (they contend, Cimarron) in 1719 must have separated from the Louisiana Wichitas long before, apparently a generation or more before 1700, the time when Bienville wrote. They point out that Bienville mentioned the "Ouachita" as having canoes, while Beaurain's note to La Harpe (6 Margry, 290; Rec., 156) states that none of the nations whom La Harpe met on the Canadian made dugouts, "having no knowledge of them [or, perhaps, 'of it,' i. e., the art of making them] up to the present time." In the first place, however, as Bienville, who used the word "canot" (canoe), and Beaurain, who used the word "pirogue" (dugout), were evidently not referring to the same type of boat, it is not at all certain that the Indians on the Canadian may not have had canoes, even though they had no dugouts. Then, too, we know nothing positive about the sources of Beaurain's information, which he certainly did not gather at first hand, for he was not on the spot with La Harpe. We do not even know when he wrote these notes. It is very possible, even probable, that he was misinformed, as La Harpe stated

that these Indians believed that after death they em
barked for the next world on a large dugout, steered b
a black man (6 Margry, 296), which shows that the
knew that such things as dugouts could exist and wha
steering a boat meant, whether they found it necessary
in their own mode of life in the place where he foun
them, to make and use dugouts or not.

According to La Harpe the Touacaras (Tawakonie
were the leading tribe, as he always refers to the vi
lage as that of the Touacaras, and states that the chi
of the Touacaras was the most respected of all, enjoy
ing certain special privileges which in a savage com
munity would assuredly not have been granted excep
to a chief whose followers were sufficiently numerous t
compel compliance with his wishes. At the same tim
La Harpe states that the Toajas were the most numerou
nation. This is one of the puzzles about La Harpe
narrative, presumably due to the fact that La Harp
carried on conversation through two interpreters, a
Indian and a French soldier, who had a common knowl
edge of Nassonite, a language equally unknown to th
chiefs and to La Harpe.

La Harpe states that the chief of the Touacaras an
six other chiefs of nations met him, and he mentio
seven distinct tribal names, counting the names Toaya
Quirasquiris, and Ousita as referring to one tribe. Fro
this it would seem that he met seven tribes in all, vi
the Tawakoni, Southern Comanche, Adái, Wichit
Caddo, Kiowa Apache, and Waco. Leaving out th
Wichitas, it will not be denied that every one of th
other tribes belonged at that time in Texas, excep

the Caddoes, who belonged in Louisiana, near the Texas border, and possibly the Tawakonies, on the strength of Niastor's alleged tradition, though as to these it is safer to take Dunbar's statement that their home was upon the Upper Leon River. (The Pawnee Indians, p. 2.) It can not be contended that any of these tribes had remained long in or near the locality where La Harpe met them, or that they were in the course of a migration to Texas from some other point. It is most probable that their stay, which was only during the summer time, in any event, lasted but a few seasons, after which they returned to the regions where they properly belonged. If, as counsel contend, the Wichitas did not return to Louisiana and moved westward along the Red River, but went southwestwardly from the Canadian (they contend, Cimarron) to the Wichita Mountains and other parts of the leased district, what became of the other tribes? Why were they not associated with the Wichitas in such a movement?

After 1719 the next record of the Wichitas is found in Le Page du Pratz's Histoire de la Louisiane, published in Paris in 1758. He says:

> At present there remains nothing of this [Ouachita] nation, the Tchicachas [Chickasaws] having destroyed the greater part and the rest having retired to the Cadodaquioux [Caddos], where the Tchicachas dare not molest them. (Vol. II, p. 242; Rec., 98.)

In the paragraph immediately preceding the one quoted du Pratz stated that the Cadodaquioux lived upon the Red River, three hundred miles west of the

Mississippi, so that this must be taken as the location of the Wichitas, according to du Pratz's ideas, at the time that he wrote. As he had lived sixteen years in Louisiana (see preface to English edition), his statement carries some weight. It is most probable, therefore, that after La Harpe met the Wichitas they returned to Louisiana, where the Chickasaws attacked them.

Du Pratz's statement that the Ouachitas went westward is not merely found in Jefferys' History of the French Dominions in North and South America (London, 1761, Vol. I, p. 165, Rec. 98), but receives confirmation from Dunbar, who visited the Washita River in 1804, and reported that the tribe of that name, formerly dwelling on its banks, was said to have gone "into the great plains to the westward." (Am. State Papers, Ind. Affs., Vol. I, p. 732.)

The removal referred to by du Pratz must have taken place some time before his book appeared, for the Taovayases (Tawéhash) are stated to have been among the tribes who attacked the Presidio of San Savàr (now San Saba, San Saba County, Tex., near the center of the State) in 1758 (Documentos para la Historia de Texas, vol. 1, p. 33, in Cong. Lib.), and also defeated Parrilla's force the next year. (Bancroft's Works, Vol. XV, pp. 626–628; Rec., 203.) The latter defeat was inflicted near the village which De Mesieres called San Teodoro, when he visited them in 1778, eighteen years after Padre Calahorra had pacified them. (Documentos, etc., vol. 1, p. 33, vol. 2, pp. 272, 275; Rec., 210.)

De Mesieres reports "the Taovayase Nation" as divided into two villages, which he called San Bernardo and San

Teodoro, on opposite sides of the Red River, not far west of a wooded mountain, which may mean the Cross Timbers; but as he also reports the mountains of New Mexico, where the Red River was supposed to rise, as being about four days' travel from the villages, his geography can not be wholly relied on. Fragoso seems to have found them somewhat south of there in 1788. (House Ex. Doc. No. 21, Fiftieth Congress, first session, p. 49.)

The counsel for the Wichitas (Brief, p. 15) cite the statement of Fabry (who saw an abandoned Wichita village on the Canadian in 1742) as confirming their view that La Harpe in 1719 found these Indians still farther north. They omit to point out, however, that, as to the Wichitas, Fabry supplies the missing link between the statements of La Harpe and of Du Pratz. Fabry's statement is:

> The 24th [January, 1742] he saw come to his camp a party of thirty-five Osages, who were going to war against the Mentos, whom these savages also call Pawnees, who were formerly on the Arkansas River, above its forks and 25 leagues below the Black Pawnees, whence they withdrew to the River Saint André [Canadian], where one still sees their old village, and four or five years ago [they withdrew to] near the Kadodakious [Caddoes], where they are at the present time. (6 Margry, 474.)

Beaurain's note to La Harpe's narrative (Rec., 156) states the belief that the Indians met by the latter were the Mentos, but even without this it is clear enough that Fabry was referring to those whom La Harpe met, apparently at the same "old village" on the Canadian whose remains Fabry saw. From the Canadian they

went to the Caddo neighborhood in 1737 or 1738, precisely as stated by Le Page du Pratz, whose work was published in 1758.

It may be added that Fabry, on his return, struck the Red River "three days' journey above the Tavakavas and the Kitsaiches." (6 Margry, 492.) It is practically certain that "Tavakava" is a misprint for "Touacara," i. e., Tawakoni, while it is highly probable that "Kitsaiche" is a form of "Kichai," i. e., Keechi. Certainly the place where Fabry found the Tavakavas and Kitsaiches, on the Red River, near the Caddo country, is just where the Tawakonies and Keechies seem to have been at that time.

Putting Tonty, Bienville, La Harpe, Du Pratz, Fabry, and the Spanish records together, the most reasonable conclusion, that which involves the least amount of conjecture, is that the French found the Wichitas originally in Louisiana; that for a time, probably short, the tribe, or a portion of it, passed the summer season on the Canadian together with portions of other southern tribes, but that ultimately they were driven westward up the Red River by the Chickasaws, after which time they were found among the Indians with whom the Spaniards had to deal in Texas.

After the Wichitas' attack on San Savàr in 1758 (where they figure under their Spanish name, Taovayases), and from that time until Fragoso's visit to them in 1778, they certainly lived in Texas, apparently on the Red River, a little west of the Cross Timbers, and also, at least in 1778, directly across the river in what is now a part of the Chickasaw country. (Rec., 208.) From

1788 there is no record till 1805, when Sibley reported on all the Indian tribes in Louisiana south of the Arkansas and between the Mississippi and the Rio Grande. This report includes the following statement:

> PANIS OR TOWIACHES. The French called them Panis, and the Spaniards Towiaches; the latter is the proper Indian name. They live on the south bank of the Red River, by the course of the river upward of 800 miles above Natchitoches, and by land by the nearest path is estimated at about 340. They have two towns together; the lower town, where the chief lives, is called Witchita, and the other is called Towaahach. (Am. State Papers, Ind. Affs., Vol. I, p. 723.)

It is unlikely that the two Towiache villages referred to by Sibley were actually named Witchita and Towaahach, respectively. What Sibley was told, in all probability, was that the tribe had two villages and also that it was called Witchita (Ouichita) as well as Towaahach (Towiache), as was certainly the case, the one name being used by the French and the other by the Spanish. For some reason Sibley inferred erroneously that these were names of villages, not different European names for the same tribe.

Sibley gives, however, some valuable information, viz, that the Towiaches live "on the south bank of the Red River," about 340 miles above Natchitoches by the nearest path, and 30 miles (by water 70) above the mouth of the False Washita. He also states that their language differs from that of all the other tribes referred to by him (viz, those south of the Arkansas, between the Mississippi and the Rio Grande) except the Tawakenoes,

whose name he translates as Three Canes, and whom he locates on the west side of the Braces (Brazos). He speaks of the alleged descent of the Tawakenoes from the same ancestors as the Towiaches, therein agreeing with Niastor (Rec., 221), from whom, however, he differs altogether as to the meaning of the name Tawakenoe or Tawakoni. According to Sibley, both the Wichitas and Tawakonies belonged in Texas in 1805.

Robin, relying on manifestly earlier data than those of Sibley, placed the two villages on opposite sides of the river. (Voyages dans l'Interieur de la Louisiane, Paris, 1807, vol. 3, p. 3, Rec., 99.) He makes it 80 leagues from the upper Caddo villages to those of the Wichitas, a distance which does not quite tally with that given by Sibley, but both parties relied on loose estimates only.

Sibley quotes Brevel as saying that "about forty years ago" (i. e., in 1765) the Panis lived "about 50 leagues above where they now live. (Am. State Papers, Vol. IV, p. 729.) This location is evidently that near where Parilla was defeated in 1759 (Bancroft's Works, Vol. XV, p. 628, Rec. 203), and where De Mesières visited the tribe in 1778. (Documentos para la Historia de Texas, vol. 2, pp. 272, 275, Rec. 208.)

In 1806 Captain Sparks and others attempted to visit the "Pawnee Piquas," but were prevented by the Spaniards, a fact which indicates that these Indians must have been living in Spanish territory, as Sibley had reported. (Long's Expedition, vol. 2, pp. 302–314.)

H. M. Brackenridge (Views of Louisiana, published in 1817, p. 160, Rec. 125) reports the "Pani or Towiache"

ibe as living 800 miles above Natchitoches, 340 by nd, and as having been "much diminished six or eight ears ago by the smallpox." The table on page 150 of ie same book states that the "Tawakenoes or Panis" ve "south of the Red River, above the Caidoques." his is evidently a misprint for "Towiaches or Panis," s the Tawakenoes are also referred to in their proper lace.

Stoddard, writing from data collected in 1804–1810 nd advising the establishment of a garrison and factory n the Red River, at the present northern boundary of ouisiana, said:

> The Indians, who are now obliged to trade at Natchitoches, would be equally well and perhaps better supplied at the proposed factory. In addition to this, the Pawnes [Footnote: These are a different people from those of the same name on the river Platte] and Ietans and some other Indians high up on Red River and to the southwest of it might also obtain supplies from us and thereby be prevailed on to break their connection with the Spaniards. The Pawnes pursue no other game than the buffalo, of which they kill an immense number. They, however, attend to agriculture and raise more than double the quantity of corn and vegetables that is necessary for their own consumption, and furnish their neighbors with the surplus in exchange for peltries, so that their trade, which is now engrossed by the Spaniards, is deemed of considerable value. (Sketches of Louisiana, p. 455.)

According to this statement, the Wichitas seem to have been living in the villages referred to by Sibley.

Humboldt's map (U. S. Exhibit No. 1, reproduced), published in 1811 from data obtained in 1803, shows

"Indiens Taouaiazes" about latitude 36° 30′ north, longitude 103° west. This indicates a Mexican belief that the Tawéhash (Wichitas) were one of the nomad tribes of the Great Prairie.

Pike's map of the internal provinces of New Spain (U. S. Exhibit No. 5), based on information received by him in 1807, shows "Indiens Yawayes" (evidently an engraver's error for Tawayes, i. e., Tawéhash) south of the Red River.

Melish's maps of 1816, 1818 (U. S. Exhibit No. 6, reproduced), and 1820 show a "Panee" village on the south side of the Red River, about 96° 15′ west longitude. This is, of course, the village, or rather the pair of villages, mentioned by Sibley and which Sparks tried to visit. The longitude of some of the localities on Melish's map is incorrect, and this village is placed somewhat farther east than it should have been, according to Sibley's report, but there is no reason to suspect any other error in its location.

Clark's census of Indian tribes, dated November 4, 1816, (Rec., 244–245), states that the Cadeau and Paneas Piqué (i. e., Caddo and Wichita) tribes reside "on Red River near the southern boundary line of the Missouri Territory." Major Long's report of February 20, 1821, states that—

> They [the Osages] have recently driven the Pawneys of Red River from their place of residence, and compelled them to seek an abode upon the head waters either of the Brassis or Colorado. (Rec., 303; see also Long's Expedition, vol. 2, p. 366.)

The "Pawneys of Red River" can only mean the

Wichitas, who are frequently referred to in Long's Expedition under the name of Pawnee Piquas, and whom Long confidently expected to find on the river which he thought to be the Red, but which proved to be the Canadian. This statement of Long's explains the removal from the villages referred to by Sibley in 1805, and which Sparks tried to visit in 1806. The precise locality to which the Wichitas removed was probably the "Towiash" village on the Big Wichita, shown in early maps of Texas.

It is rather significant that in 1820 Major Long, who had met Kaskaias, or "Bad Hearts," on the Canadian, in Spanish territory, about the one hundred and second meridian, followed the course of the Canadian from the one hundredth meridian to its mouth for twenty-five days, constantly on the lookout for Indians, but seeing no signs of any whatever. As he said that the Kaskaias assured him that the river led to the "permanent village of the Pawnee Piquas," it is evident either that he misunderstood them, or else that they knew but little of the village, and could not have lived near it, or roamed far to the eastward of where Long met them. (Long's Expedition, Vol. II, pp. 101–167; see Rec., 275.) As far as Long's observation went, the country was unoccupied by any Indians whatever, and hence his map, made just after the Choctaw treaty was ratified, indicates the country east of the one hundredth meridian as belonging to the Choctaws only.

When the Choctaw treaty of 1830 was before the Senate, inquiry was made of A. P. Chouteau, a well-known Indian trader, who had traveled extensively in the region

of the Arkansas and Red rivers, as to the proximity of wild Indians to the Choctaw country, and he replied as follows:

> And as regards the proximity of the wild or savage Indians, the nearest band is the Paw-nis Pick, whose village is about 250 miles from Fort Gibson. They raise corn and vegetables in small quantities. Other rambling tribes are to be found. They are the Padocas, Aïtans,* Huitsitas, Hichas, and Cousadas. Their range is from the Pawnees Picks to San Antonio, in Texas, to the south. The Comanches, Arapahoes, Cayouwas, and other bands ramble from the head waters of the Great Platte, Arkansas, Red River, in the direction to San Antonio, and parallel to that chain of the Rock Mountains running south. (Rec., 328.)

This statement shows not merely that a distinction was made at that day between the roving Huitsitas (Wichitas) and the more sedentary Pawnee Picks (Panis Piqués), but that the latter did not live within the country granted to the Choctaws in 1820 and regranted in 1830. A distance of about 250 miles from Fort Gibson indicates that the village was somewhere on the Red River, near the mouth of the Big Wichita, for instance, or perhaps on the Big Wichita, where Austin's map of Texas (published the year Chouteau's statement was made) shows a "Towiash" village. Wherever the village referred to by Chouteau was, it could not have been within the bounds of the country granted to the Choctaws, for Chouteau not merely knew what those

*It is impossible to tell with certainty whether this word is Aïtans or Aïtaus in the original MS., but the former is the more probable, as it would be equivalent to Hietans, i. e., Comanches.

bounds were, they having been established ten years before, but he actually knew the country "from personal examination," and it can not be doubted for a moment that if the Pawnee Picks, as he called them, or any other Indians had had a settlement within that country, he would both have known the fact and would have reported it. Of course it is possible that Chouteau's knowledge on this point was acquired a few years previously, and that the Pawnee Picks had actually moved to the Wichita Mountains when he made his statement, but in any event they could not have been there long.

There is no real evidence of an early residence of the Wichitas at the village on the east side of the North Fork of Red River, where Colonel Dodge found the "Toyash" in 1834, and, in view of Chouteau's statement, it may be said that the evidence is that this village had been occupied but a few years. It is true that Mr. Albert Pike's letter of July 12, 1882 (Sen. Ex. Doc. 13, Forty-eighth Congress, first session, p. 29), states that in 1832, when on the Red River, he heard of a tribe called Pawnee Piks living "in the vicinity of some mountains north of Red River, in a village or villages, and cultivating the soil," and who had, as his informants expressed it, "lived there always." In the sense that these Indians had lived in the neighborhood of the Red River for a very long time, though at different points, the expression is substantially true, and that was probably all that was meant. If the expression referred to the site of the particular village, it was not true, and can not even be relied on as evidence that the Wichitas had lived there a long time.

Ski sa ro ka, "an intelligent Toyash," told Dodge "that their nation lived formerly south" (Am. State Papers, Mil. Affs., Vol. V, p. 381), a statement which is opposed to the theory of a migration from the north; and although the further statement that "their oldest men were born there," i. e., in the south, suggests the inference that they had left the south a considerable time before, yet all these statements that come through interpreters must be received with great caution. Ski sa ro ka might have said that all but the children were born in the south, a statement which a very slight misinterpretation would so change as to leave the impression that only the oldest men were born there; or the statement might have been correctly interpreted, and yet had reference to a residence farther south than the one they had most recently left. The distinction made by Dodge, in addressing the Toyash, between them and the "Mexican Indians" may show that he supposed that the former were entitled to reside north of the Red River; but if so, this was merely his opinion, and could not alter the facts.

No valid argument in support of a Wichita right of occupancy of a portion of the "leased district" can be drawn from the Comanche and Witchetaw treaty of August 24, 1835 (7 Stats., 474). This treaty must be understood in connection with the Kiowa, Kataka, and Tawakaro treaty of 1837 (7 Stats., 533), because it had been intended to include these three tribes among the parties to the former treaty, and it was only their accidental absence from the council that prevented their joining at that time. These treaties were for the purpose of keeping the peace between the western tribes—Comanche,

Wichita, Kiowa, Kataka, and Tawakaro, and the eastern tribes—Cherokee, Muscogee, Choctaw, Osage, Seneca, and Quapaw. They were not treaties of limits, nor did they undertake to define in any way the country which any of these tribes was entitled to call its own. They were purely treaties of "peace and friendship," and to secure those ends both treaties provided that all the tribes that were parties to them should "have free permission to hunt and trap in the Great Prairie west of the Cross Timbers to the western limits of the United States." This permission was given as much to the Quapaws, who had undertaken in 1818 to cede to the United States the country between the Red River and the Arkansas and Canadian as far west as the one hundredth meridian; and to the Osages, who had ceded in 1825 the country between the Red River and the Kansas River as far west as a "line to be drawn from the head sources of the Kansas southwardly through the Rock Saline"* (7 Stats., 240); and to the Choctaws, to whom the western part of the Quapaw cession had been granted in 1820; and to the Cherokees, Muscogees, and Senecas, who had no right to any part of "the Great Prairie west of the Cross Timbers," as to

*The Rock Saline is about latitude 36° north, longitude 98° 30′ west, near the source of Salt Creek. The "head sources of the Kansas" were not accurately known in 1825, and were apparently supposed to lie approximately north of the Rock Saline. This would make the western boundary of the cession about the meridian of 98° 30′, the cession itself including a portion of the Quapaw cession of 1818. In the map on page 57 of the brief for the Wichita and affiliated bands the line is drawn southeastwardly, as if the precise sources of the Kansas had been known in 1825. This is an error. The intention of the parties was to draw the line southwardly, not southeastwardly.

the Comanches, Wichitas, Kiowas, Katakas, and Tawakaros, all of whom belonged west of the Cross Timbers. These two treaties, therefore, furnish no argument in support of any exclusive right of occupancy of "the Great Prairie west of the Cross Timbers" on the part of any of the tribes mentioned in the treaties, which secured to the Wichitas free permission to hunt and trap in that region, but nothing more.

While the treaty of 1835 did not undertake to disturb the Wichitas in their occupancy of the village west of the Wichita Mountains, that occupancy in no way increased their rights under the treaty. It can not be pretended that the Comanches, Kiowas, Katakas and Tawakaros, Cherokees, Muscogees, Osages, Senecas, and Quapaws had any rights of occupancy in the leased district, or that the first four tribes had any such rights in any part of the then United States, and yet all these tribes were parties to this treaty (or, in the case of the Kiowas, Katakas, and Tawakaros, to the supplementary treaty of 1837) and secured precisely the same rights in the leased district as did the Wichitas. The Comanches, Wichitas, Kiowas, Katakas, and Tawakaros were not Indians of the then United States, and although the Wichitas, or a portion of them, were actually located within the United States at that time, they do not appear to have had a real right of occupancy there.

If it be asked why the United States should make a treaty with foreign Indians, the answer is that it was done as the easiest and practically the only way of dealing with them. Aside from the general desirability of main-

taining peace among the Indians, the United States and Mexico had both agreed, by the treaty of 1831, "*by all the means in their power*, [to] maintain peace and harmony among the several Indian nations who inhabit the lands adjacent to the lines and rivers which form the boundaries of the two countries." (8 Stats., 424.) Undoubtedly it would have been more logical to have guarded the border with a strong cordon of troops, so as to prevent all incursions of these roving tribes; but practically such a thing was impossible, and the only feasible way of dealing with them, as well as with the northern tribes from within the United States, was to agree, and to get the Choctaws, who had the exclusive right of occupancy, to agree, that all these tribes should have an equal right to pass to and fro and to hunt and trap on the prairie west of the Cross Timbers. It was presumably not expected that this right should continue forever, but rather that it would serve as a temporary expedient until ultimately all these Indians, the foreign tribes as well as those of the United States, should be gathered upon reservations within their respective countries and should be kept there.

The counsel for the Wichitas (Brief, p. 36) insist that the agreement for compensation for injuries to the property of traders (see article 5 of the treaty) shows that "the Wichitas and Comanches possessed the settlements and hunting grounds," while "the Choctaws and others, who were intruders thereupon," did not. As regards possession of the hunting grounds, no such distinction can be made, for article 4 secured equal rights in them

to all the parties to the treaty, while as to settlements it has already been stated above that this treaty did not undertake to disturb the Wichitas in their temporary occupancy of a village within what was strictly Choctaw country, and it does not appear that any of the other tribes to whom article 5 applied in terms had any settlements there at that time, so that as to them the agreement was theoretical rather than practical. The manifest reason why no such agreement was required of the Choctaws, Cherokees, etc., is that they were already sufficiently bound by the treaties previously made with them (e. g., Quapaw treaty of 1818, art. 6; Choctaw treaty of 1830, Arts. VI and XII; 7 Stats., 177, 334, 335).

In 1843 Gen. H. P. Bee found a Wichita village on Cache Creek, about 30 miles from its mouth; but it does not appear how many of the tribe lived there nor how long they had lived there. (Rec., 234.)

Soon after 1835 the Wichitas abandoned the country north of the Red River and removed to Texas, where they lived in various places between the Red River and the Brazos, and engaged in horse stealing to a considerable extent. Their residence in Texas is shown by numerous letters from the Indian agents there (Rec., 254–263; Ex. Doc. No. 8, Thirtieth Congress, first session, pp. 899, 903; House Ex. Doc. No. 1, Thirtieth Congress, second session, pp. 587, 591, 593; Senate Ex. Doc. No. 1, Thirty-first Congress, second session, p. 145) between 1836 and 1850, and by their participation, along with the Comanche, Ioni, Anadaca, Cadoe, Lepan, Longwha, Keechy, Tahwacarro, and Waco

tribes, in the treaty of May 15, 1846 (9 Stats., 844), made at Council Springs, Robinson County,* Texas.

The map in Gregg's Commerce of the Prairies, published in 1844, has a note stating that "the Wacos, Wichitas, Towackanoes, Towyash, Keechyes, Caddos, and Inyes reside chiefly on Red River and its branches, above the Cross Timbers." Gregg does not seem ever to have himself come across any of these tribes, and he does not state whether the branches of the Red River, on which he says the tribes resided, were in Texas or not, but the statements of the Indian agents indicate that these tribes lived exclusively in Texas at that time. Shortly before 1850 the Wichitas or some of their affiliated tribes seem to have lived partly in Texas, west of the Cross Timbers, and partly in the neighboring country directly across the Red River.

The following historical authorities may be cited in this connection:

> In alliance with the Wacoes were the Pawnee Picts, or Toweashes, residing on the Red River, sometimes on the side of the United States and sometimes in Texas. (Kennedy's Texas, 1841, vol., p. 349, Rec., 102.)
>
> The Towaccanies and Toweash resemble each other and are often found associated in the same village; they number about two hundred and fifty warriors. They live high upon the Colorado above the San Saba. (Moore's Description of Texas, 1844, p. 32, Rec., 126.)
>
> The Whacoes, Tawacanies, Toweash, Aynies, San

* This is apparently a mistake, and should be Robertson County, which is shown on the De Cordova map of 1849. There is no county named Robinson in Texas.

Pedro's, Nabauchoes, Nacadochuts, and Hitchies are small tribes, or fragments of tribes, and separately considered are quite insignificant. They have been long resident in Texas and properly belong to it; but they are originally, the Hitchies excepted, of the Caddo stock, being offsets from that family. The Whacoes * * * live in a village on the Upper Brazos. * * * The other small parties, amounting to about fifty families each, live in villages, on the waters of the Trinity and Neches, and cultivate the ground to a small extent. (Statement of David G. Burnet, August, 1847; 1 Schoolcraft's Information Respecting Indian Tribes, p. 239; Rec., 100.)

I was born at To-wako-nee Hills, in Texas, and I come here to Fort Sill when I was about ten years old. The Wichita used to live right there at the foot of the hills. I belonged to the Ta-wako-nees. The Ta-wako-nees are all the same tribe as the Wichitas. (Deposition of Ta-wak-o-nee Jim, a Wichita chief, Rec., 133. It appears that he was born in 1843.)

In Catlin's North American Indians, compiled from personal researches in 1832 to 1839, is a map of Indian localities in 1833. This shows the Pawnee Picts and Wicos on the Red River, in the "panhandle" of Texas (about lat. 35° 10′ N.; long. 103° 15′ W.).

The following maps show a Towiash (sometimes written Towish) village on the Big Wichita west of the ninety-ninth meridian:

Lee's map of Texas, 1836 (Rec., 113).
Austin's map of Texas, 1837 (Rec., 114).
Hunt and Randel's map of Texas, 1839 (Rec., 115).
Arrowsmith's map in Kennedy's Texas, 1841 (Rec., 116).

The preface states that this map has been carefully made from the latest authorities and is believed to be the most accurate.

De Cordova's map of Texas, 1849 (United States Exhibit No. 8). This shows a "Tanawash" village west of the one hundredth meridian, and a Wichita village on the south side of Red River just above the mouth of the Big Wichita.

Young's map, published by Mitchell in 1838 (Rec., 114), and other maps based thereon, show a Towiash village north of the Red River, west of the one hundredth meridian, omitting the Big Wichita altogether; but this map is manifestly inaccurate, as is admitted by Kennedy, who reproduced it in his book merely to show the location of land grants. (Kennedy's Texas, Vol. I, p. 336.)

In 1843 the republic of Texas established a Bureau of Indian Affairs and provided for a line of trading posts, the posts to be located as follows:

No. 1. On or near the South Fork of the Trinity, between the upper and lower Cross Timbers.

No. 2. At or near the Comanche Peak.

No. 3. At or near the old San Saba Mission.

No. 4. At or near Porto Vandero.

No. 5. At or near the junction of the Moras and Rio Grande.

All the country west of a line drawn from Red River to the Rio Grande through these posts was Indian country from which settlers were to be excluded, except by special permission. (See act of Jan. 14, 1843, Tex. Laws, 1843, p. 19; Sen. Ex. Doc., 31st Cong., 1st sess., p. 973.)

On the annexation of Texas in 1845, jurisdiction over the Indians therein passed to the United States, and the

Commissioner of Indian Affairs stated as follows in his annual report:

> The annexation of the Republic of Texas to the United States will make it necessary to organize an agency or branch of this department within its boundaries. The superintendency of Indian affairs for the western territory includes all the Indians south of the line of the St. Louis superintendency, and as far west as the Rocky Mountains, and north of the line of Mexico and Texas. This is a large district and requires the undivided attention of the present efficient superintendent, owing to the unsettled condition of the Camanches, Witchetaws, and other tribes, who lead a wandering life. Sometimes being in Texas and sometimes in the United States, it has been impossible to extend over them the eye of this department. They have neither belonged hitherto to the one Government nor the other; and though several attempts have been made to negotiate with them, every effort of the kind has thus far proved unsuccessful. A commission has this fall been sent out under more favorable auspices, and it is confidently expected that a treaty or treaties of peace and friendship will be entered into with these wandering tribes. (Sen. Doc. No. 1, Twenty-ninth Congress, first session, p. 454.)

The unsuccessful efforts above mentioned were the treaties of 1835 and 1837, which had not produced the desired results. The commission referred to consisted of P. M. Butler and M. G. Lewis, appointed September 12, 1845.

Early in 1846 a report on the Indians in Texas was made, containing these statements:

> The habits of the Indians within the Texas border

are so uncivilized and they are so predatory and wandering that correctness as to their number can not be relied upon.

* * * * *

The Toweash, Waco, Towagany, and Wachita Indians are on the Red River above the Cross Timbers, with their villages on both sides and near each other.

They have amicable relations with the Comanches, though dreading them; are but fragments of tribes and weak, but partially agricultural, raising maize and the various kinds of vegetables. (Rec., 252, 253.)

In March, 1846, the commissioners met chiefs of the Comanche, Mescalero (Lipan), Tawakoni, Waco, Keechi, Kickapoo, Wichita, and Toweash tribes at Comanche Peak, and held a talk with them in regard to a cessation of hostilities and horse stealing, and on May 15, 1846, the treaty was made (9 Stats., 844). This treaty was made in Texas, with Texas tribes, in consequence of the sovereignty which the United States had acquired over them by the annexation.* It was not a treaty of

*There is no reason to believe that the United States failed to carry out the treaty of 1846, or that the encroachments of white settlers resulted from such failure. The treaty had nothing to do with the Indians' lands, and "the delay in the fulfillment" to which the Indian Commissioner referred in 1846 was merely due to the fact that the treaty was not finally ratified and proclaimed until March 8, 1847. The Commissioner's report does not refer at all to white settlement on the Indian lands in Texas, no such settlements having apparently yet been made, but it refers to the predatory excursions of the Indians into the country of the whites and the frequent murders and abductions of women and children committed by the former.

limits, because the lands occupied by Indians in Texas belonged to that State and not to the United States, but it differed from the treaties of 1835 and 1837 in providing that the United States should have the exclusive right to regulate trade and intercourse with the Indians, a right which could not exist in 1835 and 1837, when these Indians belonged on foreign soil. This treaty made no distinction between the Wichitas and the other Indians, a fact which shows conclusively that the former were regarded as Texas Indians, whether they all actually resided in Texas at that time or not.

In 1847 a special Indian agent for Texas was appointed, whose report of June 22, 1847, in regard to the recovery of stolen horses, states:

> On the 30th of May I arrived at the village of the Caddoes, Ionies, and Onadakoes, situated on the Brazos River, 45 miles from Torrey's trading house. * * * From the frequent depredations committed by the Wacos, Wichitas, Tah wah ca roos, and Keechies I found it necessary, at as early a day as possible, to give them my attention. * * * I determined, at all risk, to go to their village, and accordingly engaged the services of a small party of Delaware Indians—six in number—to accompany me.
>
> On application to the chief of the Onadakoes, he sent Pow iash, second chief, with six of his warriors with me. * * * On the 10th instant we arrived at the village of the hostile bands. * * * After much counseling among themselves, we were invited to a council in their village. * * * Our council lasted four days, during which time all matters of difference were discussed at length, and the following conditions agreed upon:
>
> * * * * *

In accordance with this agreement they delivered up 46 head of animals, which were all that were in the village, the larger portion having been driven to the main Wichita village, which is situated on the Witchita River. The chiefs present immediately dispatched men for the horses. * * *

The Caddoes, Onadakoes, Wacoes, Tah wah ca roos, Keechies, and Wichitas are making corn this year to a considerable extent. (Sen. Ex. Doc. No. 1, Thirtieth Congress, first session, pp. 894–896.)

According to this statement, the main Wichita village was on the Wichita River (i. e., the Big Wichita, of course, probably near its mouth, where the village is shown on De Cordova's map), while another village was near the Brazos. Counsel for the Wichitas insist that they lived on Cache Creek, near Mount Scott, at that time, but if any of them did, it could have been only a very few families.

Other communications from the agent in 1847–1850 refer to the Wichitas as living in Texas. In 1849 the Chickasaw agent reported the Wichitas and other Texas Indians as living in the western part of the Chickasaw country (Ex. Doc. No. 1, Thirty-first Congress, first session, p. 1130), but as Captain Catlett's report of that year (id., p. 968) states that they live "upon the Brazos, head of the Trinity, and upon the Big Wichita," a statement practically confirmed by Agent Neighbors's report (id., p. 963), it is evident that but few could have been living in the Chickasaw country.

Counsel for the Wichitas (brief, p. 44) cite Catlett's report as evidence that the Wichitas did not live in Texas in 1849. It is true that Catlett says that they did not rightly belong there, but his report shows clearly

that at least a very considerable portion of the tribe was there at that time, and not elsewhere. Some of the tribes mentioned by him (e. g., Creeks, Cherokees, Quapaws, Seminoles, Choctaws, Chickasaws, and a few others) could only have had a few members in Texas, and those as wanderers, but the Wichitas and Towash, together with the Caddoes, Annadarcoes, and Ionies, are declared to "have stated homes" there and to "cultivate the soil." (Same rept., p. 969.)

The agent's report of August 2, 1851, however, states that—

> The Wichitas, * * * together with about 80 warriors from the Caddoes, Wacoes, and Keechies (including about two-thirds of the latter tribe), together with a small proportion of women and children, have, within the last two years, left Texas, and are now inhabiting the Wichita Mountains beyond Red River. (Sen. Ex. Doc. No. 1, Thirty-second Congress, first session, p. 523.)

On July 19, 1852, Marcy passed the deserted Wichita village on Cache Creek, which he understood had been abandoned two years before, but it is likely that he was in error as to this. His failure to imagine why it should have been abandoned shows his ignorance of the roving habits of the tribe. Three days later he came upon the new Waco and Wichita villages on Rush Creek, built since the removal from Texas reported by the agent in 1851. He reported the Wichitas as "an insignificant tribe in point of numbers," being not over 500 souls.*

* Two years later he reported the population to be: Men, 80; women, 112; children, 122; total, 314. (Sen. Ex. Doc. No. 60, Thirty-fourth Congress, first session, p. 37.)

Ignorant of the fact that the Wichitas, or most of them, had been living in Texas until very recently, and impressed by their boasted origin from the womb of the Wichita Mountains, Marcy thought that their claim to the country was "guaranteed to them" by "the right of occupancy and possession;" but he added a grave "doubt if they have any claims upon the consideration or generosity of our Government, being the most notorious and inveterate horse thieves upon the border." (Sen. Ex. Doc. No. 54, Thirty-second Congress, second session, pp. 69, 72, 77.)

Counsel for the Wichitas (brief, p. 50) quote from the agent Capron's report of 1853 in support of the Wichita claim of original occupancy, but Capron's statements can not be received as evidence, being merely unsworn hearsay statements of what the Indians claimed to be a tradition, but which, even if true, would be irrelevant. An Indian claim of title to country to which the United States has at any time asserted title can only be supported by proof of continuous occupancy from before the time when the United States asserted title, so that no tradition of any prior occupancy can possibly affect the case. It is immaterial how long, if ever, the Wichitas occupied the country in question, unless they can prove that they did so, and by a valid title, in 1818, and that they have continued to do so ever since. This they have not done, and apparently can not do.

Capron's statement, moreover, is evidently that of a man ignorant of the real history of the Wichitas and their associates, and who has, therefore, been unable to test the truth of the alleged traditions. The Keechies,

Wacoes, and Tawakonies never had any villages north of the Red River before 1850, or thereabouts, and yet Capron seems to believe that they had really occupied the country, along with the Wichitas, from time immemorial. Of the actual facts with regard to the Wichitas and their various places of residence within historic times, Capron had obviously no knowledge whatever, and hence he assumed that their claim was what they represented it to be. He even seems to have adopted their statement that their country had been given to the Creeks and Cherokees, as well as to the Choctaws, although the least inquiry would have disclosed the error of such a statement. Neither Capron's nor Marcy's statements as to the supposed strength of the Wichita claim can, therefore, be received as evidence.

In the court below the counsel for the Wichitas quoted the opinions of the agents, Neighbors and Hill, in favor of a Wichita right of occupancy north of the Red River in 1854–55. (Secretary of Interior's Report, 1854, pp. 372, 373; 1855, pp. 180, 184.) The private opinion of these gentlemen, whose official duties gave them little time for historic research, can not give strength to the Wichita claim, which must be proved to a reasonable certainty by records contemporaneous with the alleged occupancy, or else the claim must fail altogether.

The northward movement of the Wichitas and some of their associates, in 1850 or thereabouts, was probably due to some extent to the failure of Texas to adhere to its early policy of reserving the Western portion of the State for the Indians. In 1854, however, Texas gave the United States twelve square leagues for Indian settle-

ment, and in 1856 five leagues additional. (Tex. laws, 1853–54, p. 51; 1855–56, p. 78.) Captain Marcy was ordered to survey the country and select the reservations in 1854, and the account of his expedition, written by one of his company, contains the following statements:

> We struck tents this morning and marched to Fort Belknap, where we camped for a short time, to procure stores and prepare for future work in locating and surveying lands for the Caddos, Ionies, Ah-nan-da-kas, To-wac-ko-nies, Wichitas, and Ton-kah-was, who exist in this neighborhood.
>
> * * * * *
>
> We arrived at Fort Belknap on the seventh [of September, 1854]. At a council held here the Ionies and Ah-nan-dah-kas were represented by Jose Maria, the Caddos by Ti-nah, the Wichitas and Wacos by O-che-ash and Aek-a-quash, and the To-wac-ko-nies by Utsiocks.
>
> * * * * *
>
> As far as could be ascertained, there are 80 Wichita men, 112 women, and 122 children. * * * They have a village up on Rush Creek, a tributary to the Washita, a kind of rendezvous for them, from which they make constant marauding expeditions. (Notes of Marcy's Expedition through unexplored Texas, by W. B. Parker, Phila., 1856, pp. 212, 213, 228, Rec., 128.)

Marcy's own report states that the Caddoes, "Ionies," and "An-dak-has" were living on the Brazos, but that the Wichitas (numbering 314 in all), "To-wock-o-nees," and Wacoes were on Rush Creek, whence they continually made forays into Texas. (Sen. Ex. Doc. No. 60, Thirty-fourth Congress, first session, pp. 36–37.) In 1857, however, some of them returned to Texas and had a village

near the mouth of the Big Wichita. (Rec., 262.) In 1858 the Wichitas took refuge at Fort Arbuckle, in the Chickasaw country, fearing the vengeance of the Comanches, who had suffered in an encounter with United States troops, and were supposed to believe that the Wichitas had induced the troops to attack them. (Sen. Ex. Doc. No. 2, Thirty-sixth Congress, first session, p. 584.) In 1854, as is evident from Marcy's report and Parker's notes, the Government's intention was to put the Wichitas and such of their associates as were with them back in Texas where they belonged, and to keep them on reservations there, but in 1855 it adopted the idea of securing for them a portion of the Choctaw and Chickasaw country, as stated in the brief for the United States in cases 337 and 339 (pp. 131–135, 260).

In pursuance of the latter policy, the Wichitas and all of the affiliated bands were removed from Texas and from Rush Creek in 1859, and were located within what is now the Wichita reservation. At that time, however, the Wichitas had clearly no more right to occupy any portion of the leased district than had their associates, who are conceded to have been Texas Indians, pure and simple. Under the treaty of 1835 they had, in common with several other tribes, a right to pass to and fro, and to hunt and trap, on so much of the Choctaw and Chickasaw country as lay west of the Cross Timbers, but no right to permanently occupy any portion of it to the exclusion of the other tribes, as by placing a village there. History shows that when they moved westward from Louisiana they first occupied villages on both banks

of the Red River, but afterwards on the Spanish side only, and that in the early part of this century, on account of the attacks of the Osages, they went farther west and settled on the Big Wichita. Before 1834 some of them, not all apparently, went to the Wichita Mountains, and afterwards there was a Wichita village on Cache Creek, but in 1847 their principal village was on the Big Wichita, and a smaller one near the Brazos. If any of them lived north of Red River continuously after 1835, which is merely a possibility, the tribe as such was very far from doing so. About 1850, however, the tribe left Texas and went to Rush Creek, but as intruders, not as rightful occupants of the soil.

In spite of the evidence of repeated changes of habitation on the part of the Wichitas, their counsel state (Brief, p. 30) that they "are certainly as sedentary as any of the tribes known to the whites." This statement is wholly unwarranted. The Six Nations of New York, for instance, tribes many times outnumbering the Wichitas at the latter's period of greatest population, have remained far more nearly in their original homes. Besides, all the real changes of residence of the sedentary tribes of the East have been due to wars with the whites or sales of land to them, or, in some instances, to the incursions of other Indians; whereas not one movement of the Wichitas down to 1859 can be traced to the action of white men, and only their original withdrawal from Louisiana was caused by an Indian attack. The Wichitas' repeated changes of residence can only be ascribed, therefore, to their being more nearly nomadic than the tribes of the East.

In the court below the counsel for the Wichitas relied on the speculations of scholars as to the home of the "Caddoan family," and on the Indians' statements of certain alleged traditions, more or less conflicting with each other, to the effect that the Wichitas had always occupied the leased district, from a period long anterior to the Quapaw cession of 1818.

The map accompanying the treatise on Indian Linguistic Families (Rept. of Bur. Ethn., 1885–86) shows the "Caddoan family" as occupying most of Louisiana, the western two-thirds of the southern half of Arkansas, eastern Texas, and the eastern three-quarters of the southern part of the Indian Territory, including the present Wichita Reservation, but only the extreme eastern part of the Wichita Mountains. The Caddoan family, however, comprised many other tribes besides the Wichitas, and the first actual record of the latter (Bienville, in 1700) is that they were on the Washita, in Louisiana. A map of this sort is necessarily speculative to a large degree, and can hardly be relied on seriously in support of the Wichitas' claim. It is interesting, however, as showing that, in the opinion of the maker (Mr. H. W. Henshaw, from notes of the late Rev. J. O. Dorsey; see deposition of F. W. Hodge, Rec., 55), neither the place where, apparently, La Harpe met the "Onsita" in 1719 nor the western part of the Wichita Mountains, where one legend says the Wichitas originated (Rec., 442), was Caddoan territory.

Although the records of French exploration show that the Wichitas were known to white men at least as early as 1688 (Rec., 94), counsel for the Wichitas, in support

of their theory that the present Wichita Reservation was included within the "pristine habitat" of the Wichitas, introduced, in the court below, various conflicting oral traditions. The first tradition is "that their original progenitor issued from the rocks of these [Wichita] mountains, and that the Great Spirit gave him and his posterity the country in the vicinity for a heritage, and here they continued to live and plant corn for a long time." (Sen. Ex. Doc. No. 54, Thirty-second Congress, second session, p. 69.) This tradition is about as credible as the next, which is that the tribe came to the region of the Wichita Mountains "before they knew of the existence of any white men." (Rec., 194.) It is submitted that such a tradition is not merely utterly irrelevant, in view of the evidence as to the movements of the Wichitas during the past two centuries, and especially since 1835, but wholly unreliable as well. Had the Wichitas been first found by white men in the country to which these alleged traditions relate, it is possible that a tradition that they had been there for some time might carry weight, especially if they had remained there for a long time within the knowledge of white men. As it is, however, they were first met with on the Washita River of Louisiana, where they seem to have remained (except for a short period when they were on the Canadian, near its mouth) until almost wiped out of existence by the Chickasaws. (Le Page du Pratz, Vol. II, p. 242, Rec., 98.) *Then* they went westward beyond the Cross Timbers, and with good reason, but previously they had not been known there, and it was not until 1834 that they were found in the "leased district" at all, and then nowhere near their

present reservation. The tradition therefore relates to a place of residence which they are supposed to have had more than two centuries ago, probably three or four centuries ago, for they must have known of the existence of white men before 1700, and presumably they had been some time in Louisiana before Bienville's journey. What value can attach to a supposed Indian tradition, on the part of a tribe at least seminomadic, as to where they lived 300 years ago, when the earliest record places them some distance from their alleged home?

Besides, there is no evidence that the alleged tradition is a Wichita tradition at all. Captain Scott admits that he has made no investigation as to the actual habitat of the Wichitas in 1820 or any other time. He has lived a few years among the Comanches, and he gives this tradition as he heard it from Comanches, not from Wichitas. Even if it were a tradition of the latter, it relates only to the country near the North Fork of the Red River, where Dodge and Catlin found the Wichita village in 1834. A very probable explanation is that it originated about that time, and was the invention, or dream, of some chief who wished either to give the tribe a motive for remaining in that particular spot or to give to other tribes a reason for the Wichitas being there. The tradition is entitled to the same respect as those of the Pukwana of the Peace-pipe, of Mudjekeewis and Hiawatha, and the other Indian legends which Longfellow has made world-known.

The next tradition is in no sense evidence, being an Indian interpreter's unsworn statement of what Uts-tutskins, a Wichita, had told him. It is that originally the

Wichitas lived near the Missouri, where men came in wagons and issued trinkets, etc., to them. These were, of course, white men, so that this tradition conflicts absolutely with that related by Captain Scott. After the visit of the white men, the Wichitas came south to the Comanche country, where they caught wild horses, then east to the Neosho, then west to the Salt Fork of the Arkansas, then south to the Red Hills on the North Fork of the Canadian, then to the mouth of Otter Creek, on the North Fork of Red River. There they divided into three bands, one remaining there, another going to the Red River near the Little Wichita, and the third going to the Clear Fork of the Brazos. Ultimately the first and third bands joined the second on the Red River, where Uts-tuts-kins was born, apparently about 1790. During his lifetime they went first to the mouth of Cache Creek, and afterwards to the mouth of Otter Creek. He remembered the visit of Dodge and Catlin's party in 1834. From Otter Creek they went to where Fort Sill is now, apparently about 1844, and afterwards to Rush Springs, apparently about 1850. (Sen. Ex. Doc. No. 13, Forty-eighth Congress, first session, p. 36.)

The statement of what took place in Uts-tuts-kins's lifetime is partly corroborated from other sources, but as contemporary records show that the Wichitas were in Texas from about 1836 to 1850, the accuracy of the statement has evidently suffered, either from Uts-tuts-kins's great age or from its having come through an interpreter. The tradition as to what took place before Uts-tuts-kins's birth conflicts not merely with the Comanche tradition, but, what is more important, with the French records.

It may have some truth in it, but how much it is utterly impossible to say.

A similar tradition is given by Mr. A. S. Gatchet in the American Antiquarian (Vol. XIII, p. 250, Rec., 221). He quotes a Tawakonie chief, Niastor, who was himself born about 1837, near Mount Scott, in the Wichita Mountains, and who said that his maternal grandfather was born (apparently between 1750 and 1770) on the Arkansas River below where the town of Wichita, Kans., now is. From there (where, Niastor said, "our people had always lived") the Wichitas went to the sand hills at the bend of the North Fork of the Red River, where the name Tawakonie, "bend in the river among red hills or sand hills," was given to a part of the Wichitas. Thence they went north of the Washita, near the mouth of Sugar Creek, in the southern part of the present Wichita Reservation; thence to the Wichita Mountains, where Niastor's mother was born, apparently between 1790 and 1800, as she died in 1872, "very old."

This tradition differs somewhat from all the others, though it is to the same general effect as that of Uts-tuts-kins. It conflicts with history, because at the very time when Niastor says the Wichitas were on the Arkansas they were found down in Texas fighting Parilla's troops, or living at peace after the visit of Padre Calahorra. There is no record, either from history or tradition, except Uts-tuts-kins's tradition of a temporary division of the Wichitas into three bands, that the Wichitas were divided, and even Uts-tuts-kins's story does not account for any such complete separation

as would have been the case if one branch of the tribe had lived on the Arkansas so long as to have the idea that it had always lived there, while another branch lived in Texas. Had this occurred, they would probably not have come together again except as foes, as was the case with the Pawnees and Wichitas after the latter had separated from the parent stock. (Grinnell, Pawnee Hero Stories, p. 226.)

Another fact showing the unreliable character of Niastor's tradition is that although he places the origin of the Tawakonies as a separate clan or tribe in his grandfather's lifetime, after the Wichitas left the Arkansas, between 1755 and 1775 apparently, the Touacaras, as the Spaniards called the Tawakonies, were among the tribes who attacked San Savàr in 1758 and were pacified in 1760. (Documentos, etc., Vol. I, p. 33, Rec., 203.)

Mr. Grinnell (Pawnee Hero Stories, pp. 215–231) appears to accept a tradition of the Wichita migrations akin to those of the Uts-tuts-kins and Niastor, but he is careful to give no dates and to say that "in the earlier accounts of this people the Pawnee Picts [French, Panis Piqués, i. e., tattooed Pawnees] or Wichitas are often confounded with their more northern relatives."

The traditions, if they are worthy of being received as evidence at all, which is very doubtful, are certainly, as Grinnell says of the Pawnee traditions (Pawnee Hero Stories, p. 223), "vague, and so lacking in detail as to be of little value except as suggestions which need confirmation before being accepted as having any solid basis of fact." They certainly represent the Wichitas to have

been far too migratory to entitle them to set up any claim of title by occupancy to any of the places which they successively occupied and deserted, and only one of these traditions (that of Niastor, which is particularly unreliable) states that the Wichitas ever occupied any portion of the present Wichita Reservation. It is futile even to speculate as to the origin of these alleged traditions, as their falsity is manifest. A portion, at least, of the Wichitas occupied a small part of the district west of the Wichita Mountains in 1834, having come there from the South, as they then admitted. Just how long they had then been there is uncertain, but among people like the Indians traditions grow rapidly when there is a motive for their growth; and although the tradition of continuous occupancy was not heard of in 1834 by Dodge, or even such a keen inquirer as Catlin, it is not surprising that it had fully developed by 1852, when Marcy first heard it, or that several others, differing from that told Marcy, but directed to the same conclusion, have developed since.

Even if the Wichitas, whom Marcy reported as numbering but 314 souls in 1854, had had a right of occupancy in the leased district, such right was necessarily limited to an extent of country suited to their numbers. This they certainly received, and the proof is that to-day, after allotting 160 acres to every man, woman, and child of the Wichitas and all their affiliated bands, there still remain about 574,000 acres of surplus land within the reservation, the Wichitas' proportionate share of which is about 95,000 acres. Their share of allotted and surplus

land together is from 122,000 to 125,000 acres. If that quantity of what is acknowledged to be good land, given in fee simple or to be sold for their benefit, does not sufficiently represent an Indian right of occupancy on the part of 153 to 175 people, or even the 314 reported by Marcy in 1854, it is hard to say what would be enough. If the line can not be fairly drawn at 122,000 to 125,000 acres, there is no reason for drawing it at any point.

THE CLAIM OF ALL THE DEFENDANT INDIANS TOGETHER TO THE ENTIRE "LEASED DISTRICT."

This claim, as stated at the beginning of this brief, has nothing to do with the Wichita claim of alleged original occupancy, being in fact antagonistic to it. It is based on a supposed understanding between the United States and the Wichita and affiliated bands in 1859. Had a treaty of limits ever been made with these Indians, it would be needless to inquire into this understanding, except where the meaning of the treaty was doubtful; but there being no treaty, it is necessary to examine all evidence tending to show precisely what rights in the "leased district" the United States may fairly be held to have granted to the Wichita and affiliated bands in 1859. As to this point, it is submitted that—

WHEN THE WICHITA AND AFFILIATED BANDS WERE REMOVED TO THE "LEASED DISTRICT" IN 1859, TWO SPECIFIC RESERVATIONS WERE ASSIGNED TO THEM, WITHIN WHICH THEY WERE REQUIRED TO REMAIN, BUT THEY WERE ALLOWED, WHEN PERMITTED BY THE AGENT, TO HUNT ON

> ANY PORTION OF THE DISTRICT NOT YET SPECIFICALLY ASSIGNED TO OTHER INDIANS. THE AREA OF THESE TWO RESERVATIONS WAS BUT SLIGHTLY MORE THAN ONE-FIFTH OF THAT OF THE RESERVATION ASSIGNED TO THEM IN 1872.

The idea of securing a portion of the Choctaw and Chickasaw country for the settlement of other Indians seems to have originated with Major Neighbors, supervisory agent for the Texas Indians, whose letter of February 5, 1855, suggests the acquisition of—

> a tract of land lying on the east side of the Red River (known as Cache Creek), near the Wichita Mountains, for the colonization of the Wichita Indians and such other prairie Indians as may be convenient to that location. (Sen. Ex. Doc. No. 13, 48th Cong., 1st sess., p. 15.)

The words "east side of the Red River," taken in connection with similar words ("the new reserve, east of Red River") in Neighbors' report of September 15, 1858 (Sen. Ex. Doc. No. 1, Thirty-fifth Congress, second session, vol. 1, p. 526), indicate that he supposed the North Fork of Red River to be the main stream, constituting the boundary between the Indian Territory and Texas, while the phrase "known as Cache Creek" seems to refer to the tract of land, so that the whole meaning is, "a tract of land lying on the east side of the Red River (known as the Cache Creek country)."* Whatever his precise meaning, however, Neighbors obviously referred

* The only other explanation is to supply the words "a branch of," so as to make the whole phrase read, "a tract of land lying on the east side of a branch of the Red River (known as Cache Creek)."

to but a small portion of what ultimately became the "leased district," yet he treated the use even of this small area as a matter to be determined by the convenience of the United States only.

Neighbors' suggestion was not merely adopted, but improved upon, the treaty of 1855 securing much more territory than he had suggested, and providing for settling thereon a large number of Indians described as follows:

> The Wichita and such other tribes or bands of Indians as the Government may desire to locate therein, excluding, however, all the Indians of New Mexico and also those whose usual ranges at present are north of the Arkansas River, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas. (11 Stats., 613.)

It can not be contended for a moment that these words applied only to the Wichita and affiliated bands, or that the United States was not entitled to settle upon the "leased district" every Indian, whether nomadic or not, who properly belonged south of the Arkansas and east of New Mexico, the boundary running at that time to the thirty-eighth meridian, i. e., practically to the Arkansas. The tribes whose permanent ranges were immediately south of the Arkansas were the Comanches, Kiowas, and Apaches, with whom the United States had made a treaty on July 27, 1853, wherein they are expressly described as "inhabiting the said [Indian] Territory south of the Arkansas River." (10 Stats., 1013.) Apparently the Southern Comanches and Apaches were regarded as distinct from those with whom the treaty of 1853 was made, but they were equally within the provision for the use of the leased

district. When that district was first leased it was not intended to place upon it the greater number of the affiliated bands, viz, the Anadahkos, Caddoes, Tawakonies, Wacoes, Tonkawas, and Penetethka Comanches, as they had but recently been placed on reservations in Texas, where they were doing fairly well, and the Texan hostility to them did not break out till the latter part of 1858. (See reports for 1855, Ho. Ex. Doc. No. 1, 34th Cong., 1st sess., pp. 330, 497–505.) These reservation Indians were, however, as much within the purport of the provision for the use of the "leased district" as were their wilder brothers in Texas, and ultimately the former were among the first who were placed within the district. Besides all these Indians, the Choctaws and Chickasaws still retained a right to settle in the district, though apparently none of them actually did so.

In addition to the terms employed in the treaty of 1855 in regard to the purpose for which the "leased district" was obtained, considerable light is thrown upon the subject by official reports and correspondence, as follows:

> By the convention referred to it is provided that the western end of the Choctaw country shall be opened to the permanent settlement of the Southern Comanches,* Wichitas, and such other Indians, within prescribed limits, as the United States may determine to locate therein. (Ind. Commr.'s Rept., Nov. 26, 1855, p. 329.)

*Wild Indians in the central and southern part of western Texas, numbering several thousands, not to be confused with the Penetethka Comanches, numbering about 277 in 1855, who had just been placed on a reservation in Texas, where they were expected to remain. (See same rept., p. 498.)

Should this be the case [i. e., should the treaty of 1855 be ratified], the way will be opened for the domestication of the wild savages who rove and plunder on the Grand Prairie, west of the Cross Timbers, as far north as the Arkansas River and west to New Mexico, sometimes extending their marauding expeditions into Texas, and even across the "Llano Estacado" to the Rio Grande and into Mexico.

* * * * *

The location affords great facilities for the subjection and control of the wild Indians of Texas and the plains south of the Arkansas. (Agent Cooper to Ind. Commr., Aug. 28, 1855; same rept., p. 473.)

The flattering success in Texas gives promise that by a similar policy the Southern Comanches, Wichitas, and other wandering bands near the northern frontier of that State may be successfully colonized on the western end of the Choctaw country, for which provision was made by the treaty of June 22, 1855, between the United States and the Choctaws and Chickasaws. (Ind. Commr.'s Rept., Nov. 22, 1856, p. 566.)

I perceive, by reference to your last annual report, that by a convention the western end of the Choctaw country should be thrown open to the permanent settlement of the Southern Comanches, Wichitas, etc. It is to be regretted that that measure has not been consummated. I have heretofore directed your attention to that subject. Those Indians have been in friendly intercourse with the Indians at this [Texas] agency; * * * they reside about 150 miles from this agency, on the east side of Red River. * * * There are also two bands of Comanches, viz, the "Noconee" and Tenawish (middle Comanches), who inhabit the same country and

are similarly situated. (Agent Neighbors to Commr., Sept. 18, 1856; same rept., p. 726.)

For the expenses of collecting and establishing the Southern Comanches, Wichitas, and certain other bands of Indians on reservations to be located south of the Arkansas River and west of the ninety-eighth degree of longitude, fifty thousand dollars. (Act of Mar. 3, 1857, 11 Stats., 169,183.)

Preliminary measures have been adopted for colonizing, as soon as possible, on the tract of country leased from the Choctaws and Chickasaws for the purpose, the Wichitas and other Indians intended to be located there.

* * * * *

This is the only practicable system for redeeming the wild, lawless, and roaming tribes within our borders. (Ind. Commr's Rept., Nov. 30, 1857, p. 296.)

Of Comanches, there are about 600 living on or near the one-hundredth degree west longitude. * * * It is understood, however, that they desire a reserve on the leased ground, and will locate there if such should be the wish of the Department. (Agent McKisick to Supt. Rector, Oct. 21, 1857; same rept., p. 549.)

Experience has demonstrated that at least three serious and, to the Indians, fatal errors have from the beginning marked our policy toward them, viz, their removal from place to place as our population advanced; *the assignment to them of too great an extent of country;* and the allowance of large sums of money, as annuities, for the lands ceded by them. * * * Our present policy, as you are aware, is entirely the reverse of that heretofore pursued in

the three particulars mentioned. It is to permanently locate the different tribes on reservations embracing *only sufficient land for their actual occupancy;* and to divide this among them in severalty, and require them to live upon and cultivate the tracts assigned to them.

* * * * *

I regret to state that no progress has yet been made in carrying out the provision in the act of March 3, 1857, for "collecting and establishing the Southern Comanches, Wichitas, and certain other bands of Indians on reservations to be located south of the Arkansas River and west of the ninety-eighth degree of longitude." Those Indians are wild and lawless in their disposition and habits, and can not be brought together without danger of difficulties occurring among themselves or of their committing forays upon the western Choctaws and Chickasaws. * * * A strong military force at the proper point in the region of country where it is intended to settle them is absolutely necessary to hold in check and control them, and to afford the requisite protection to the agent appointed to take them in charge. And until it shall be in the power of the War Department to furnish such a force for that purpose no successful efforts can be made to carry out the intention of the above-quoted provision. (Ind. Commr's Rept., Nov. 6, 1858, pp. 354, 355, 360.)

It is to be regretted that the General Government could not in [by?] this have consummated the contemplated policy of settling all the bands of Northern Comanches, Kioways, etc., on the new reserve, east of Red River. (Agent Neighbors to Commr., Sept. 16, 1858; same rept., p. 526.)

There are other considerations that would have induced me to extend our relations to every Indian that is roving west of the Chickasaws and Choctaws and south of the Canadian River. I will name one that appears to me sufficient. The [leased] district * * * is one of unusual fertility of soil and abounding in agricultural resources, being about 114 miles in breadth and 120 in length, and capable of sustaining a population of at least 1,000,000 people. This of itself was sufficient to convince me of the purpose of the Government, and I should have acted upon my convictions [as to locating the Kickapoos and Shawnees in the leased district] but for the reasons set forth in my report of December 1.

The extent of the country, its fertility, its capability of sustaining a dense population, contradict the position assumed, that it was intended alone for the Wichitas, Keechies, and a few other trifling bands, all of whom when collected and settled will not make up a population of more than 4,000. If the Kickapoos and Shawnees are denied the right of settlement, unless the Comanches when subdued are to be settled here, I would be at a loss to suggest a plan that would facilitate the object more than to take the tribes already named. (Rept. of S. A. Blain, agent to the Wichitas, etc., Jan. 15, 1859, Sen. Ex. Doc. No. 13, 48th Cong., 1st sess., p. 17.)

You will at the same time fix upon a suitable location for the Wichitas, and make such an examination of the country as will enable you to determine upon proper places for locating and colonizing the Texas and other Indians which it is intended to place within that district. In carrying out that policy the different bands, so far as they can not be united, are to be located upon distinct reservations, with cir-

> cumscribed limits, containing only as much land as may be necessary for their actual occupancy and use, it being the intention, as soon as it can be done, to divide the lands in the reservations into small parcels amongst them in severalty; and generally to carry out the plan laid down in the last annual report of this office in regard to colonization. * * *
>
> So soon as it may be practicable and safe for the Wichitas to remove to their new location, you will require them to go there, giving them to understand that it is to be their permanent home, and that none of them must leave their reservation without the permission of the agent. The same understanding must be impressed upon the other Indians. (Acting Commr. Mix to Supt. Rector, Mar. 30, 1859; same doc., p. 15.)

It is immaterial whether the words "the Texas and other Indians" refer only to those Indians whose immediate settlement upon the "leased district" had then been determined upon (i. e., those on the reservations in Texas, whom the Texans wished to get rid of, and the few Wacoes, Keechies, and Caddoes who were with the Wichitas), or whether they include all Indians who might from time to time be placed there, and for whose benefit it was desired that a number of suitable places for reservations should be selected in advance. Whether those words were used in the narrower or the broader sense, it is evident that there was no intention in 1859 of appropriating the "leased district" to the exclusive benefit of those Indians who were settled on it in that year. By Neighbors' report of May 2, 1859, the Indians then about to be taken there from Texas numbered 1,492 (Sen. Ex. Doc. No. 2, 36th Cong., 1st sess., vol. 1, p.

635), while those about Rush Creek certainly did not exceed 500. Altogether there may have been 2,000, while the "leased district," as Neighbors' letter of September 3, 1859, states, was "capable of sustaining a very dense population." (Same doc., p. 700.) Agent Blain's letter of January 15, 1859, stated that the "leased district" was "capable of sustaining a population of at least 1,000,000 people," meaning chiefly agriculturists, of course, and as it contains 7,713,239 acres his estimate was not too large, in view of the Government policy, announced in 1858, of giving the Indians no more land than they needed, and dividing it among them in severalty.

The same report of Neighbors, after giving statistics as to the tribes about to be removed from Texas to the "leased district," refers to the future settlement of other Indians there as follows:

> The Comanches [i. e., those from the small Comanche reservation in Texas, not the roving Comanches] would, of course, have to be located separate from the others, as I presume it will be the wish of the department to associate the more northern Comanches with them whenever they can be induced to settle down, and it was found by experience that they could not agree with the other Indians on the Texas reserve during our first experiment.

The person who primarily represented the United States in dealing with these Indians in 1859 was Elias Rector, superintendent of the southern superintendency, whose district included the lands in question. While he thought that a considerable part of the "leased district" was of little value for agriculture, and that the country

between the False Washita and Red rivers would have been a better selection (a country of just about the same area as the "leased district," but extending farther to the east and not so far to the north), yet he evidently realized that the Wichita and affiliated bands were not to have the entire district. In fact, in view of the numerous declarations of the officers of the department as to this, he could not possibly have supposed otherwise. His report of July 2, 1859, refers to the roving bands of Comanches and other prairie tribes, and to the desirability of inducing them "to settle with their brethren in the country selected for them and assigned to them." The words "their brethren" can only refer to the other Indians to which the report relates, those who were about to be located on the "leased district," especially as 300 or more of the Penetethka band, a portion of the Comanche nation, were among the Indians previously referred to. The words "the country selected for them" must have been used with reference to the country to which the report relates, and they indicate that the intention was to ultimately select portions of the "leased district" for the roving bands of the southern prairies, and to assign these portions to them.

Rector's idea was that, for the time being, the land in severalty plan was not feasible. He said:

> Each band, to make the present experiment—in which the good faith and honor of the United States are so much concerned—successful, must be put in exclusive possession of a much larger tract of country than is needed for cultivation, and when part of it has been inclosed be left to subdivide that part

> among themselves each year as the needs of each may require. * * * We have proceeded upon these principles in selecting the country to be occupied by these bands. * * * The plan of assigning to each head of a family his 40 or 80 acre lot, to be his own, would not succeed for a day or an hour. (Sen. Ex. Doc. No. 13, Forty-eighth Congress, first session, p. 22.)

Although Rector reserved for the Wichita and affiliated bands, then numbering about twice as many persons as at present, "a much larger tract of country than is needed for cultivation," the area of these reservations (one of 69,120 acres, in the northeast corner of the district, for the Wichitas and Keechies, and another of 85,120 acres, on the False Washita, for the Caddoes, Delawares, and other Texas Indians) was but a small portion, slightly over a fifth, of that included within the bounds as established in 1872. The map made at the time of Rector's report and reproduced in the document above cited is incorrect, placing the False Washita too far north and too near the Canadian, so that the reservation of 1872 is larger than it would appear if laid off between the two rivers on that map.

In view of the language of the treaty by which the "leased district" was acquired, of the repeated declarations of officers of the Government, including those two, Rector and Neighbors, who were concerned in placing the Wichita and affiliated bands there in 1859, and of the reservations actually made in that year, to which the Indians were to be confined, the contention that it was then understood between the United States and these Indians that the latter were to have the whole "leased

district" for themselves can not possibly be sustained. Rector and Neighbors knew too well that the district was intended for as many other Indians of the plains as could conveniently be placed there—to say nothing of the rights of the Choctaws and Chickasaws—to have given the defendant Indians to understand anything of the kind; and even if Rector and Neighbors had given them so to understand, they would have wholly exceeded their authority, and the United States would not have been bound thereby.

In the case of an Indian treaty, where something is surrendered by Indians in consideration of benefits promised by the United States, and the Indians are an ignorant, unlettered people, the language used must never be construed to their prejudice (*Worcester* v. *Georgia*, 6 Pet., 515, 582); but there was no treaty in 1859, nor did the defendant Indians then surrender anything worth speaking of to the United States. The Indians from the Texas reservations, about three-fourths of the whole number, abandoned those reservations to Texas, not to the United States, and they did so to save their lives, the Texans being bent upon their extermination. The United States not merely removed them and supplied them with food, but gave them larger reservations than the twelve square leagues they had in Texas. The remaining fourth, the Wichitas and the few others with them, had no legitimate home at all, nothing but a bare right to hunt and trap on the Great Prairie in company with hostile Comanches, Kiowas, and Apaches, and many other tribes. This right they may be considered to have surrendered when they consented to go

on a reservation and stay there, but they surrendered nothing else. What the United States gave to the Wichita and affiliated bands in 1859 was therefore practically a free gift, and hence the only question can be, How much were Rector and Neighbors authorized to give? If the Indians thought that more was given, their impression was wholly immaterial.

Counsel for the Wichita and affiliated bands wish to treat as evidence two statements (brief, pp. 70–72), made since 1883, in regard to what Rector and Neighbors had said in 1859, twenty-four years before. The jurisdictional act gives great liberty as to what shall be received as evidence, but it is submitted that upon this particular issue such *ex parte* statements as these can not be received, and even if they could they would be wholly irrelevant, for the reason above stated; while if both competent and relevant, they would still be incredible on any other theory than that Rector and Neighbors deliberately lied to these Indians as to the extent of country they were to have. Such a course would have been without motive, however, for the Indians were evidently only too glad to have a lawful, permanent home somewhere, and be free from the attacks of the Texan, Choctaw, and Chickasaw claimants of the soil they had formerly occupied, without inquiring too closely as to the precise area of the reservations granted them.

These statements, moreover, are evidently based on the theory that the Wichitas, and apparently their Texan associates as well, were entitled to exclusive possession of the "leased district" as a portion of the country

which they had always occupied. It has been already shown that this theory has no real foundation in fact, even as regards the Wichitas, and certainly there is no indication whatever that the United States ever paid any regard to it. The fact that a Government astronomer, employed to locate the 98th and 100th meridians, made a map of the leased district in 1858, writing across it the words "Leased country for Caddoes, Wichitas, Keechies," and that an army officer transmitted this map to the War Department, with a letter alluding to the district as the "country within the two degrees leased for the Wichitas" (Rec., 248-251), can hardly be received as binding the Government to devote the whole district to those particular tribes. It is easy to see how Mr. Majors and Major Emory came to speak of the country as they did. The Wichitas, with a few Caddoes, Keechies, and Wacoes, had for a few years settled themselves on land supposed to be within the "leased district," but which Mr. Majors discovered to lie to the east of it. It was clear that they would have to be moved to the district, but no other Indians were settled there then, although the money to settle the Southern Comanches there had already been appropriated. Up to that time, therefore, the Wichitas were more identified with the district than any other tribe was, and hence the prominence given to their name. It can hardly be supposed that Mr. Majors and Major Emory *intended* to assert that the whole district was to be appropriated to the use of the few hundred Wichitas, Caddoes, Keechies, and Wacoes who chanced to be the first whom it was determined to place there.

The most reasonable statement produced in support of the defendant Indians' claim is that of H. P. Jones, in an affidavit made February 21, 1883, as follows:

> I heard Major Nabors [Neighbors] tell the Indians in a general way that their country extended from the Canadian to Red River, and west a long distance; that it was a big country, and the Government would some day want the plains Indians to live with them, and that they were all to be friends and settle and share the country with them. (Affidavit of H. P. Jones, Feb. 20, 1883, Sen. Ex. Doc. No. 13, Forty-eighth Congress, first session, p. 37.)

This probably approaches a fair general statement of what Neighbors told the Indians when they were all gathered on the False Washita in August, 1859, prior to their location upon the two reservations selected for them by Rector. What Neighbors really said may be presumed to be that the Government had secured a large country, extending "from the Canadian to the Red River, and west a long distance," for permanent homes for them and the plains Indians, who had no reservations; that the Choctaws and Chickasaws had a right to settle there also, and that all the Indians who were or should thereafter be settled in the district were to be friends, and to share together whatever common hunting grounds the Government should retain for them outside the particular reservations. Such a statement would have about covered all that Neighbors could lawfully say, and anything more would have been false, to his own knowledge.

At all events, what the evidence shows is that the Government undertook, in 1859, to give to the Wichita

and affiliated bands, for their occupancy, both for farming and grazing, the particular reservations then established, containing 154,240 acres, and nothing more, but that they were allowed to hunt, when permitted to leave the reservations for that purpose, on any land within the district not yet specifically assigned to other Indians.

The Wichita and affiliated bands fled to Kansas during the rebellion, and did not return till August, 1867, apparently to the same reservations. (Ind. Commr.'s Rept., 1867, p. 23.) The "Camanche and Kiowa" treaty of October 18, 1865, proclaimed May 26, 1866 (14 Stats., 717), provided that a district bounded by the New Mexico line, a line from the southeast corner of New Mexico to the mouth of the North Fork, the Red River to the 98th meridian, that meridian to the Cimarron, that stream to the Kansas line, and the Kansas line to the New Mexico line, "or such portion of the same as may hereafter from time to time be designated by the President of the United States for that purpose," should be "set apart for the absolute and undisturbed use and occupation of the tribes who are parties to this treaty and of such other friendly tribes as have heretofore resided within said limits, or as they may from time to time agree to admit among them." This district included the entire leased district; and ultimately the present Kiowa and Comanche Reservation was established within that district by the treaty of October 21, 1867, proclaimed August 25, 1868. (15 Stats., 581.) The Cheyenne and Arapahoe Reservation, disposed of by the act of March 3, 1891, § 13 (26 Stats., 1022), was sim-

ilarly carved out of the leased district by Executive order of August 10, 1869.

The setting off of these two reservations definitely established the southern and western boundaries of the Wichita Reservation, which was already bounded on the east by the Chickasaw Nation and on the north by the Seminole cession of 1866. In 1872 the following agreement was executed:

> Articles of agreement made and concluded at Washington City, District of Columbia, this nineteenth day of October, A. D. 1872, by and between Francis A. Walker, Commissioner of Indian Affairs, representing the United States, of the one part, and the undersigned chiefs, headmen, and members of the Wichitas and affiliated bands of Indians duly authorized to act for their people, of the other part, witnesseth:
>
> ARTICLE 1. The United States hereby give and grant to the said Wichitas and other affiliated bands, for a home, the tract of country bounded as follows, to wit: Commencing at a point in the middle of the main channel of the Washita River where the ninety-eighth meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the line of 98° 40′ W. L., thence on said line of 98° 40′ due north to the middle of the main channel of the main Canadian River, thence down the middle of said main Canadian River to where it crosses the ninety-eighth meridian, thence due south to the place of beginning.
>
> ARTICLE 2. In consideration of the reservation provided for in the preceding article the said Wichitas and other affiliated bands hereby cede and relinquish to the United States all right, title, interest,

or claim of any nature whatsoever in and to any lands in Texas, Louisiana, Indian Territory, or elsewhere within the limits of the United States. (Sen. Ex. Doc. No. 13, Forty-eighth Congress, first session, p. 56.)

The only practical effect of this agreement at the time was to put on record an official recognition of the bounds of the Wichita Reservation, the agreement itself never having been ratified by Congress, and having been repudiated by some, at least, of the Indians, who claimed that it was signed under compulsion by delegates who had no authority to bind the bands to such an agreement. At the same time there can be no doubt that it represented an absolutely fair settlement of all matters in controversy between the United States and the Indians. The northern, eastern, and southern boundaries of the reservation were the same as they had been ever since the Indians were settled there, and the western boundary did not exclude any land that they had previously occupied. The words "give and grant * * * for a home" clearly indicated that the Indians were to have the full enjoyment of the whole tract. On the other hand, while the Indians had, strictly speaking, no "right, title, interest, or claim of any nature whatsoever, in and to any lands in Texas, Louisiana, Indian Territory, or elsewhere within the limits of the United States," all land outside the reservation having long ago been abandoned, yet as they had abandoned their lands in Texas on account of the promise of a permanent home in the Indian Territory, they would, had that home not been given them, have had a claim on the United States

growing out of such abandonment. Under these circumstances their quitclaim, even if not essential, was a proper thing, especially in view of the tenacity with which Indians cling to the idea that a country once occupied by them is always theirs, no matter how long ago they may have abandoned it.

Had the agreement of 1872 ever been ratified by Congress, then there could be no doubt as to the right of the Wichitas and affiliated bands to the proceeds of the surplus lands; but even as it is, the agreement expresses so exactly the substantial understanding of both the United States and the defendant Indians at the time the latter were brought to the reservation, that it indicates what the decree of the court below should have been in the present case, viz, that the Wichita and affiliated bands should have a judgment for the proceeds of all the land on the reservation not allotted to them in severalty, to be paid in accordance with the provisions of the jurisdictional act, on condition that the Wichita and affiliated bands should first, and before such judgment should take effect in their favor, execute a full and complete release and quitclaim, in such form as the court may direct, of all right, title, interest, or claim of any nature whatsoever, in and to any lands in Texas, Louisiana, the Indian Territory, Oklahoma Territory, or elsewhere within the limits of the United States, other than the land allotted to each individual.

To give a judgment for the proceeds of the lands without requiring such a quitclaim would be obviously unjust to the United States, for, although the Wichita and affiliated bands have no valid claim for any land outside the

Wichita Reservation, yet it does not follow that they may not in the future come before Congress with some colorable demand for further compensation, and the United States has a right to be protected against such demands. It is entirely within the jurisdiction of the court below to require such a quitclaim, the jurisdiction over the present suit having been expressly given "so that the rights, legal and equitable, of *the United States* and the Choctaw and Chickasaw Nations and the Wichita and affiliated bands of Indians in the premises shall be fully considered and determined, and to try and determine *all questions that may arise on behalf of either party* in the hearing of said claim."

Ever since the agreement of 1872 was executed the Wichita Reservation, with the bounds stated in the agreement, has been kept for the use of the Wichita and affiliated bands, and Congress has made annual appropriations for their support on that reservation. As it is nearly five times the size of the reservation originally set off in 1859, its appropriation to their use manifested no small liberality on the part of the United States. This was done, however, in consideration of the express agreement of the delegates of the Wichita and affiliated bands, representing themselves as "duly authorized to act for their people," to relinquish to the United States all claim to lands elsewhere within its limits. Unless a judgment be made which will carry into effect that feature of the agreement, then the only judgment that can be justly rendered in favor of the Wichita and affiliated bands is for so much of the scrip provided for by the act of March 2, 1895, as will cover the proceeds of the sale of as many

acres of land (154,240) as were actually set apart for them in 1859, less the acreage required for their allotments; and judgment for the balance of the proceeds of the sale of the reservation lands should be rendered in favor of the United States.

It is therefore submitted, both for the reasons above specified and for those set forth in the brief for the United States in cases Nos. 337 and 339, that the decree of the court below should be reversed and set aside and the cause remanded to the said court with directions to enter a decree dismissing the petition of the Choctaw Nation and the Chickasaw Nation, and ordering the allotment of 160 acres of land in the Wichita Reservation to each member of the Wichita and affiliated bands, in accordance with, and under the restrictions of, the agreement of June 4, 1891, and also ordering the proceeds of all sales of the unallotted portion of the said reservation to be disposed of for the benefit of the said Wichita and affiliated bands in accordance with the provisions of section 6 of the act of February 8, 1887 (24 Stats., 388), commonly called the "Dawes land in severalty act," and further ordering the said Wichita and affiliated bands to execute a release to the United States of all right, title, interest, and claim, of any nature whatsoever, in and to any lands within the limits of the United States, except those allotted to them.

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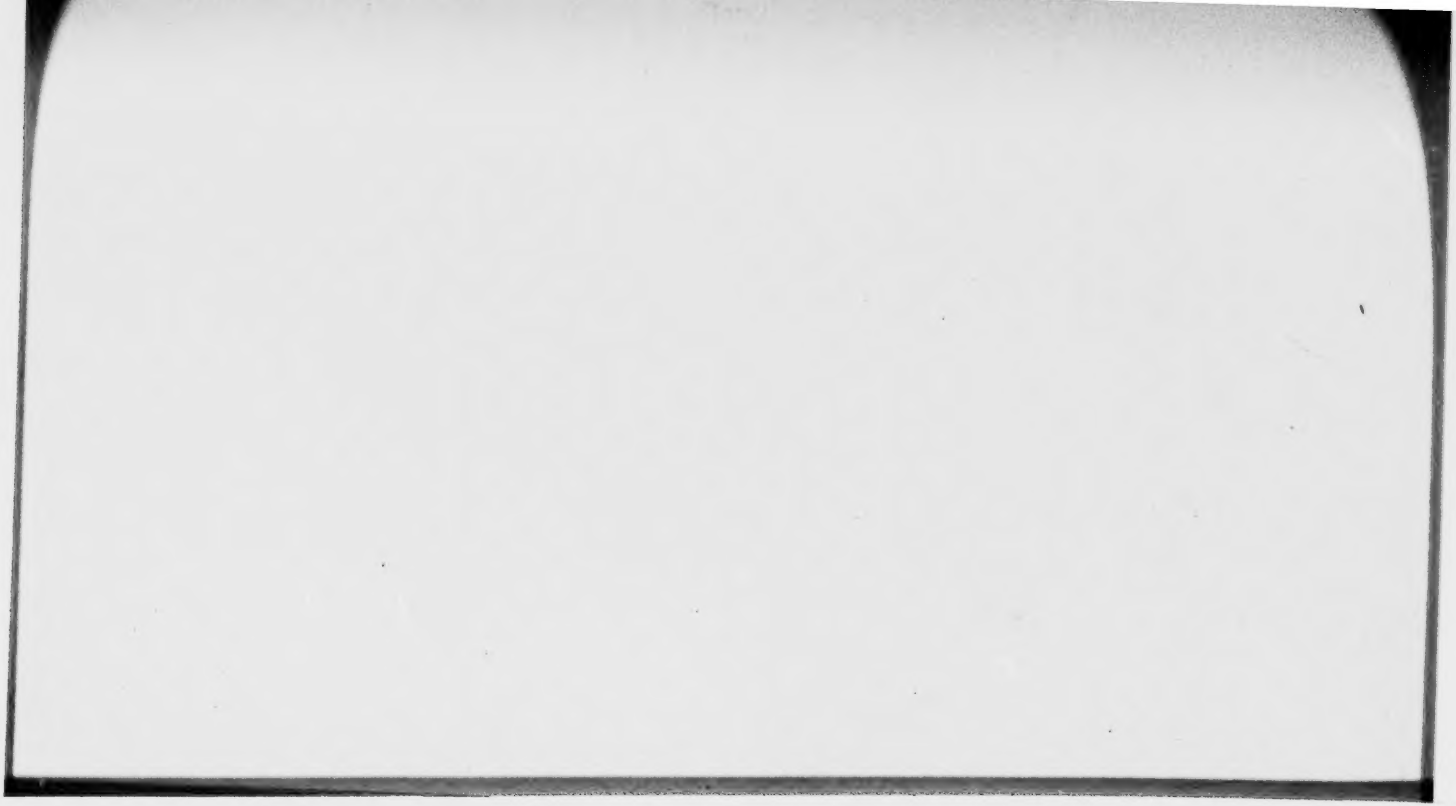

No. 337 and 339

Reply Br. of Atty. Gen'l

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APPEALS FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES.

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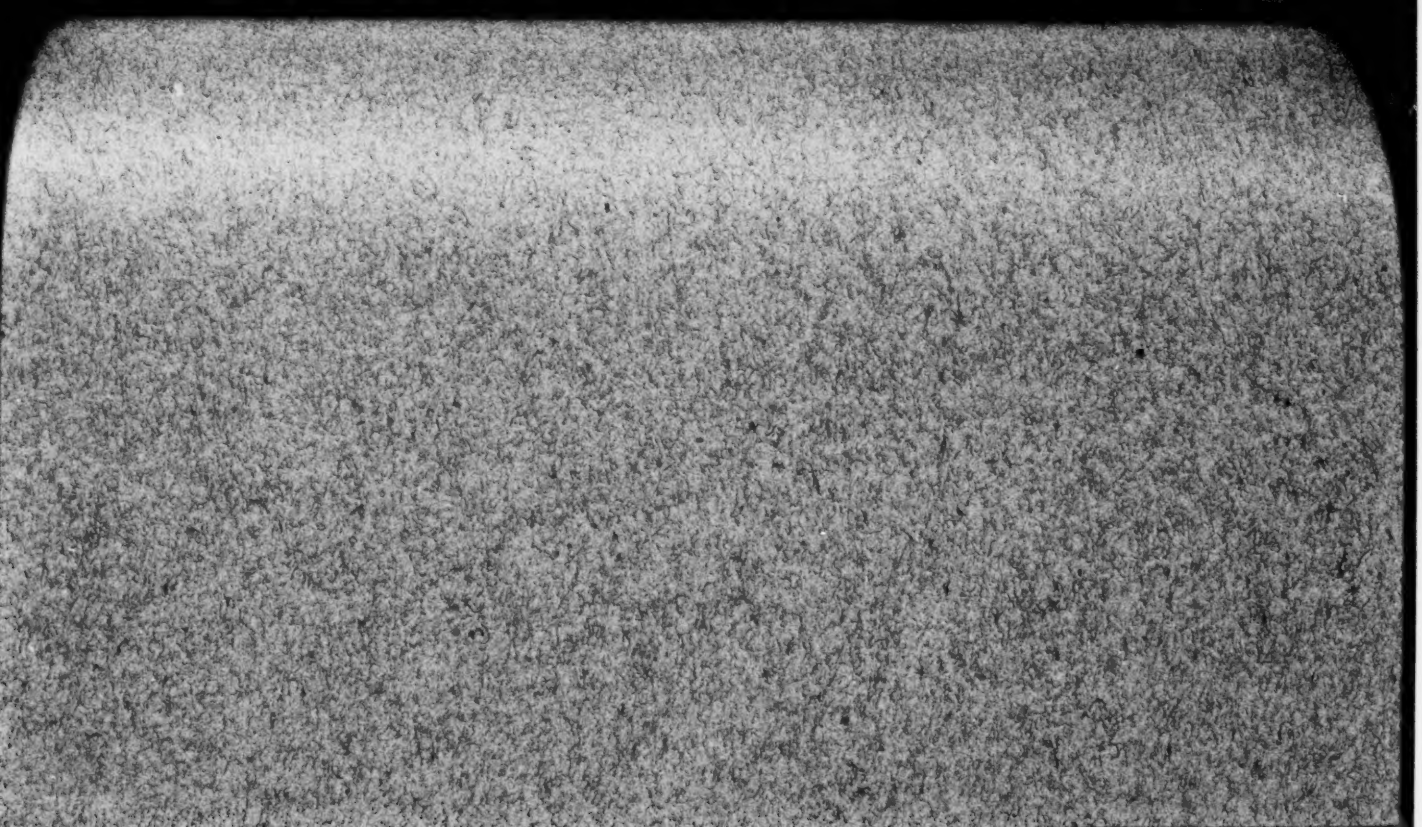

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, APPELLANT, v. THE CHOCTAW NATION AND THE Chickasaw Nation. — No. 337.

THE CHOCTAW NATION AND THE Chickasaw Nation, appellants, v. THE UNITED STATES AND THE Wichita and Affiliated Bands of Indians. — No. 339.

APPEALS FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES.

In considering the briefs* filed by the attorneys for the Choctaws and Chickasaws it is necessary to notice, first, certain of their statements of fact.

THE EVIDENCE OF THE MAPS.

The Paine brief (pp. 41–42) insists that the Canadian is "delineated with great accuracy" on De l'Isle's map of

*These briefs will be referred to as the Wilson brief, the Paine brief, etc.

1720 (Western Hemisphere, claimants' exh. No. 29), his map of 1739 (America, claimants' exh. No. 34), and Boehme's map of 1746 (America, claimants' exh. No. 35). It is a sufficient reply to ask the court to look at these maps, and to compare them with De l'Isle's maps of Louisiana of 1741 (claimants' exh. No. 28), and of Mexico and Florida of 1722 (claimants' exh. No. 30). Both of these were published *in the same atlas* as the maps of the Western Hemisphere and of America, and must be taken into consideration in answering the question of whether the latter can be properly understood as delineating the Canadian, and if they can not, surely Boehme's map can not, for it is obviously but a copy of De l'Isle's America.

The Paine brief (pp. 46–47) further contends that the small-scale maps of De l' Isle and Boehme must have been intended to show the Canadian (which De l' Isle's large-scale map manifestly did not show), because the Spaniards had long been at Santa Fe, and must have known the sources of both the Red and Canadian rivers, as they were not far off. The contention is easily answered. The source of the Red River was probably not known to the Spaniards, as it is really at 102° west longitude (Marcy's Exploration, Sen. Ex. Doc. No. 54, 32d Cong., 2d sess., p. 55, and map*; Hay's Rept. on Irrigation, Sen. Ex. Doc. No. 41, part 3, 52d Cong., 1st sess., 134, and map), some distance from Santa Fe. That

*As is well known, Marcy's longitude must be corrected by deducting about one degree. He puts the one hundred and third meridian at the source of the Red River, but it should be the one hundred and second.

of the Canadian was known, but its further course was *not* known (owing to the jealousy and practical hostility between the French and Spanish colonies, and the existence of savage tribes in between, both of which causes prevented intercourse), and it was supposed to be the source of the Red River, and was called Rio Rojo (Red River). (See note on Humboldt's Map, U. S. Exh. No. 1.)

The Paine brief (pp. 42–45) criticises the maps of Pike, Melish, Darby, Arrowsmith, and Pinkerton. The brief for the United States (pp. 59, 60) is not calculated, and was not intended, to create the impression that the English maps of Arrowsmith and Pinkerton were standards in at all the same sense as the American maps of Pike and Melish were. The Arrowsmith and Pinkerton maps were introduced merely to show that English geographers adopted Pike's delineation of the course of the Canadian, though not his longitude; and as long as we have Pike, the original authority, what his followers show (even if they may have been regarded as standards in their own country) is really unimportant. Pike's chart, published in 1810, was the standard *for the region between the Rocky Mountains and the Mississippi, south of the Missouri*, and it gives the source of the Canadian at about 100° west longitude, possibly three or four minutes to the west of that. Melish's map (of 1816, republished in 1818) was the standard *for the United States as a whole*, and it gives the source of the Canadian just east of 100°, locating its mouth and delineating its course more correctly than Pike did,

and making it a longer stream. Apparently something had been learned about it between 1810 and 1818. Darby's map never received the prominence that either Pike's or Melish's did, and hence can not be regarded as a standard, although there is reason to believe that Darby imparted to Melish the data from which the latter prepared this portion of his map.

Now, it is not contended for a moment that these maps, even the best of them, were either correct or harmonious with each other, but it is submitted, and with confidence, that they show what was believed at that time. Where they differ, they show that uncertainty existed; but in so far as they agree, they show general concurrence. And on two points they do agree, viz, that the Canadian did not rise appreciably west of the one-hundredth meridian, and that the streams which *we now know* as the sources of the Canadian River were the sources of the Red River. On both of those points of agreement they were wrong, but these errors were a part of the geographic belief of the day, and it was in that erroneous belief that the Quapaw treaty of 1818 and the Choctaw treaty of 1820 were made, ratified, and proclaimed, and it is in the light of that erroneous belief that they should be construed.

Apropos of the maps, the positive statement (Paine Wichita brief, p. 17) that Louisiana, when ceded, "extended from the Mississippi River westward to the Rio Bravo del Norte and Rocky Mountains," should not pass unnoticed. French maps so showed it, but Spanish geographers placed the boundary of New Spain nearly at the

Mississippi. Practically the whole territory between that river and the mountains was in dispute between the United States and Spain until 1819, and the final compromise involved no real surrender by the former nation.

THE TRUE FORM OF THE FIFTH STIPULATION.

On page 14 of the Wilson brief it is stated that the fifth stipulation or proposition submitted at Fort Smith in 1865 was submitted in the following form:

> 5. A part of the Indian country to be set apart to be purchased for the use of such Indians from Kansas or elsewhere as the Government may desire to colonize therein.

It is also stated that *in elucidation* of the stipulations the Commissioner addressed the Indians with regard to the said fifth stipulation, as follows:

> A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government.

Again, on page 26, the same brief purports to quote all the seven stipulations as submitted, giving the fifth in the same form as first given on page 14 and quoted above.

As appears more fully from the Paine brief (pp. 21–24), the first of the above forms, as distinguished from the second, is insisted upon as the actual form in which the stipulation was submitted to the Indians, because it is thought that the words "to be purchased for the use of

such Indians" mean a purchase *by the United States* for the use of Indians, and suggest such a transaction as, according to the same brief, the cession of the "leased district" constituted; while the second form of words obviously refers to such an acquisition of lands, *by Indian tribes themselves*, for a consideration to be paid *by them*, as the treaty of 1866 provided for in Articles XXX, XXXI, and XXXVII in regard to the land east of the "leased district." Of course the words "to be purchased for the use of such Indians from Kansas or elsewhere as the Government may desire to colonize therein" may fairly be understood as referring to a purchase by the Indians themselves as well as to a purchase by the Government, but if, in point of fact, the stipulation, as actually submitted to the Indians, was so worded as to refer to an acquisition of lands by the friendly Indians themselves, rather than a purchase by the Government for their use, and if, in consequence of its wording, the stipulation refers to such a transaction as was provided for in regard to the land east of the "leased district" rather than to the cession of the "leased district" itself, it is important to show what the wording of the stipulation really was.

Now, the official report of D. N. Cooley, as president of the southern treaty commission, dated October 30, 1865 (Secretary of the Interior's Report, 1865, pp. 480, 482), is as follows:

> On the second day * * * I addressed the Indians, in which I stated that the commissioners * * * had authorized me to submit the following statement and propositions as the basis on which

the United States were prepared to negotiate with them:

* * * * *

"A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government."*

The official report of the proceedings of the council, signed by Charles E. Mix, secretary, contains the minutes of the council on the second day, and recites the stipulations as submitted, giving the fifth stipulation in precisely the same words as those given in Mr. Cooley's report with the single addition of the word "now," making it read, "the friendly tribes now in Kansas," etc. (Secretary of Interior's Report, 1865, pp. 496, 503.)

Counsel for the Choctaws and Chickasaws have put in evidence, and have included in this record, a paper from the files of the Bureau of Indian Affairs, which counsel entitle "the printed address of the United States commissioners who attended the Fort Smith council of 1865." This paper gives the fifth stipulation in the same form

* The Paine brief (p. 22) refers to this report of Mr. Cooley as his "second report," but it is really entitled to be called his *first* report, as it is dated October 30, 1865, whereas his annual report as Commissioner of Indian Affairs, from which the brief had already quoted, is dated October 31, 1865. The fifth stipulation, as it appears in the first (miscalled "second") report, is incorrectly quoted in the Paine brief, the precise wording being as given above in the text. The misquotation, unless corrected, would create the erroneous impression that it was at least doubtful as to how the stipulation really had been worded.

in which it appears in the reports of Mr. Cooley, as president of the commission, and Mr. Mix, as secretary, following the latter report in using the word "now." (See Rec., 139, 142.) Apparently this paper is one of the "printed copies of the address" with which the agents were supplied for the purpose of fully explaining the stipulations to the Indians. (See Secretary of Interior's Report, 1865, p. 503.)

These three documents, all using the same language, would seem to show conclusively that the fifth stipulation, in the actual form in which it was submitted to the Indians as a stipulation, did not suggest any purchase of lands by the Government, from the Indians to whom the stipulation was presented, for the use of other Indians. The Paine brief, however (p. 23), seeks to avoid this conclusion by pointing to pencil memoranda on the back of the paper from the Indian Office, stating, among other things, that "the Gov'm't will insist upon purchasing a portion of their lands for the use of friendly Indians." (See also Paine Wichita brief, p. 27.) The genuineness of the printed paper itself is not disputed, but the pencil memoranda were duly objected to at the trial in the court below by the counsel for the United States and the counsel for the Wichita and affiliated bands "on the ground that they are not signed, and that it has not been proved who wrote them, when they were written, in what capacity the writer acted, or that they were ever shown to the Choctaw and Chickasaw commissioners." (Rec., 144.) This objection is now renewed, and it is submitted that these unauthenticated pencil memoranda can not now be received as evidence.

The Paine brief seeks to give an evidentiary standing to these memoranda by pointing out that they also contain a statement as to amnesty and the rights of Indians friendly to the United States, couched in language which also appears in a written paper, which was pinned to the printed paper, and bore the signature "R. M. Jones, chairman of the committee of Choctaw and Chickasaw Com'rs" (Rec., 143), and which same language is also found in article 8 of the unsigned treaty of 1865 and in Article V of the treaty of 1866. The paper signed R. M. Jones was also duly objected to, as it is not among the communications from the Choctaws and Chickasaws printed in the official records of the Fort Smith council, and there is no evidence of the constitution of the committee by whose chairman the paper purports to be signed, nor whether it was accepted by the whole body of Choctaw and Chickasaw commissioners and submitted officially by them to the United States commissioners. (Rec., 143, 144.)

It is submitted that this paper is not sufficiently authenticated to warrant its being received in evidence, but its reception or rejection is comparatively unimportant in the present connection, as those words which it contains in common with the pencil memoranda are also found in the treaty of 1866, as well as in the unsigned treaty of 1865.

The matter, then, stands thus: The pencil memoranda contain one statement which undoubtedly entered into the negotiations between the United States and the Choctaws and Chickasaws, and from this the latter's counsel contend that all that appears in those memoranda must also have entered into the negotiations. It

is submitted that the contention can not be sustained. No one knows who wrote those memoranda, nor when they were written, nor for what purpose, and the mere fact that they contain a statement which entered into the negotiations can not possibly entitle them to be received as evidence that other statements also entered into the negotiations. There is, therefore, no evidence that the fifth stipulation was ever submitted to the Choctaws and Chickasaws in the form now contended for by their counsel.

The form so contended for is taken from Mr. Cooley's annual report* (Secretary of Interior's Report, 1865, p. 202), wherein he did not recite the stipulations themselves, but gave an abbreviated statement of each, in words which he may have thought expressed the meaning, but which certainly did not do so at all fully or clearly. At all events, this rather ambiguous statement of the supposed substance of the fifth stipulation was not presented to the Indians at the Fort Smith council, and hence can have no bearing on the case; so that, it is

*The opinion of the court below is rather misleading in this connection, saying that the stipulation in this form was "stated by D. N. Cooley." (Rec., 402.) This is true, but it was not so "stated" to the Indians, but only to the Secretary of the Interior in Mr. Cooley's annual report. The discrepancy between the two forms of the stipulation is also said to "imply that no stenographic notes were taken during the sitting of the council" (Rec., 403); but even if no stenographic notes were taken, this fact does not impugn the accuracy of the reports of the president and the secretary, nor does it give any evidentiary value, for the purposes of this case, to the inexact language of Mr. Cooley's annual report.

submitted, the only form in which the fifth stipulation can be considered here is this:

> 5. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government.

It is true that Mr. Cooley's annual report also states that "it was understood that delegates would, if necessary, visit Washington on behalf of any of the tribes owning lands in the Indian country which the Government might desire to purchase for the use of other Indians, so that, by properly accredited delegates, all necessary arrangements with the several tribes might be made." (Secretary of Interior's Report, 1865, p. 204.) This statement must be understood in connection with what is known to have taken place at the Fort Smith council. It is known that a stipulation for the acquisition of lands by the friendly tribes in Kansas and elsewhere was presented at that council, and also that the only treaty (other than the treaty of peace) which appears to have been presented at that council, viz, the unsigned treaty with the Choctaws and Chickasaws, had provided for such an acquisition of lands. It is not known that any proposition was made for the purchase of land *by the Government* from any of the tribes for the use of other Indians, and it is unlikely that there was any such proposition. The statement in the annual report is probably an inexact statement of what was understood at the council, viz, that the Government was to *supervise and approve* the proposed sales of land. It was proposed

that the Government should exercise a controlling influence in regard to all such sales, and hence the report refers to the matter as if the Government was itself to be the purchaser, but this is no evidence that the Indians were told that the Government wished to purchase land itself for the use of other Indians, and certainly can not outweigh the positive evidence as to the form in which the fifth stipulation was presented.

The Wilson brief (pp. 26, 27) insists that whatever the actual form of the fifth stipulation, it is "certain" that the agents of the United States impressed it upon these Indians that what the United States sought to accomplish was to procure the "right to locate other Indian tribes upon the territory so alleged to have been ceded by the third article of the said treaty of April 28, 1866," i. e., the "leased district," and that "it is equally certain that this is *all* that the Indians intended to give, and did actually give, to the United States as a result of these negotiations. The same contention appears in substance on page 32 of the same brief.

That anything of the sort was told the Indians, in connection with the fifth stipulation, there is no evidence whatever, and there is also nothing to show that they ever connected that stipulation with the cession of the "leased district," until years afterwards. That they were never actually called upon to admit other Indians to their lands east of the "leased district," in compliance with the fifth stipulation as actually embodied in the treaty of 1866, was merely due to the fact that the lands available for Indian colonization under the Creek, Seminole, and Cherokee treaties were more than sufficient.

THE FIFTH STIPULATION AS EMBODIED IN THE UNSIGNED TREATY.

The Wilson brief (p. 15) recites the fifth article of the unsigned treaty of 1865 as the one "mainly important" in connection with the fifth stipulation, and follows it with this paragraph (p. 16):

> *It is important to state* that there is nothing in the record or history pertaining to this case showing anything else as to the policy and purpose of the United States leading to the treaty of April 28, 1866, than the said fifth proposition and the said fifth article of said unsigned treaty.*

Had counsel said, "The said fifth proposition and the *fourth* article of said unsigned treaty," it might have been "important to state" their collective bearing upon the policy and purpose of the United States, and, at all events, *the statement would have come much nearer the truth.* How much truth there is in pointing to the fifth proposition and the fifth article of the unsigned treaty as the only evidence of that policy and purpose, while suppressing all reference to the *fourth* article, can be best shown by placing the stipulation and the fourth article

*The conclusion drawn from this "important" statement is found in the paragraph immediately following it in the Wilson brief, and also in the latter part of the paragraph ending on the tenth line of page 22 of the same brief.

side by side, as has already been done in the original brief for the United States (pp. 146, 147):

From the stipulations.	*From the unsigned treaty.*
5. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by Government, or such as may be fixed by the Government.	ART. 4. The Choctaw and Chickasaw tribes of Indians hereby agree to open their country to the settlement of friendly Indians from Kansas and elsewhere upon such terms as may hereafter be agreed upon by the respective parties and approved by the Government, and the Government may settle such friendly Indians on a portion of said territory *east of the ninety-eighth degree of west longitude*, not necessary for the use of said Choctaw and Chickasaw tribes, as it may desire, not exceeding one-third of the whole remaining territory, for a fair and equitable consideration, to be fixed by the Government.

In view of the fact that the country "east of the ninety-eighth degree of west longitude" is *not* the "leased district," further comment on this point is unnecessary.

ARTICLES X AND XLV IN CONNECTION WITH THE CESSION.

The Wilson brief (pp. 33–35) makes the extraordinary contention that if the cession of the leased district were absolute, the provisions of Articles X and XLV as to the treaty obligations of the United States, and the rights, privileges, and immunities of the Choctaws and

Chickasaws, would be "inoperative and meaningless," and could only have been intended "to mislead and deceive the Indians to their prejudice." The bearing of these articles has been noticed in the original brief for the United States (pp. 32–34, 217). Each of these reaffirms the preexisting obligations, rights, etc., only so far as they are "not inconsistent" with the provisions of the new treaty. As far as these articles concerned rights in land, the Choctaws and Chickasaws, after ceding the "leased district," retained an undisputed title to 11,338,935 acres to which the articles could apply. How then these articles could be regarded as "inoperative," "meaningless," "useless," or calculated "to mislead and deceive," passes comprehension.

THE CHICKASAWS HAD NO SHARE IN THE RELINQUISHMENT OF 1855.

Passing now to what may more properly be regarded as questions of law, it may be noted that the Wilson brief (p. 72) seeks to show that the $800,000 paid to the Choctaws and Chickasaws under the treaty of 1855 (i. e., $600,000 to the Choctaws and $200,000 to the Chickasaws, in proportion to their respective interests in the "leased district") was not paid exclusively for the "lease," by contending that as the Chickasaws had, under the intertribal agreement of January 17, 1837 (7 Stats., 605), in proportion to their numbers, "all the rights and privileges of Choctaws," with certain specified exceptions, they must have had an interest in the land west of the one hundredth meridian, and at least half of the money paid them in 1855 must have been paid for

their relinquishment of that interest. This contention as to their "rights and privileges" proves too much. The agreement of 1837 was approved by the President and the Senate. This approval bound the United States to uphold all the provisions of the agreement, and to recognize that whatever the Chickasaws acquired thereby they acquired as fully and completely as if it had been granted them by the United States directly. Hence if the Chickasaws had, under this agreement, any interest whatever in the land west of the one hundredth meridian, they had precisely the same character of interest therein as had the Choctaws, and should have joined with them in the relinquishment, which they did not do, although they joined in the "lease." The reason why they joined in the latter, and not in the former is that they were joint owners of the land leased, but had no share in the Choctaw claim for land west of the one hundredth meridian. They received $200,000 as their proportionate share of the consideration paid *for the lease*, the Choctaws receiving $600,000 as their share.

THE EFFECT OF THE WORD "CEDE."

The Paine brief (pp. 1–5) seeks to support the contention that the provision in the treaty of 1866, for the cession of the "leased district," was couched in such uncertain and ambiguous terms as to necessitate a recourse to evidence *aliunde* for the purpose of explanation, by asserting that the word "cede" has no certain meaning; that it may mean a transfer of dominion only, or of public property, or of private property; that there is, in

short, something necessarily occult and mystifying about the word.

There is no reason whatever for treating the word "cede" as a term of mystification. It is the word regularly used by nations in transferring territory, and conveys whatever rights the nations have in such territory. It is more used in Indian treaties than any other word of conveyance, although, of course, when used of grants by the United States to Indians, it does not import the conveyance of more than a full Indian title. There can be no doubt that in article 2 of the treaty of 1820 it meant the conveyance of a full Indian title to the Choctaws, and there can be equally little doubt that in Article III of the treaty of 1866 it meant the reconveyance, by the Choctaws and Chickasaws, of whatever remained to them of that full Indian title, as to the "leased district," over and above what they had parted with by the "lease."

The suggestion (Paine brief, p. 5) that the guaranty of the treaty of 1855 may have made the land within the leased district, or a part of it, the private property of individual Choctaws and Chickasaws, and that this makes the meaning of the word "cede" uncertain, is wholly without foundation. The guaranty in the treaty of 1855 was made pursuant to the act of May 28, 1830, § 3 (4 Stats., 411), authorizing a guaranty to tribes or nations, not to individuals, so that the fact that the individuals of the tribe to whom the guaranty was given had an equal undivided interest in the tribal lands did not make that land private property in any sense whatever. If it had

had such an effect, moreover, the Choctaw and Chickasaw nations would have had no right of action for the land now in question, as the jurisdictional act only authorizes a suit upon a claim of those nations, and not upon any private claims whatever.

THE $300,000 AS A CONSIDERATION.

The Paine brief (p. 18), after attempting to show how the $300,000 could not be regarded as a consideration for the cession of the remaining interest of the Choctaws and Chickasaws in the "leased district," because in certain contingencies it might not have been paid to them, proceeds further to state that this sum "was to be paid to them *as a consideration* for the grant of forty acres of land, and of citizenship, including the right of suffrage, to each of their freedmen."

This bold assertion wholly overlooks the fact that the third stipulation required that the freedmen should be incorporated "into the tribes, on an equal footing with the original members [i. e., on an equality as to citizenship, land ownership, and suffrage], or suitably provided for," without the payment of any consideration whatever by the United States, and that this stipulation was literally complied with by the Creeks, Cherokees, and Seminoles without any compensation. That the Choctaws and Chickasaws were required to give their freedmen only forty acres apiece, instead of an acreage equal to what they would themselves be entitled to if their land were divided up, was a concession to them, and to that extent a departure from the strict terms of the stip-

ulation, but there is nothing whatever to show that any further departure therefrom was intended.

The assertion is also peculiarly inconsistent with the main argument of counsel for the Choctaws and Chickasaws. They contend that the cession of 1866 was for the sole purpose of Indian settlement because the fifth stipulation required land to be set apart for that purpose, and because the Creeks, Cherokees, and Seminoles were afterwards paid for all land not wholly used for that purpose. When it comes to the third stipulation, however, and its embodiment in the Creek, Cherokee, and Seminole treaties, counsel insist that the stipulation and treaties form no precedent whatever for the construction of the Choctaw and Choctaw and Chickasaw treaties.

If one of the stipulations, and its embodiment in the treaties with the other civilized tribes, is to influence the construction of the Choctaw and Chickasaw treaty, surely another of the stipulations and its embodiment in those treaties should have equal influence.

The position of the United States involves no such inconsistency. It is submitted that the fifth stipulation never was intended to apply to the "leased district," but to the land east of it, occupied by the Choctaws and Chickasaws; that the United States had no such rights in any of the Creek, Cherokee, or Seminole lands as it had in the "leased district;" that the Creek and Seminole cessions were expressly made for a particular purpose, and that the Cherokee treaty provided for a future acquisition of land by other Indian tribes, whereas the "leased district" was ceded in absolute terms. In other words,

the Creek, Seminole, and Cherokee treaties covered no cession at all similar to that of the "leased district," that which corresponded to the cessions in those treaties being provided for in Articles XXX, XXXI, and XXXVII of the Choctaw and Chickasaw treaty, just as the provisions for the freedmen in the latter treaty, though less stringent than those in the former treaties, undoubtedly corresponded to them.

In this connection attention may appropriately be called to the fact that in Indian treaties the United States has frequently retained a control over the disposition of the consideration money to be paid for a cession of lands, in order to secure justice to third parties at the hands of the Indians.

In the Ottawa treaty of 1836, $300,000 of the consideration money due from the United States were set apart for the payment of just debts against the Indians, to be examined by a commissioner. (7 Stats., 492.)

Under the treaty of February 18, 1837, with a band of Pottawatomies, the debts of the band were to be paid out of and deducted from the consideration due from the United States. (7 Stats., 513.) The same is true of a number of other treaties, with other bands of Pottawatomies, executed about the same time.

In the Sac and Fox treaty of 1836 the payment of certain liabilities of the tribes was a part of the consideration. (7 Stats., 518.)

By the Saginaw treaty of 1837, a portion of the fund created by the sale of lands was set apart, to be expended under the direction of the President, for various

specified purposes, including the payment of certain claims. (7 Stats., 529.)

In the Miami treaty of 1838, $150,000 were set apart for the payment of claims against the Indians. (7 Stats., 570.)

The above are but a few of the many instances in which the United States arranged that the consideration due from it for a cession of lands should be applied to various purposes, including the performance of obligations of the Indians toward third parties. It can not seriously be claimed that in any of those cases the absolute character of the cession made was at all affected by the control exercised over the consideration, and there is no more reason in the present case for claiming that the control retained over the $300,000 had any effect upon the cession.

The Paine brief, however, says (p. 60) that "article 3 itself obviously implies that one of the uses of the land was to be the settlement of freedmen removed from the Choctaw and Chickasaw nations," and this statement is practically repeated at the foot of page 68, and less positively in the Paine Wichita brief, at page 46. Now, the only part of Article III which could imply this must be the part which regulates the disposition of the $300,000, but counsel have always insisted that this part of the article implied that the cession was subject to the fifth stipulation, which relates to setting apart land for "the friendly tribes now in Kansas and elsewhere," and not to any provisions for freedmen. If the cession was, to any extent, for the use of freedmen, then it was certainly

not a cession in accordance with the fifth stipulation. In point of fact it was not intended to be restricted in any particular, and these obviously inconsistent contentions of counsel are the natural result of seeking to restrict what was intended to be unrestricted. Counsel are evidently uncertain in their own minds as to what the restriction really was.

As to the suggestion (Paine brief, p. 68) that "there was *no other district* available for [the freedmen's] colonization," except the "leased district," it is enough to point out that the Creek and Seminole cessions were expressly stated to be for the location of "other Indians *and freedmen*" upon the lands ceded.

The Paine Wichita brief (p. 25) states that the "leased district" was worth, "at the price fixed by the act of May 20, 1862 [12 Stats., 392], from $9,000,000 to $19,000,000." The latter figure is reached by computing on a basis of $2.50 per acre, but this price was only asked for "double minimum" lands, i. e., the alternate sections remaining to the Government after a grant of the intervening sections to a railroad. There were no such lands in the "leased district." Moreover, the fact that the ordinary price of public lands was $1.25 per acre is no warrant for saying that the lands in the "leased district" were worth that rate in 1866, as they were too near the heart of the Indian country to be desirable for white settlement at that time. They might possibly have been accepted as a gift, but would certainly have had no appreciable market value at a time when so much good public land away from the Indian country could still be obtained. In view of the fact that the United

States had paid $800,000 for a permanent "lease" of this district in 1855, $300,000 was no inadequate sum for a cession of the remaining interests of the Choctaws and Chickasaws in 1866.

AN ADMISSION BY THE CHOCTAWS.

The Paine brief (pp. 11–18) reviews the correspondence between the Secretary of the Interior, the Commissioner of Indian Affairs, and the Choctaw delegates in 1854–55, in order to attempt to show that some part at least of the $800,000 was not paid for the lease. This matter is sufficiently discussed in the brief for the United States (pp. 130–134), but it is as well to call attention to the letter of the Choctaw delegates of June 14, 1855, eight days before the treaty was executed. That letter, insisting on the limitations of the use to which the United States could put the district about to be "leased," contains this statement:

> The lease we consented to agree to was a limited one, viz, for the permanent settlement, within the country leased, of the Wichita and several alien tribes and bands now in our country—the Government to have control of them, but we still to retain jurisdiction over the country itself, with the right of settlement therein by Choctaws and Chickasaws as heretofore, as expressed and provided for in the convention. If the Government had the unrestricted right to bring in any and all Indians it pleased, the whole district might soon be filled up with a discordant, restless, and predatory population, which would endanger the frontier settlements of the Choctaws and Chickasaws, deprive us, practically, of our jurisdiction, and necessarily exclude Choctaws and

> Chickasaws from settling within the district, if they so desired. Such an arrangement would be *a virtual sale* of that portion of our country, to which we could under no circumstances submit. (Sen. Mis. Doc. No. 31, 34th Cong., 1st sess., p. 79.)

The cession of 1866, even when construed with the limitations contended for by counsel for the Choctaws and Chickasaws, entitled the United States to fill up the "leased district" with friendly Indians to the total exclusion of Choctaws and Chickasaws. The word "friendly," as used of Indians, is one of relative significance, and does not necessarily mean that none of them shall be "discordant, restless, and predatory," and at all events there can be no doubt that the cession of 1866, even with the limited construction contended for, "necessarily excluded the Choctaws and Chickasaws from settling within the district," and was therefore by their own admission "a virtual sale of that portion of [their] country." That which these Indians in 1855 declared would be a sale they now contend could not possibly have been a sale. The condition of being "unlettered" seems to carry with it some privileges.

THE PAYNE CASE IS NOT IN POINT.

The Wilson brief (pp. 38–39) refers to the case of *United States* v. *Payne* (2 McCrary, 289), and by extraordinary inadvertence the brief even refers to Payne as wishing to settle upon "these lands," which one would naturally suppose meant the "leased district." The case is not in point, however, as it did not concern the land

now in question, but only land that had been obtained from the Seminoles (not Creeks, as erroneously stated in the Wilson brief) in 1866 "in compliance with a desire of the United States to locate other Indians and freedmen thereon," as the Seminole treaty distinctly stated. No such language, nor anything equivalent thereto, was used in the Choctaw and Chickasaw treaty of 1866, and there is no warrant whatever for the statement in the Wilson brief (p. 58) that "the Seminoles as absolutely ceded these lands to the United States as did the claimants in this case."

A SUPPOSED ADMISSION AGAINST THE UNITED STATES.

The Commissioner of Indian Affairs, who presided in the negotiation of the treaty of 1866, in his report for 1866 (pp. 8–9), relating to that treaty, said:

> Four principal points came up for settlement, to wit: * * * Cession of lands by the several tribes to be used for the settlement thereon of Indians whom it is in contemplation to remove from Kansas. * * * The first tribe with which arrangements were consummated were the Seminoles. * * * The Indians cede the Government the entire domain secured to them by the treaty of 1856. * * * The next treaty in this series was made with the confederate nations of Choctaws and Chickasaws. * * * The Indians cede to the Government the whole of that tract of land known as the leased lands.

The cession by the Seminoles having been expressly made "in compliance with the desire of the United States to locate other Indians and freedmen thereon," i. e., on

the lands ceded, and the United States having, twenty-three years later, paid the Seminoles for an absolute cession of the same land, the Paine Wichita brief (p. 48) contends that the Commissioner meant that the Choctaw and Chickasaw cession was "in trust," because he used the same language in regard to it that he did in regard to the Seminole cession. A rather more natural explanation of the similarity of language would be that the Commissioner did not, in 1866, foresee what Congress would do in 1889, and understood that both cessions were absolute. Certainly there is nothing in his language to indicate that he believed that more money would have to be paid before the Seminole title to the land ceded by that tribe would be complete. Besides, the Commissioner was not undertaking to give an explanation of the treaties, but a mere summary of their contents, expressed in the briefest language, and in so doing he took up and summarized each section in turn. The statements as to the two cessions do not follow each other, but are thirty lines apart, and it is unreasonable to suppose that the Commissioner, in his brief summary of Article III of the Choctaw and Chickasaw treaty, had in mind the precise language previously used by him in summarizing the Seminole treaty. If the whole summary is looked at, and not merely counsel's extracts, the unreasonableness of his deductions will be made plain.

THE ACT OF 1891 NOT CONCLUSIVE.

As was stated in the former brief (pp. 185, 186), while the court below attached some importance to the statement in the act of March 3, 1891, §15 (26 Stats., 1025),

to the effect that the Cheyenne and Arapahoe Reservation, a portion of the "leased district," had been "ceded in trust" by the Choctaws and Chickasaws, it did not hold that statement to be conclusive in law as regards the Wichita Reservation. The counsel for the Choctaws and Chickasaws are not, however, satisfied with the position of the court below on this point, and now renew their contention that "by this statute [of 1891] the character of the cession of 1866 is definitely fixed," not merely as regards that portion of the "leased district" to which the act specifically referred, but all other portions as well. (Wilson brief, p. 46.) This remarkable contention is attempted to be based on the doctrines of construction *in pari materia* and of the effect of declaratory legislation, neither of which doctrines are, it is submitted, really applicable to the case.

The relevant portion of section 15 of the act of 1891 is as follows:

> And the sum of two million nine hundred and ninety-one thousand four hundred and fifty dollars be, and the same is hereby, appropriated out of any money in the Treasury not otherwise appropriated, to pay the Choctaw and Chickasaw nations of Indians for all the right, title, interest, and claim which said nations of Indians may have in and to certain lands now occupied by the Cheyenne and Arapahoe Indians under Executive order; said lands lying south of the Canadian River, and now occupied by the said Cheyenne and Arapahoe Indians; said lands have* been ceded in trust by article three of the treaty between the United States and said Choctaw and Chickasaw nations of Indians, which

*Apparently this word should be "having."

> was concluded April twenty-eight, eighteen hundred and sixty-six, and proclaimed on the tenth day of August of the same year, and whereof there remains, after deducting allotments as provided by said agreement, a residue ascertained by survey to contain two million three hundred and ninety-three thousand one hundred and sixty acres.

It is to be observed that the act of March 3, 1891, did *not* declare that the land in controversy in the present case had been ceded in trust, but merely that the Cheyenne and Arapahoe Reservation had been so ceded. That the declaration of a cession in trust was limited to those particular lands and referred to no others is too clear to call for any argument. It may perhaps be inferred that if the status of the land now in controversy had also come before the Fifty-first Congress, that particular Congress would have regarded it in the same way as it regarded the Cheyenne and Arapahoe Reservation, but the history of the bill introduced in that Congress to pay the Choctaws and Chickasaws for the whole leased district (see brief for U. S., p. 187) tends to rebut that inference, which is at best merely an inference, not a certainty. What is certain is that the Fifty-second Congress, in correcting an error of $48,800 in the computation of the amount due the Choctaws and Chickasaws by the act of March 3, 1891, added this proviso:

> *Provided, however*, That neither the passage of the original act of appropriation to pay the Choctaw and Chickasaw tribes of Indians for their interest in the lands of the Cheyenne and Arapahoe Reservation, dated March third, eighteen hundred and ninety-one, nor of this resolution, shall be held in

> any way to commit the Government to the payment of any further sum to the Choctaw and Chickasaw Indians for any alleged interest in the remainder of the lands situated in what is commonly known and called the "leased district." (Joint Res. of Jan. 18, 1893, 27 Stats., 753.)

It is also certain that the Fifty-third Congress in sending the present case to this court was very careful not merely to avoid using any language that could be taken as a declaration of trust, but even to refuse to admit that the claimants had any interest whatever in the land in question. As to this the language is unmistakable:

> That as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, *which claim is controverted by the United States*, jurisdiction be, and is hereby, conferred upon the Court of Claims to hear and determine said claim of the Choctaws and Chickasaws, and to render judgment thereon. * * * *And provided further*, That nothing in this act shall be accepted or construed as a confession that the United States admit that the Choctaw and Chickasaw nations have any claim to or interest in said lands or any part thereof. (28 Stats., 898.)

It being clear that Congress has carefully avoided making any declaration of trust as regards any portion of the "leased district" except the Cheyenne and Arapahoe Reservation, it remains to consider the effect of the act of March 3, 1891, upon the interpretation given to the cession of 1866 in general. Whether a treaty and a

statute should ever be considered *in pari materia* is doubtful at best, the one being an executive act and the other legislative. By what appears the most reasonable authority, a constitution can not be construed in the light of subsequent legislation. (Black, Interp. of Laws, 211.)

> Where enactments, separately made, are read *in pari materia*, they are treated as having formed, in the mind of the enacting body, parts of a connected whole, though considered by such body at different moments of time and under distinct and separate aspects of the common subject. Such a principle is in harmony with the actual practice of legislative bodies, and is essential to give unity to the laws and a consistent embodiment in a connected system. It is difficult to see how this principle can become the means of connecting, for the purpose of construction, clauses and provisions of a constitution established by an authority distinct from and independent of such legislative body and proceeding by different methods with the enactment of a strictly legislative body. As the two bodies can not in their nature unite to carry out a common purpose it is difficult to see how their independent enactments can be treated as if they had such capacity and intention. (*State* v. *Williams*, 13 S. Car., 546, 558.)

The same reasoning forbids the construction of a treaty in the light of a subsequent statute *in pari materia*. A treaty is the act of the President, made operative by the advice and consent of the Senate, while a statute is the act of both Houses of Congress, made operative by the approval of the President, and in some cases in spite of his disapproval. Although the two parties concerned in making treaties are also concerned, along with a third

party, in legislation, yet the capacity in which they act in the two cases is as distinct as if they were two different bodies. As to this matter of construction *in pari materia*, therefore, a treaty and a constitution appear to stand on the same ground.

Even were this otherwise, though, the effect which counsel for the Choctaws and Chickasaws seek to give to the act of 1891 interpreting the treaty of 1866 far exceeds the scope of the doctrine of construction *in pari materia*. The meaning of that treaty is a judicial question, with which Congress, acting in its legislative capacity, can not deal. Congress has power to make laws and within certain limits to dispose of the property of the United States, and hence its declaration, in the act of 1891, that the Cheyenne and Arapahoe reservation was held in trust was binding upon the United States, and the trust existed *from that date*, whether it had existed previously or not; but to declare what the treaty meant, or, in other words, what the law had been before that date, was beyond the legislative power of Congress. Such a declaration would have been merely an expression of the collective opinion of the individual members, to be respected just as much as, but no more than, the collective opinion of an equal number of equally intelligent men.

As early as *Ogden* v. *Blackledge* (2 Cr., 272), the Supreme Court held it superfluous for counsel to argue that "to declare what the law is or has been is a judicial power; to declare what the law shall be is legislative. One of the fundamental principles of all our governments is that the legislative power shall be separated from the judicial;" and this doctrine has never been departed

from by the courts, in spite of what seem to have been legislative attempts to override it.

> In this country, where the legislative power is limited by written constitutions, declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights, or to change the rule of construction as to a pre-existing law. Courts will treat such laws with all the respect that is due to them as an expression of the opinion of the individual members of the legislature as to what the rule of law previously was. But beyond that they can have no binding effect; and if the judge is satisfied the legislative construction is wrong, he is bound to disregard it. (*Salters* v. *Tobias*, 3 Paige, N. Y., 338, 344.)
>
> The legislature can hardly change the effect of an existing enactment or grant by giving legislative definitions or constructions. Regarded as *prospective*, such enactments may govern *for the future* the legislation to which they apply, but they can not operate retrospectively to change the force or construction of statutes already passed as to any right or interest already vested under them, though we can recall instances where this seems to have been attempted. (*State* v. *Canterbury*, 28 N. H., 195, 218.)

It must therefore be considered as established that if a court holds that a later statute puts an erroneous construction upon a prior one, such construction not only may, but must, be disregarded, except in so far as the later statute may make some positive enactment for the future. (*Koshkonong* v. *Burton*, 104 U. S., 668; *United States* v. *Chong Sam*, 47 Fed., 878, 886; *Oakland* v. *Water Front Co.*, 118 Cal., 160, 171; *People* v. *Supervisors*, 16 N. Y., 424, 432; *Smith* v. *Westerly*, 19 R. I., 437; Black, Interp.

of Laws, 371; Sutherland, Statutory Constru., § 229, and cases there cited.)

As was said in *Postmaster-General* v. *Early* (12 Wheat., 136, 148), "a mistaken opinion of the legislature concerning the law *does not make the law*." The opinion in that case further stated that if the mistake of the legislature was "manifested in words competent to make the law in future," it would have that effect, but of course, even in such a case, such an effect can only result in regard to the particular matter with which the law undertakes to deal. In the present case, it is submitted, Congress did not even "make the law in future" as regards the character of the title of the United States to the Cheyenne and Arapahoe Reservation. The only positive enactment is that a certain sum of money shall be paid to the Choctaws and Chickasaws on account of certain lands, and in this enactment there occurs the explanatory statement (indicating the reason which induced Congress to make the appropriation) that the lands had been ceded in trust. This was a statement of the belief of Congress, not an enactment which was intended to control the opinions of courts; and at all events it can not be stretched into an enactment in regard to any land outside the Cheyenne and Arapahoe Reservation.

The doctrine as to the construction of statutes *in pari materia*, to which the authorities cited in the Wilson brief (pp. 46–47) refer, had really nothing to do with the case. It is a doctrine for the guidance of courts, but can not operate to control them against their own judgment. If the meaning of the legislature, as expressed

in a subsequent act, throws light upon the probable meaning of a prior act, a court should not disregard such light, but where a legislature, without throwing any light whatever upon a prior law, simply states that it chooses to construe it in a particular way, such declaration is in no way binding upon a court.

As to the other authorities relied on in this connection, what is referred to in Sutherland, § 231, and the cases there cited, is the declaration of the purpose or meaning of an act, given in the act itself, or a general rule of interpretation, given in a code or other statute. The rule stated in Endlich, § 365, admits that a legislative interpretation can only act prospectively. *Whitney* v. *Robertson* (124 U. S., 194) states that a treaty can be modified or superseded by subsequent legislation, as, it is submitted, was done in the case of the Cheyenne and Arapahoe Reservation by the act of 1891, but that has nothing to do with the interpretation.

The Barnes brief (p. 149) contends that the act of 1891 must control the interpretation of the treaty of 1866 because Sedgwick, in his Construction of Statutory and Constitutional Law, pp. 386–387, laid it down that "whenever the nation by its properly constituted agents has declared its interpretation of a treaty, that interpretation becomes binding on the courts."

All that this statement can reasonably be held to mean is that when the properly constituted agents of the nation interpret a treaty in regard to any matter which is not judicial in its nature, and hence is outside the jurisdiction of the courts, and that interpretation is not subsequently departed from, it is binding on the courts as

to all judicial questions arising in regard to the matter as to which the interpretation was given.

The authority cited for Sedgwick's statement is the opinion of Marshall, C. J., in *Foster* v. *Neilson* (2 Pet., 253, 307), but the rather garbled quotation which Sedgwick gives must be understood with reference to the preceding paragraph, reading as follows:

> In a controversy between two nations concerning national boundaries it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own Government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they can not adjust their differences peaceably the right remains with the strongest. The judiciary is not that department of the Government to which the assertion of its interests against foreign powers is confided, and its duty commonly is to decide upon individual rights according to the principles which the political departments of the nation have established. If the course of the nation has been *a plain one*, its courts would hesitate to pronounce it erroneous.

The above statement clearly confines the binding force of the legislative interpretation of a treaty to cases where the question before Congress was purely political and its course of action in regard thereto has been plain and consistent. Hence it was no departure from the doctrine of Marshall, C. J., when this court said, in 1867:

> Congress has no constitutional power to settle the rights under treaties, except in cases purely political. The construction of them is the peculiar province of the judiciary when a case shall arise between individuals. (*Wilson* v. *Wall*, 6 Wall., 83, 89.)

The class of judicial questions to which the doctrine of *Foster* v. *Neilson* applies comprises, therefore, those whose decision necessarily depends upon decisions given by the legislative or executive branches of the Government in the performance of their exclusive duties, and which decisions have subsequently been adhered to. The mere fact that a question concerns the Government of the United States does not make it political in the sense to which Marshall, C. J., referred in *Foster* v. *Neilson*, nor is it made so by the mere fact that Congress acts without leaving the matter to the courts.

In the Cheyenne and Arapahoe case Congress acted, while in the present case it has given jurisdiction to a court, but that does not make the question of a cession in trust a political question in the one case and judicial in the other; and the fact that the present case comes to this court by a special act can not make the question any less judicial than if the general jurisdiction of the court below, itself the child of Congress, had been broad enough to cover such a suit.

A political question, within the doctrine of *Foster* v. *Neilson*, is therefore one to which, from the nature of things, the jurisdiction of a court can not extend, and hence the question whether the Wichita Reservation was ceded in trust can not be political, and this being so, the similar question as to the Cheyenne and Arapahoe Reservation could not have been political, and the action of Congress in regard thereto can not come within the rule of *Foster* v. *Neilson*.

Even were this otherwise, the fact would remain that "the course of the nation," to use Marshall's words, has

not "been a plain one." In 1891 Congress said that the lands within the Cheyenne and Arapahoe Reservation had been ceded in trust by the treaty of 1866, while in the joint resolution of January 18, 1893, and in the jurisdictional act, Congress has expressly refused to admit that the claimants have any rights whatever in any further portion of the leased district. As it is manifest that prior to the act of 1891 the claimants' rights were the same as to every portion of the leased district, Congress has plainly twice repudiated its declaration of 1891, so that the latter can not now be binding upon this court, whatever might have been the case had the interpretation been adhered to.

Moreover, the declaration in the act of 1891 is expressly confined to particular lands, viz, the Cheyenne and Arapahoe Reservation, not an acre of which is involved in the present case, whereas in *Foster* v. *Neilson* the land in controversy was within a district as to which Congress had acted. Had Congress only acted with reference to some other part of the disputed territory, the question would have been different.

The Paine brief (pp. 28, 29) relies on the supposed legal effect of the act of 1891 as an acknowledgment of a trust by a trustee. Granting all that the authorities cited state, there is no authority for holding that when the one who has made such an acknowledgment realizes that he was mistaken, he can not afterwards cancel or withdraw the acknowledgment, or declare that it shall not be taken to affect any other property than that in regard to which it was specifically given.

THE BEARING OF TEXAS AND PACIFIC RAILWAY CO. V. MARSHALL.

The Wilson brief (pp. 73, 74, 86) contends that because the case of *Texas and Pacific Railway Co.* v. *Marshall* (136 U. S., 393) and other authorities cited in the brief for the United States (p. 266) hold that the word "permanent" does not mean "lasting forever," therefore the cession of 1866, being understood to be for the permanent settlement of friendly tribes, could not in any event have been intended to pass all the interest of the Choctaws and Chickasaws in the lands ceded. This contention wholly perverts the doctrine of the authorities cited. They hold that if an establishment is located in a certain place with the intention of keeping it there, and it is subsequently removed because a change of circumstances makes it undesirable to keep it there, this does not violate a contract for its permanent location, nor require a return of land or money given in consideration of such permanent location. Applying this doctrine to the cession of 1866, supposing that to have been made for the permanent settlement of friendly Indians, that cession must be held to have been permanent, so that the Choctaws and Chickasaws have received the full consideration for their cession and have no right to ask that the land or its proceeds be returned to them, even if a change may now take place in the precise uses to which the land is put.

It is true that in *Texas and Pacific Railway Co.* v. *Marshall* the court further stated that even if the railway company, by removing its shops from Marshall, had broken the contract for their permanent location there,

the remedy must be at law and not in equity, but this view of the court can not weaken the authority of this case upon the fundamental point on which it was decided.

THE CLAIM TO COMPENSATION FOR LAND ALLOTTED TO THE WICHITA AND AFFILIATED BANDS.

In view of the fact that the Choctaws and Chickasaws insist on the right to compensation even for the land allotted to the Wichita and affiliated bands, it may be as well to point out that a recognition of such a claim would be utterly unprecedented. In the settlements with the Creeks and Seminoles, who ceded lands expressly for Indian settlement, and with the Cherokees, who had sold land to other Indian tribes, nothing whatever was paid for lands wholly occupied by Indians, while in case of partial occupation the price paid was reduced in proportion to the extent to which the land was actually occupied by Indians. All this is set out in full in the original brief for the United States, pages 222 to 228.

Even in 1891, when Congress saw fit to recognize the Choctaw and Chickasaw claim to the Cheyenne and Arapahoe Reservation, no payment whatever was made for the allotments to the Cheyennes and Arapahoes, the acreage for which the Choctaws and Chickasaws were paid being what remained "after deducting allotments as provided by said [Cheyenne and Arapahoe] agreement." (26 Stats., 1025.)

From the standpoint of the United States, the mere fact that a part of the claim of the Choctaws and Chickasaws is unsupported by any precedent, even in the lavish

generosity of a Congress legislating in the last hours of a session, with no time left for a searching inquiry into facts or law, is not specially important, the whole claim being, it is submitted, without legal or equitable foundation; but this unprecedented feature of the claim is worth noticing, as a sample of the spirit of the whole claim.

In this connection it should not be overlooked that although the court below laid great stress upon the precedents set by the dealings with the Creeks, Cherokees, and Seminoles (Rec., 421–423), the decree is much more liberal to the Choctaws and Chickasaws than would be warranted by those precedents, supposing them to be such. In the dealings with the Creeks, Cherokees, and Seminoles, full credit was given for every dollar paid by the United States, even for cessions which were unqualifiedly in trust. (See original brief for U. S., pp. 223–227.) In the present case the Wichita Reservation is very nearly one-tenth of the whole "leased district," so that, as $1,100,000 were paid for that district, about $110,000 should be deducted from whatever sum might be due under the decree of the court below, even should this court permit that decree to stand in other respects.

CHARLES C. BINNEY,
Special Attorney.

JOHN W. GRIGGS,
Attorney-General.

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Nos. 337, 338 and 339.

Supreme Court U.S.
FILED
OCT 16 1899
JAMES H. McKENNEY,
Clerk.

Answer of Appellees to motion to

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

Filed Oct. 16, 1899.

THE UNITED STATES, *Appellant*, *vs.* THE CHOCTAW NATION and THE CHICKASAW NATION.	No. 337.
THE WICHITA AND AFFILIATED BANDS OF INDIANS, *Appellants*, *vs.* THE CHOCTAW NATION and THE CHICKASAW NATION and THE UNITED STATES.	No. 338.
THE CHOCTAW NATION and THE CHICKASAW NATION, *Appellants*, *vs.* THE UNITED STATES and THE WICHITA AND AFFILIATED BANDS OF INDIANS.	No. 339.

Answer of The Choctaw Nation to the Motion of The United States to Remand These Cases to the Court of Claims.

The Choctaw Nation, answering the motion above mentioned to remand these cases to the Court of Claims, says:

That, as will be seen by reference to said motion, its purpose, in substance, is to have this court remand the above-entitled cases to the Court of Claims, for the purpose of

having inserted in the record photolithographic copies of certain maps in said motion mentioned on file in the Library of Congress.

This motion to remand is resisted by the Choctaw Nation for the following reasons:

1. By reference to the record, it will appear that the questions in the case, among others, were whether or not the lands in controversy were embraced in the cession by the United States to the Choctaw Indians by the treaty of 1820. The Wichitas, as will appear by the record, claimed that they held these lands by Indian occupancy. This made it necessary to produce in evidence to the court, in some form or other, the maps relating to this region of country, and accordingly the Choctaws and Chickasaws, in order to meet this portion of the case, proceeded to procure and place before the court that part of the maps that covered this region of country.

For this purpose, the maps themselves not being available (as will appear by reference to the answer of the Chickasaws), H. E. Paine, Esq., counsel for the Chickasaws, prepared tracings of the maps in question, in so far as they affected this case, omitting from such tracings such parts of the maps as had no possible relevancy to the matter in controversy, and, as will appear by the record, on the 25th of April, 1896, and on the 23d of July, 1896, his depositions were taken, in which, among other things, he testified that he had made these tracings, that they were accurate, and the tracings themselves were attached as exhibits to his depositions.

While it is true that counsel for the United States objected to these tracings when the depositions were taken, and also objected to them on the trial, it is also true that when the objection was made in court inquiry was made of counsel for the United States by the court whether it was claimed that there was any inaccuracy in these tracings,

with the result that these tracings were, by common consent, placed in the hands of Mr. Walker, of counsel for the Wichitas, for the purpose of comparing the tracings with the originals, on file in the Library of Congress, and at a subsequent date and while the case was still on trial he stated in open court, in substance, that he had made the examination and found no material or substantial difference between the tracings and the originals. The precise language used by him cannot be recalled after the lapse of about a year and eight months, but this is substantially what occurred.

The trial proceeded thereafter without any controversy in regard to this matter. Counsel for the United States, although Mr. Paine's depositions had been on file from about the dates above given until the trial began, did not offer to produce said maps nor any copies thereof, photolithographic or otherwise. He did not show or attempt to show that there was anything material omitted from such tracings, and the attention of the court is now called to the fact that he does not by his motion show wherein he claims the tracings were misleading when separated from the rest of the maps not traced. He had ample opportunity to bring the entire maps before the court by photolithographic copy, tracing, or otherwise, but did not make any offer to do so. He contented himself with objecting to the competency of a tracing proved to be accurate by the testimony of Mr. Paine.

It is true that counsel for the United States asked the counsel for the claimant to enter into a stipulation in regard to the printing of reproductions of the original maps. What he desired was that the tracings should be omitted from the record and the reproductions, by photolithography, substituted in the place of such tracings. Counsel for the claimant Indians declined to agree to any change in the record, and for the reason, first, that these tracings were the

subject of the testimony of Mr. Paine and were exhibits to his depositions; and, second, because the proposed reproductions were not in fact offered in evidence on the trial; and, third, because they did not deem it proper to change the record so as to present therein what had not been presented to the Court of Claims.

Counsel for the claimant Indians have only insisted that the record as made in the Court of Claims shall be printed without change. They have not insisted that this court shall be confined to the tracings. They have not insisted, and do not now insist, that this court cannot regard as evidence the originals from which the tracings were made or make any use of reproductions of the originals. If they are documents of which judicial notice may be taken, they are available to counsel for the United States and the Wichitas and the affiliated bands in argument; but whether judicial notice will be taken or not, counsel for the Choctaws, on argument, will not make any objection to the use by counsel for the United States and for the Wichitas and affiliated bands of any photolithographic copies that counsel for the United States may produce that the court may deem proper, notwithstanding the want of any proof of their accuracy.

Counsel for the Choctaws do not object to this court making an order to print anything designated in the motion for use on the hearing of these cases, but does object to remanding the cases to the Court of Claims for the purpose indicated in said motion, and mainly for the reason that it involves unnecessary delay in the preparation and hearing thereof.

JEREMIAH M. WILSON,
Of Counsel for the Choctaw Nation.

DISTRICT OF COLUMBIA, *ss*:

Jeremiah M. Wilson, being first duly sworn, on his oath says that he is counsel for the Choctaws in the above-entitled cases, and that the matters of fact stated in the foregoing answer are true as he verily believes.

JEREMIAH M. WILSON.

Sworn to and subscribed before me this 14th day of October, A. D. 1899.

[SEAL.] EDMUND VAN DYKE,
Notary Public.

No. 337, 88
Ex. of Paine for Choctaws
FILED
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JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Feb. 27, 1900.

No. 337.

THE UNITED STATES, APPELLANTS,

v.

THE CHOCTAW NATION AND THE CHICKASAW NATION, AND THE WICHITA AND AFFILIATED BANDS OF INDIANS.

APPEAL FROM COURT OF CLAIMS.

Brief for Choctaws and Chickasaws.

HALBERT E. PAINE,
Attorney for Chickasaw Nation.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1900.

United States Supreme Court.

OCTOBER TERM, 1899.

No. 337.

THE UNITED STATES, APPELLANT,

v.

THE CHOCTAW NATION AND THE CHICKASAW NATION AND THE WICHITA AND AFFILIATED BANDS OF INDIANS.

BRIEF FOR CHOCTAWS AND CHICKASAWS.

I.

The word "cede" does not per se import a transfer of the absolute beneficial ownership of the ceded territory.

It is contended that the ceding clause in this treaty of 1866 is absolutely clear and unambiguous, so that no room is open for interpretation. The words of the clause are these :

> The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the ninety-eighth degree west longitude known as the leased district: PROVIDED, &c. Appendix to Rec. 30.

The contention that this clause is clear and unambiguous, beyond the reach of interpretation, is based upon the

assumption that when the ceding clause contains no words to qualify, or limit, the meaning of the word "cede" (or "cession") that word *per se* necessarily imports a conveyance of the absolute beneficial ownership of the land. This is, I submit, an unwarranted assumption. The words *cede* and *cession*, which, in modified forms, appear in several European languages of Latin derivation, never *per se* import a conveyance of the beneficial ownership of the land. That such is their import can *never* be determined, without recourse to other clauses of the treaty, or to outside facts.

The cession may be only a transfer of paramount dominion. It may be a mere transfer of subordinate dominion, paramount dominion being reserved by the ceding party. It may be a conveyance of the legal title in trust for certain purposes, or by way of mortgage. It may be a transfer of the beneficial ownership of public property. It may be the transfer of the beneficial ownership of private property. The import of the word *cede*, standing unqualified in the ceding clause of a particular treaty, is to be ascertained by looking to other clauses of the treaty, or to the relations and circumstances of the contracting parties, and to other facts outside the treaty.

By the treaty of St. Ildefonso Spain, in 1800, retroceded the province of Louisiana to France. The word "cede" was used both in the Spanish version and in the French version of that treaty. Did it import a transfer of dominion without property, or a transfer of dominion and of public property, or a transfer of dominion and of both public and private property? Did it import an unconditional transfer of either dominion or property? If the counsel correctly interprets the word "cede," the cession was an absolute unconditional conveyance of every square foot of land within the exterior limits of the province of

Louisiana; for every foot of that land was ceded by the treaty. But that province had been held by France and Spain, successively, for one hundred and fifteen years. During that period private property had been acquired, by extensive royal grants, in New Orleans and in other parts of Louisiana. Did the word "cede," *per se*, take that property from its private owners and convey it to France? Does it even import that Spain, in the exercise of the right of eminent domain, had taken that property, and, by the treaty, transferred it to France?

I submit that in order to determine whether the treaty conveyed private property in the lands of Louisiana, as well as dominion over the same, we must look to other parts of the treaty or to extraneous facts.

Again, did the word "cede" import, *per se*, an absolute transfer of *anything*,—either of dominion or of property? For an answer we must look to other parts of the treaty. And other clauses show us that the cession was wholly conditional,—was not to take effect at all, unless, or until, France should consummate certain projects undertaken in the interest of the Duke of Parma.

The word "cede" is used in the English version and the word "cession" in the French version of the treaty of 1803, by which the United States acquired the province of Louisiana. 8 Stat. 200; Appendix to Rec. 7. Was that cession a mere transfer of dominion, or was it also a conveyance of property? If it was a transfer of property, was it a conveyance merely of public property, or also of private property? It might have been a transfer of dominion only. If Louisiana, or any part of that province, was the public property of the nation, the cession might, of course, have been a transfer of public property, as well as of dominion. But it might also have embraced a conveyance of private property

in the city of New Orleans, or elsewhere. For France was a sovereign state, invested with the power of eminent domain. The precise meaning of the word "cede," in that treaty, can be determined,—and can only be determined,—by recourse to other clauses of the treaty and to outside facts.

Was the cession of 1820, by the United States to the Choctaws (7 Stat. 210; Appendix to Rec. 9), a transfer of paramount dominion,—or was it a transfer of dominion subordinate to the paramount dominion of the United States? Was it a conveyance of public property? Was it a conveyance of private property, effected through the exercise of the power of eminent domain? The ceding clause of the treaty does not answer these questions. For answers we must look to other parts of the treaty, or to the circumstances and relations of the parties and other facts. To determine whether the dominion transferred was paramount, or merely subordinate, paramount dominion over the ceded territory being reserved by the United States, it is necessary to ascertain whether the relations of the parties admitted of the exercise of paramount dominion by the Choctaw nation. To determine whether the cession was a transfer of public, or of private, property it is necessary to ascertain whether the land was public, or private, property, and, if any part of it was private property, whether it was the intention of the United States, in the exercise of the right of eminent domain, to take that property and convey it to the Indians.

Was the cession of the leased district by the Choctaws to the United States, in 1866 (14 Stat. 785; Appendix to Rec. 30), a transfer of paramount dominion,—a transfer of subordinate dominion,—a conveyance of public property,—a conveyance of private prop-

erty,—a conveyance of the absolute beneficial ownership of public or private property,—or a mere conveyance of the legal title, in trust for the settlement of friendly Indians on the land? The ceding clause gives no answer to these questions. For answers we must look to the context of the treaty and to facts outside the treaty. Looking to facts outside the treaty, we learn that the Choctaw nation was never invested with paramount dominion over the leased district, and, therefore, was incapable of transferring it,—could only dispose of the subordinate dominion with which it was, in fact, invested.

Did the cession embrace private property of the Choctaw and Chickasaw citizens, or only public property of the Choctaw and Chickasaw nations, in the ceded lands? To decide that question we must first ascertain whether the land was, or was not, wholly, or in part, private property. On that question there is a difference of opinion. The treaty of June 22, 1855, contains the following provision:

> And, pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guaranty the lands embraced within the said limits to the *members* of the Choctaw and Chickasaw tribes, *their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal undivided interest in the whole.*

If the effect of this provision was to make all, or any part, of the land private property, the question, whether the cession was a conveyance of such private property, is to be determined otherwise than by recourse to the word "cede."

It will be necessary to look to the context of the treaty of 1866 and to pertinent facts outside the treaty, in order to ascertain whether this cession was a conveyance of the absolute beneficial ownership of the land, or only a conveyance of the legal title, in trust for the settlement of friendly Indians on the land. But, before entering

upon that investigation, let us recall the general rules governing the interpretation of treaties, and also the special rules applicable to the interpretation of treaties with the Indians.

II.

General Rules of Interpretation.

A deed absolute upon its face may be shown, by evidence *aliunde*, to be a deed in trust. Babcock *v.* Wyman, 19 How. 289; Russell *v.* Southard, 12 How. 154; Conway *v.* Alexander, 7 Cranch, 238; Morris *v.* Nixon, 1 How. 126; Osterman *v.* Baldwin, 6 Wall. 116; Morris *v.* Nixon, 17 Pet. 109; Flagg *v.* Walker, 113 U. S. 659.

When the *apparent* meaning of terms used in a contract involves injustice and absurdity, that fact suffices to occasion a doubt as to their *real* meaning, and it becomes competent for the court to ascertain that meaning by recourse to outside facts.

The same rules of interpretation are to be applied to treaties as to other contracts. United States *v.* Percheman, 7 Pet. 51; *In re* Ross, 140 U. S. 458; 1 Kent. Comm. 174; Maryatt *v.* Wilson, 1 Bos. and Pull. 438, 439; Wheaton Int. Law, pt. 3, c. 2, § 17; Gardner, Inst. c. 12, § 13; Kent. Int. Law, 391; Vattel, bk. 2, c. 17, §§ 282, 289

Treaties are to be so construed as to give effect to the objects of the parties; and, for that purpose, *all of their provisions are to be examined in the light of attendant and surrounding circumstances.* *In re* Ross, 140 U. S. 453; Vattel, bk. 2, c. 17, §§ 270, 277, 279, 280.

An interpretation which leads to an absurdity is to be rejected; and this rule is to be applied even when the text of the treaty does not, considered by itself, present

either obscurity, or ambiguity, in its language. Vattel, bk. 2, c. 17, §282; Grotius, bk. 2, c. 16, §5. Appendix to Rec. 61, 63.

III.

Special rule of interpretation applicable to Indian treaties.

Treaties with Indian nations are to be liberally construed in favor of the Indians. Worcester *v.* Georgia, 6 Pet. 515, 583; United States *v.* Kagama, 118 U. S. 375, 383; Choctaw Nation *v.* United States, 119 U. S. 1, 27.

The relation existing between the United States and these nations, which has been likened to the relation between guardian and ward, necessitates this rule of interpretation.

The counsel for the appellant contends that this rule of interpretation is not applicable to the treaty of 1866, because, as they assert, the Choctaws and Chickasaws were not "unlettered people," in 1866; but were "capable of dealing at arm's length" with the United States. They assume that the fact, which fixed the relation defined by the court, was the "illiteracy" of the Choctaws and Chickasaws. This is evidently a mistake. The main facts, which fix this relation, are, on the one side, the *weakness, helplessness* and *dependence* of the Indians, and, on the other, the *paramount power* and *sovereignty* of the United States. So this court has decided in 119 U. S. 27, quoted on page 25 of this brief, and also on pages 53 to 56 of the "Appendix to the Record." The Choctaws and Chickasaws were, in 1866, as in 1820, weak dependent tribes. They were absolutely in the power of the government of the United States. With this power was coupled a correlative obligation of the government not only to protect them from wrongs at the hands of others, but also

to abstain itself from taking advantage of them, by means of harsh and overreaching bargains.

The reason, for the application of the rule of interpretation of Indian treaties adopted by this court, was very much stronger, in the case of the treaty of 1866, than in the case of the treaty of 1820; for, as will be hereafter shown, at the commencement of the negotiation of the treaty of 1866, the Choctaws and Chickasaws *were virtually placed under duress* by the commissioners of the United States.

IV.

Absurdity and injustice of the interpretation which makes the cession an absolute conveyance.

That interpretation of the treaty of 1866, which finds in the treaty a transfer, by the Choctaw and Chickasaw nations, to the United States, of the absolute beneficial ownership of the leased district, leads, I submit, to such palpable absurdities, to such gross injustice, that this court will not make haste to accept it as the true expression of the intent of the parties to the contract.

If it be true that, by the treaty of 1866, the United States acquired, from the Choctaws and Chickasaws, the absolute beneficial ownership of the "leased district," then it is true that, for the consideration of $800,000, the United States have acquired from the Choctaws and Chickasaws 15,938,519 acres of land, worth, in 1866, at the government price, ($1.25 or $2.50) $19,923,138 or $39,846,276, and worth to-day more than $50,000,000. The leased district amounts in area to 7,713,239 acres; the Choctaw land west of the leased district to 8,225,220 acres; the aggregate being 15,938,519 acres. How did the Choctaws become invested with the ownership of

these lands? Did they merely hold them by the right of Indian occupancy? Certainly not. Were these lands a gift—a gratuity—from the United States to the Choctaws? Not at all. They bought them from the United States. And they paid for them a price which was many times their value in 1820 and 1830. The Choctaws owned and occupied 15,000,000 acres of land, in the State of Mississippi. Their title is carried back, by authentic history, more than two hundred years. Their nation had existed, as a nation, on that ground, certainly for one hundred years, probably for several hundred years, before the commencement of our national existence. Soon after the organization of our government, that is to say, on the 3d of January, 1786, a treaty was concluded between the Choctaws and the United States, defining the boundaries of the Choctaw Nation.

As I said, the only consideration ever paid by the United States for these two bodies of land, amounting in round numbers to 16,000,000 acres, was $800,000. That sum was paid, in 1855, for the *cession* of the eight and one quarter millions acres west of the 100th meridian, AND the *lease* of the district between the 98th and 100th meridians. Am I mistaken on this point? Was any part of the $300,000 mentioned in article 3 of the treaty of 1866 paid for these lands? As shown in the opinion of the Court of Claims and on pages 17, 18, of this brief, and also on pages 32, 33 of my brief in cause No. 338, not one penny of that sum was paid for these lands. But if the whole sum of $300,000 had been paid for the land, the total price paid for lands worth, in 1866, more than $19,000,000, would have amounted to only $1,100,000. Was such a bargain ever before made between a powerful republic and a dependent Indian tribe? Did a court of equity ever approve such a bargain between guardian and ward?

But the interpretation, which makes this cession of 1866 a conveyance of the absolute beneficial ownership of the leased district, and not a mere conveyance of the legal title, in trust for the settlement of friendly Indians on the land, involves a still more palpable absurdity. In 1855 the gross sum of $800,000 was paid for the relinquishment of the eight and one-quarter millions of acres west of the 100th meridian, AND the lease of the seven and three-quarters millions of acres between the 98th and 100th meridians. Whatever part of that gross payment was applicable to the lease, whether the whole or one-half, or none at all, the lease was acquired by the United States subject to five conditions, viz:

(1) The land was to be used only for the settlement of friendly Indians.

(2) The Choctaws and Chickasaws reserved the right to settle on the land.

(3) The Choctaw nation reserved jurisdiction of Choctaws and Chickasaws residing on the land.

(4) The leased land remained a part of the Choctaw district.

(5) The United States were to make no regulations, for the government of any Indians in the district, inconsistent with the interests of the Choctaws and Chickasaws.

Whatever was paid for the lease, in 1855, was paid for the lease subject to all these conditions.

If the cession of 1866 was an absolute conveyance, all these conditions were swept away, and the United States became the beneficial owner of the entire leased district, without paying any consideration whatever for the *substitution* of the *beneficial ownership* of the land, in lieu of the *conditional leasehold interest* acquired by the treaty of 1855. If the cession was an absolute conveyance, the United States, without the payment of a single dollar,

obtained from the Indians an absolute unqualified title to the land, in lieu of a mere lease subject to the five conditions which I have indicated. The obligation of the United States to locate Indians on the land was extinguished. It was to be used for general settlement, or for any other purpose, at the discretion of the government. The Choctaws and Chickasaws were excluded from the land. The Choctaw nation was deprived of jurisdiction of settlers already there. The leased land ceased to be a part of the Choctaw district. The obligation of the United States to make no regulations, for the government of Indians in the district, inconsistent with the rights and interests of the Choctaws and Chickasaws, was extinguished.

I think that a court of equity will be slow to accept an interpretation of the treaty of 1866 which involves an absurdity so monstrous.

On pages 128 to 134 of his brief the counsel contends that although the Choctaws and Chickasaws demanded $400,000 for the quit-claim and $400,000 for the lease,—in all $800,000,—and the United States promised to pay $800,000 for the quit-claim and lease, little, or nothing, was, in fact, paid for the quit-claim; but all, or most, of the $800,000 was paid for the lease. I submit that the correspondence of the parties, which immediately preceded the signing of the treaty, printed in the Court of Claims Record in Choctaw Nation *v.* U. S., 119 U. S. 1, conclusively establishes three facts, viz: (1) that the Choctaws and Chickasaws understood that one-half of the $800,000 was payable for the quit-claim; (2) that the Secretary of the Interior knew that such was the understanding of the Choctaws and Chickasaws; and (3) that he permitted them to so understand the treaty. In the letter of July 11, 1854, from the Choctaw Delegates to the Acting Commissioner of Indian Affairs, they said:

Our country extends west to the headwaters of the Canadian, about the 103d degree of west longitude, and we are prepared to maintain our rights to a boundary that far west, by facts and evidence which cannot be disputed. In the compromise with Texas, in 1850, that portion of our country west of the 100th degree of west longitude was assigned to that state, in direct and palpable violation of our rights. We must demand to be repossessed of this portion of our country; and, if this is not done, our people will take possession of it, and leave the government to settle with Texas and the Indians upon it for such damages as they claim.

General John H. Eaton, one of the negotiators of the Choctaw treaty of 1830, in his letter of December 19, 1854, to the Choctaw delegates said:

At the concluding interview in council, when, for the second and last time, we had met for them to conclude or refuse the treaty, perceiving the decided opposition of the Indians, I addressed them (many knew our language) and said: "The United States neither need nor want your lands for any purpose of profit, for already they have lands enough and to spare; the only object is to have jurisdiction over your country, and save you from the encroachments of the whites which cannot be prevented." I said, moreover, that "if a treaty were not made, the president would withdraw the agent, and leave them under the state laws." These declarations had great influence, and thereupon they hastily came forward and signed the treaty. Thus a great gain was effected. The Choctaws were disposed of.

In a letter from D. H. Cooper, Indian agent, dated Washington April 9, 1855, and addressed to the Choctaw delegates, he said:

Gentlemen: I am, to-day, in receipt of a letter from the Hon. Geo. W. Manypenny, commissioner of Indian affairs, instructing me to confer with the Choctaw delegation now in this city, for the purpose of ascertaining what arrangements, if any, can be made with them having in in view the adjustment of all differences between their tribe and the Chickasaw tribe of Indians, the government of the United States, and the permanent settlement of the Witchita and other bands of Indians in the Choctaw country.

I respectfully request that you will furnish me, as early as practicable, with an answer in writing to the above interrogatories, in order that the same may be reported to the commissioner of Indian affairs.

The reply of the Choctaw delegates, to the foregoing letter, is dated April 10, 1855, and contains the following statement:

We and our people have, however, as we have ever had, every disposition to comply with the policy and wishes of the government; and if it be an object of importance to it to have these Indians accommodated with a home, within the boundaries of our country, though such an

arrangement would be greatly repugnant to our inclinations and feelings, we would consent to it, on fair and reasonable terms, if it can be made a part of a just and equitable adjustment of all the matters involved in the existing controversy between the Choctaws and the government, otherwise we could not take the serious responsibility of encountering the prejudices and opposition of our people.

On April 21, 1855, the secretary of the interior wrote to the commissioner of Indian affairs as follows:

If you have any plan for the settlement of these difficulties, or if the Choctaws will submit a distinct offer as the terms on which they will settle with the Chickasaws, and provide for the Witchitas and other Indians within the limits of the Choctaw country, the department will give it prompt consideration, and with every disposition to award to them and the Chickasaws such degree of favor as may not be incompatible with the rights and interests of the United States.

On the 23d of April, 1855, the commissioner wrote to the Indian agent as follows:

You will also ascertain upon what terms the Choctaws will arrange with the United States for the use of their country west of 98° west longitude, for the Witchitas and such other bands of Indians as the Government may desire to settle permanently west of that degree of longitude. Also upon what terms the right to settle said Indians west of 99° west longitude can be obtained, and report to this office, with the least delay possible.

In their letter of April 24, 1855, to the Indian agent, the Choctaw delegates said:

2. We will agree to provide, in the same convention or supplemental treaty, that the government shall have the permanent use of a limited portion of the western part of our country, for the accommodation of the Witchita and other bands of Indians, for a fair and just consideration, the amount to depend, of course, upon the extent of country required for the purpose. The commissioner of Indian affairs requires you to ascertain our terms for the use of that portion of our country west of the 98th degree of west longitude, and also for that west of the 99th degree. We are unwilling to lease, for the purpose mentioned, any portion of our country east of the 99th degree; but for the lease of that west of that degree, we will consent, in behalf of our people, to take the sum of four hundred thousand dollars.

The secretary, in his letter of April 27, 1855, to the commissioner, said:

I think, however, that notwithstanding their claim to an extent of country west of the 100th meridian of longitude is regarded, by the department, as without any foundation in law or equity, *it might prevent further trouble* in regard to it to insert an article, in the supplemental treaty or convention now to be held, requiring the Choctaws to relinquish and abandon all right or claim to the same.

On the 2d of May, 1855, the Indian agent wrote to the Choctaw delegates as follows:

I desire to ascertain whether you will agree, the Chickasaws assenting, to lease the country included between 98° and 100° west longitude and between Red and Canadian Rivers to the United States, for the permanent settlement of the Witchita and other bands of Indians within the territoral limits of the Choctaw nation; and, if so, upon what terms,—it being understood that the Choctaws shall relinquish and quit-claim, in favor of the United States, whatever interest they may have in the country lying west of the 100° of west longitude.

On the 3d of May, 1855, the Choctaw delegates replied as follows:

The question of the total relinquishment of any portion of our territorial rights is one of even greater delicacy and difficulty. We have fully acquainted you with the grounds of our claim to title to the headwaters of the Canadian river, extending as far west, at least, as to the 103° of west longitude. We believe our title to be perfectly valid and good; but, as it is questioned, if not disputed, by the government west of the 100° of west longitude, and we are anxious to put at rest all questions of controversy with it, we will relinquish and quitclaim to it our rights west of that degree of longitude, on fair and equitable terms. The extent of country involved is large; we know it to be valuable; and we believe the acquisition of our title to it to be important to the government; still we have no disposition to be exorbitant. As a consideration for the whole arrangement, *we would consent to take eight hundred thousand dollars—one half thereof for the lease of the country between the* 98° *and* 100° *west longitude, and the other half for the relinquishment of our right west of the latter degree.*

The above proposition has reference to the arrangement as a whole. Were it to be confined only to the lease of the portion of the country between the two degrees of longitude mentioned, we should for obvious reasons feel constrained to ask not less than six hundred thousand dollars therefor.

On the 4th of May, 1855, the Indian agent wrote to the Choctaw delegation as follows:

If the Choctaws will propose to lease to the United States the territory west of 98° and east of 100° west longitude, (the Chickasaws assenting) and couple with it a relinquishment of all claim west of 100° west longitude, the government will agree to pay them $600,000.

The letter of June 7, 1855, from the commissioner to the acting secretary, contains the following statement:

* * After consultation with the secretary of the interior, and with his concurrence, Agent Cooper was instructed, verbally, to inform the delegation that if they would accept the sum of $600,000 for the lease of the country between the two degrees, and the relinquishment west of the 100°, the government would give that sum. The delegation assented to

this proposition, and agreed to take the sum of $600,000 for the lease of the territory within the two degrees mentioned, and the relinquishment of their claims to the country west of the 100th degree. The Chickasaw delegation also assented and agreed to the terms of the lease, and the question was settled, as I supposed: but both delegations now contend that the United States shall be restricted, in the number of bands of Indians to be located in the country leased, to such as are now residing in it. With such a limitation on the use of the country, the lease would be of but little value, and I have, therefore, declined to assent to the limitation which the Indians desire to impose, and have claimed that the government must be left free to locate such Indians as it may desire within the ceded country. * *

The delegations propose, as a compromise, that the Choctaws quitclaim to the country west of 100°, and that they and the Chickasaws will lease the country between 99° and 100° for the permanent settlement of any Indians whom the government may desire to locate therein, for the sum of $600,000.

In their letter of June 11, 1855, to the commissioner, the Choctaw delegates said:

We will agree to take the eight hundred thousand dollars now offered for the lease and relinquishment, and to the location, within the country leased, of the Indians included in your original proposition, which we have quoted—Choctaws and Chickasaws to have the right to settle in the leased country as now—if you will consent to the modified proposition in regard to our claim herein submitted.

In the letter of June 14, 1855, from the Choctaw delegates to the commissioner of Indian affairs, they say:

The lease we had consented to agree to was a limited one, viz: for the permanent settlement, within the country leased, of the Witchita and several alien tribes and bands now in our country, the government to have the control of them, but we still to retain jurisdiction over the country itself, with the right of settlement therein by Choctaws and Chickasaws as heretofore, as expressed and provided for in the convention. If the government had the unrestricted right to bring in any and all Indians it pleased, the whole district might soon be filled up with a discordant, restless and predatory population, which would endanger the frontier settlements of the Choctaws and Chickasaws, deprive us practically of our jurisdiction and necessarily exclude Choctaws and Chickasaws from settling within the district, if they so desired. Such an arrangement would be a virtual sale of that portion of our country, to which we could under no circumstances submit. Moreover the consideration offered would be entirely inadequate. We had agreed to relinquish our claims to territory west of the 100° of west longitude, embracing at least six and a half millions of acres. The district desired to be leased contains quite seven millions more: so that practically the government would have acquired from us some thirteen and a half millions of acres of land, for the certainly insufficient sum of six hundred thousand dollars.

Let it be assumed, then, for a moment, that the Secre-

tary did not acknowledge that the Choctaws had any right or interest connected with land west of the 100th meridian. Nevertheless the three facts disclosed by this correspondence are decisive of the position that $400,000 was payable for the quit-claim. For a promise, made in a treaty, is always to be interpreted in the sense in which the promiser knowingly permitted the promisee to understand it.

Again, the evidence establishes the following facts: (1) The land in question west of the 100th meridian was ceded, by the United States to the Choctaws, in 1820. (2) Without the consent or knowledge of the Choctaws, the United States, exercising the right of eminent domain, subsequently took this land and ceded it to Spain. (3) It was worth many times the sum of $800,000. (4) Nothing whatever has been paid to the Choctaws for their interest in this land, unless the sum of $400,000 was paid for it, under the treaty of 1855. If, therefore, the three facts established by the correspondence above quoted, standing alone, did not prove that at least $400,000 was paid for the quit-claim, when supplemented by the last mentioned facts they could leave no doubt on the subject.

But there is no evidence to prove that the Secretary himself did not intend that half of the $800,000 should be applicable to the quit-claim. The evidence does show that he doubted the validity of the Choctaws' title to land west of the 100th meridian, but it does not show that, after learning the grounds on which the Choctaw delegates based their claim, he did not consent to their demand in order, to use his own words, to "prevent further trouble in regard to it."

V.

he interpretation which makes the ceding clause an abso-lute conveyance, is inconsistent with other parts of the treaty.

Coupled with this ceding clause is an explanatory and ualifying *proviso*, which conclusively shows that the so-lled consideration of $300,000 was not a consideration r the cession of the land, and could never become the roperty of the Choctaws and Chickasaws, unless their gislatures should enact certain laws, the enactment of hich was, by the terms of the treaty, left to the option those legislatures. Referring to article 3 of the treaty, page 30 of the "Appendix to the Record," the court ill observe that the following is the effect of the proviso, hich is coupled to the ceding clause :

This money was to remain in the treasury two years nless, before the expiration of that period, the Choc-aws and Chickasaws should elect to confer, and should onfer, upon their freedmen "*all the rights, privileges, nd immunities (including the right of suffrage) of citi-ens of said nations*," except in their annuities, moneys, nd public domain, and should also give to their freed-nen,—men, women, and children,—each forty acres of and. If their freedmen, who were estimated to number ,000, should emigrate, this sum of $300,000 was all to e paid to them,—$100 to each emigrant. If none of the reedmen should emigrate, and if the Choctaws and hickasaws should fail to confer upon each freedman itizenship and forty acres of land, the whole of the 300,000 was to remain the property of the United States. f a part only of the freedmen should emigrate, and the hoctaws and Chickasaws should grant citizenship and

forty acres of land to those refusing to emigrate, the Choctaws and Chickasaws were to receive the balance of the $300,000, after deducting the amount paid to the emigrants. Only in the event that the Choctaws and Chickasaws should grant citizenship and forty acres of land to each of the freedmen, and all the freedmen should refuse to emigrate, was the sum of $300,000 to become wholly the property of the Choctaws and Chickasaws.

But this sum was not, nor was any part of it, to be paid to the Choctaws and Chickasaws, as the *consideration* for the cession of the leased district. It was to be paid to them as a consideration for the grant of forty acres of land and of citizenship, including the right of suffrage to each of their freedmen.

In accordance with the stipulations of article 46, the United States loaned to the Choctaws and Chickasaws the sum of $200,000. This loan was to be repaid out of the $300,000 mentioned in the first article, if that money should become the property of the Choctaws and Chickasaws. If it should not become their property, the loan was to be repaid out of any funds of those nations in the treasury of the United States.

Our opponents contend that article 30 substituted for the trust to settle friendly Indians in the district west of the ninety-eighth meridian, which was created by the lease of 1855, a stipulation, by the Choctaws and Chickasaws, to permit certain Indians to settle among themselves, in their country east of the ninety-eighth meridian, and that this stipulation furnishes a reason for claiming that the cession in the third article is a cession of the absolute ownership of the land west of that meridian. It would be difficult to overestimate the absurdity and injustice involved in such a bargain. It would have amounted to this. The United States, without the payment of a dollar,

would not only have succeeded in becoming the absolute beneficial owners of over 7,000,000 acres of land freed from the trust attached to the lease, but would also have obtained from the Choctaws and Chickasaws a new and gratuitous concession of land within the country in which the Choctaws and Chickasaws themselves resided. The Choctaws and Chickasaws would have gratuitously substituted an *absolute title* to their land west of the ninety-eighth meridian for a conditional lease, and, for the privilege of doing so, would have given away a large part of their land east of that meridian. This would have been harder than the average of Indian bargains. The Indians have been in the habit of parting with their lands for trifling considerations; but they have not been in the habit of paying exorbitant prices for the privilege of doing so. The fact is that article 30, which is alleged to have effected this absurd result, never took effect at all, because the Choctaw and Chickasaw legislatures did not enact the legislation, upon the enactment of which it was to become operative.

In this third article the United States agree, "within ninety days from the expiration of said two years, to remove from said nations all such persons of African descent as may be willing to remove." It must have been the intention of the parties to the treaty that these freedmen should be settled in the leased district, for there was no other land available for that purpose.

Unless the cession of article 3 was a cession in trust for the settlement of Indians on the land between the ninety-eighth and one hundredth meridians, there was, in the treaty of 1866, no compliance with the fifth peremptory requirement of the Fort Smith Commissioners, that land should be set apart, by the treaty, for Indian settlement.

If the cession of 1866 was not a cession in trust for the settlement of friendly Indians in the leased district, that treaty actually abrogated the trust created by the lease of 1855 and authorized the United States to exclude Indians from the district altogether, and to appropriate to their own use the proceeds of over 7,000,000 acres of land.

One of two things must be true. It must be true that the cession of article 3 was a cession, in trust, for the settlement of friendly Indians on the land; or it must be true that, so far as the Choctaws and Chickasaws were concerned, the authorities of the United States used the fifth proposition merely as a pretext, to cover the acquisition of an absolute title to the leased district, exempt from a trust for the settlement of Indians, and open to general settlement. There is no ground for this grave charge against the commissioners who negotiated the treaty, or the senate who advised its ratification, or the president who ratified it.

The assumption that the Choctaws and Chickasaws would have conveyed, or the United States consented to acquire, virtually without consideration, 7,713,239 acres of land worth, in 1866, at the government price, from $9,641,548 to $19,283,096, and worth, in 1892, over $40,000,000, would, of course, be unreasonable. The real consideration, not being *expressed*, must be *implied*, in the treaty. And that consideration must have been the trust to settle friendly Indians on the land, upon the breach of which the Choctaws and Chickasaws would become entitled to compensation for so much of it as should be diverted from the purposes of the trust.

VI.

Proceedings of the Fort Smith Council.

Leaving out of view the gross absurdity involved in that interpretation which makes the cession a conveyance of the unqualified beneficial ownership of the land, we shall find in the proceedings of the Fort Smith council of 1865, conclusive proof that the parties intended the cession as a conveyance in trust for the settlement of friendly Indians on the land. There are extant four different reports of the proceedings of that council, viz: (1) The report of Mr. Cooley, the commissioner of Indian affairs, who was the president of the council, commencing on page 34 of the "Report of the Commissioner of Indian Affairs" for 1865; (2) The report of Mr. Cooley, president of the council, commencing on page 296 of the same document; (3) The report of Mr. C. E. Mix, the secretary of the council, commencing on page 312 of the same document; and (4) the original papers on file in the Indian Office.

In the first, Commissioner Cooley says, on page 34:

> On the next day (September 9) the delegates were informed that the commissioners were empowered to enter into treaties with the several tribes, upon the basis of the following propositions: * * *
>
> 5th. A part of the Indian country to be set apart to be purchased for the use of such Indians from Kansas, or elsewhere, as the government may desire to colonize therein.

On page 36 Mr. Cooley says:

> With the Choctaws and Chickasaws a treaty was agreed upon, upon the basis of the seven propositions heretofore stated, and in addition to which those tribes agreed to a thorough and friendly union among their own people, and forgetfulness of past differences; to the opening of the leased lands to the settlement of any tribes, whom the government of the United States may desire to place thereon; and to the cession of one-third of their remaining area for the same purpose; the United States to restore those tribes to their rights forfeited by the rebellion. This treaty, after its approval by the councils of the Choctaws and Chickasaws, is to be signed, in this city, by three delegates from each nation sent here for that purpose.

It is not intended to hold any general council in this city; but it was understood that delegates would, if necessary, visit Washington, on behalf of any of the tribes owning lands in the Indian country, which the government might desire to *purchase* for the use of other Indians, so that, by properly accredited delegates, all necessary arrangements with the several tribes might be made.

In the second report Mr. Cooley, on page 298, says:

On the second day (Saturday, September 9), after council met, I addressed the Indians, in which I stated that the commissioners had considered the talks of the Indians on the preceding day, and had authorized me to submit the following statement and propositions, as the basis on which the United States were prepared to negotiate with them: * * *

Such treaties *must* contain substantially the following stipulations:

* * * * * * * * *

5. A portion of the lands owned and occupied by you must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the government.

In the third report, on page 319, Secretary Mix says:

5. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the government, or such as may be fixed by the government.

The fourth report appears in the original papers on file in the Indian office. On the 24th of January, 1898, the secretary of the interior transmitted to the court of claims the following original papers: (1) The printed address of the United States commissioners who attended the Fort Smith council of 1865, with an indorsement in pencil thereon. (2) The reply of the committee on the part of the Choctaws and Chickasaws to the said address, dated Fort Smith, Arkansas, September, 1865.

These papers are printed on pages 140, 141, 142, and 143 of the record. They are also printed on pages 74, 75, and 76 of the record.

In this original document the fifth requirement takes the following form:

5th. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the government, or such as may be fixed by the government.

The indorsement, which is printed at the top of page 76 and also at the top of page 141, contains these words:

> The government will insist upon purchasing a portion of their lands for the settlement of friendly Indians.

Our opponents contend that this indorsement was not an element of the ultimatum presented to the Indians, by the commissioners of the United States, at the Fort Smith council,—that the demands of the United States were, in no way, qualified, colored, or affected by this indorsement,—that it was an unofficial inscription, which played no part in the proceedings of the council. They are mistaken. The court will observe, on pages 75 and 142 of the record, the following requirement of the commissioner:

> Brothers: You have now heard and understand what are the views and wishes of the president; and the commissioners, as they told you yesterday, *will expect definite answers* from each of you upon the questions submitted.

The court will also observe that the indorsement contains the following paragraph:

> A stipulation of general amnesty among themselves must be incorporated, and *no individual shall be proscribed, or any act of forfeiture, or confiscation, passed against those who remained friendly to the U. S.; but they shall enjoy equal privileges with other members of the nation.*

That the indorsement, which contains this paragraph, was a part of the official demand of the commissioners, is shown by the following facts:

1. The reply of the Choctaws printed on page 76 and also on pages 142–3 of the record, concludes as follows:

> We are also willing to incorporate a provision that *no individual shall be proscribed, or any act of forfeiture or confiscation passed, against those who remained friendly to the U. S., and that they shall enjoy equal privileges with other members of the nation.*

2. The fifth article of the treaty of 1866 contains the following words:

> And the Choctaws and Chickasaws, anxious for the restoration of kind and friendly feelings among themselves, do hereby declare an amnesty for all past offenses against their respective governments; and no Indian

or Indians shall be proscribed, or any act of forfeiture, or confiscation, passed against those who may have remained friendly to the United States; but they shall enjoy equal privileges with other members of said tribes; and all laws heretofore passed inconsistent herewith are hereby declared inoperative.

3. The draft of a preliminary treaty, submitted to the Indians by the commissioners at Fort Smith, contains the following provision:

ART. 8. The Choctaw and Chickasaw tribes of Indians, anxious for the restoration and preservation of kind and friendly feelings among themselves, do hereby declare a general amnesty of all past offenses, either against their government, or the government of the United States; and no Indian or Indians shall be proscribed, or any act of forfeiture, or confiscation, passed against those who may have remained friendly and loyal to the United States; but they shall all enjoy equal privileges with other members of said tribes.

4. This indorsement, as already stated, includes, on pages 76 and 141, the following clause:

The Gov'm't will insist on purchasing a portion of their lands for the settlement of friendly Indians.

This explains and qualifies the fifth requirement of the commissioners; and it also explains the fact that Mr. Cooley, the commissioner of Indian affairs, who was president of the Fort Smith council, on page 34 of his annual report for 1865, sets forth this fifth requirement in the following form:

5th. A part of the Indian country to be set apart to be purchased for the use of such Indians from Kansas, or elsewhere, as the government may desire to colonize therein.

These facts, I submit, conclusively prove that the indorsement was, in substance, embraced in the ultimatum presented by the commissioners,—that it gave character and coloring to that ultimatum, and was part and parcel of the official action of the commissioners. They prove too, I submit, that it was the deliberate purpose of the Choctaws and Chickasaws to convey and of the United States to receive the legal title to the leased district in trust for the settlement of friendly Indians on the land.

VII.

The relations existing between the parties to the treaty.

Now what were the relations existing at the time between the parties to this transaction,—between the United States and the Choctaw and Chickasaw nations,—between the purchaser and the vendors of these lands? Were the parties to the transaction equals, in legal contemplation, dealing with each other at arm's length,—free from duress,—intimidated by no threats,—at liberty to act or to decline to act, according to the dictates of their own judgment? No, the Choctaws and Chickasaws did not stand up, as equals, in this transaction. They were not able to deal at arm's length with the United States. They were not free from duress. They were not exempt from intimidation by threats. They were at the mercy of the United States, and were so notified at the commencement of the negotiations. They were not at liberty to accept, or reject, the ultimatum presented by the United States.

It was a transaction between a sovereign and a dependent,—between a guardian and a ward. In the very treaty of June 22, 1852, the United States secured from the Wichitas a stipulation in these words: "The Chickasaw tribe of Indians *acknowledge themselves to be under the guardianship* of the United States." That relation of guardian and ward has been substantially declared in many treaties between the Choctaws and Chickasaws and the United States. it has been declared *ex cathedra* again and again in the adjudications of this honorable court. In Choctaw Nation *v.* United States, 119 U. S. 1, 28, this court said:

As was said by this court recently in the case of United States *v.* Kagama, 118 U. S., 375, 383: "These Indian tribes are the *wards* of the nation; they are communities *dependent on the United States;* dependent largely for their daily food; dependent for their political rights.

They owe no allegiance to the states and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. *From this very weakness and helplessness*, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the *duty of protection*, and with it the power. This has always been recognized by the executive and by congress, and by this court whenever the question has arisen." It had accordingly been said in the case of Worcester v. Georgia, 6 Peters, 515, 583: "The language used in treaties with the Indians should never be construed to their prejudice. * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

The recognized relation between the parties to this controversy, therefore, is that between a *superior and an inferior*, whereby the latter is placed *under the control of the former*, and which, while it authorizes the adoption, on the part of the United States, of such a policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection. *The parties are not on an equal footing;* and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules, framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws.

The relation between these parties, recognized by the parties themselves and by this court, is not merely that of knowledge to ignorance,—of book-learning to illiteracy. It is the relation between power and weakness,—between sovereign and dependent,—between guardian and ward. More than that, in the Fort Smith council, during the negotiation of the treaty of 1866, the sword of sovereignty was suspended over the heads of the Choctaws and Chickasaws. They were notified at the outset, by the commissioners of the United States, that they had *forfeited all right* to annuities, lands and protection. To give emphasis to this threat, it was repeated, and, besides, the Choctaws and Chickasaws were told that the proposed treaty *must* contain substantially the seven stipulations set forth in the address of the commissioners.

The following paragraph of President Cooley's address delivered to the Indians, on the first day of the council,

September 8, 1865, is reported by himself on page 297 of the "Report of the Commissioner of Indian Affairs for 1865," and is also reported, by Mr. Mix, the secretary of the council, on page 314 of the same volume:

> Portions of several tribes and nations have attempted to throw off their allegiance to the United States, and have made treaty stipulations with the enemies of the government, and have been in open war with those who remained loyal and true, and at war with the United States, all such have rightfully *forfeited* all annuities and interests in the lands in the Indian territory; but, with the return of peace, after subduing and punishing severely, in battle, those who caused the rebellion, the president is willing to hear his erring children in extenuation of their *great crime*.

In his address to the Indians, delivered on the second day of the council, President Cooley used the following language, as reported by himself, on page 298 of the annual report for 1865, and by Secretary Mix, on page 318 of the same volume:

> The following-named nations and tribes have by their own acts, by making treaties with the enemies of the United States, at the dates hereafter named, *forfeited all right* to annuities, lands and protection by the United States.

On page 34 of the Report of the Commissioner of Indian Affairs for 1865, Mr. Cooley says:

> Immediately upon the opening of the proceedings, the tribes were informed generally of the objects for which the commission had come to them; that they, for the most part, as tribes, had, by violating their treaties, by making treaties with the so-called Confederate States, *forfeited all rights* under them, and must be considered as *at the mercy of the government*.

If an individual, being a guardian, claims to have acquired, for a mere pittance, valuable property of his ward, will not a court of equity interpose for the protection of the ward, either by adjudging the guardian a trustee of the ward as to all his gains from the transaction, or by setting aside the bargain altogether? Will not this be done, even though the guardian impose no restraint, no compulsion, no duress, upon the ward, in the transaction? Will not a court of equity interpose, with yet greater alac-

rity, for the protection of the ward, when the hard bargain has been wrung from him by intimidation and duress?

Is this contest, between the United States and the Choctaw and Chickasaw nations, to be governed by a code of equity rules different from those which are observed in a contest between individuals? When a nation voluntarily enters a court of equity, does it appear exempt from the rules of equity which are binding on other parties? Does not the nation, *pro hac vice*, lay aside the mantle of sovereignty, and stand on the same footing as any other party to the suit?

VIII.

Acknowledgment of the trust by Congress.

The following provision of the act of March 3, 1891, is an *acknowledgment of the trust by the trustee:*

> Said lands have been *ceded, in trust*, by article three of the treaty between the United States and the said Choctaw and Chickasaw nations of Indians, which was concluded April 28, 1866, and proclaimed on the tenth day of August, of the same year. 26 Stat. 1025.

At common law, a trust, in a conveyance of land by one private person to another, could be created by parol, and could also be proven by parol evidence. Under the English statute of frauds, trusts of lands could be created by parol, but could only be proven by written evidence. Trusts, like uses, are, of their own nature averrable, *i. e.*, may be declared by word of mouth without writing; as if, before the statute of frauds, an estate had been conveyed unto, and to the use of, A and his heirs, a trust might have been raised, by parol, in favor of B. And the statute of frauds will be satisfied if the trust can be manifested, or proved, *by any subsequent acknowledgment by*

the trustee, as by an express declaration, or any memorandum to that effect, or by a letter under his hand, or by his answer in chancery, or by his affidavit, or by a recital in a bond, or deed, or by a pamphlet written by the trustee, or by an entry in a bank deposit book; in short, by any writing in which the fiduciary relation of the parties and its terms can be clearly read. Lewin on Trusts, 1st Amer. from 8th Eng. Ed. pp. 51, 55, 56; cases cited and notes; Perry on Trusts, vol. 1, sec. 82, and cases cited; 4 Kent Com. 305 and cases cited; 1 Greenl. Ev. sec. 266, and cases cited; Osterman *v.* Baldwin, 6 Wall. 116; Foy *v.* Foy, 2 Hayw. 141.

A trust, once acknowledged, becomes an integral part of the deed. It cannot be shorn from the deed by the trustee, any more than can any other part of the instrument. When the beneficiary of the trust demands the proceeds of the trust, or the creator of the trust insists upon its faithful execution, the trustee cannot rescind his acknowledgment and retain, in his own purse, the money which belongs to the *cestui que trust*, or extinguish the rights of the reversioner of the estate.

The trust, upon which the leased district was ceded to the United States, is expressly acknowledged by the trustee, in the act of 1891. The acknowledgment is made by those departments of the government, which are invested with the exclusive power to make such acknowledgment. It takes the form of an act of congress, approved by the president of the United States. It is impossible to conceive of a stronger case of the proof of a trust, by the acknowledgment of the trustee. This acknowledgment was not revocable by any subsequent inconsistent action of congress. It permanently fastened upon the United States the character of trustee.

IX.

The jurisdictional act of March 2, 1895, does not "controvert" the claim of the Choctaws and Chickasaws.

This act contains the following words:

> That as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, which claim is *controverted by the United States*, jurisdiction be, and is hereby, conferred upon the court of claims to hear and determine the said claim of the Choctaws and Chickasaws: * *And provided further*, That *nothing in this act shall be accepted or construed as a confession that the United States admit* that the Choctaw and Chickasaw nations have any claim to or interest in said lands, or any part thereof. 28 Stat. 893; Appendix to Rec. 1.

Our opponents understand these words to mean that congress controverted this claim. We do not so understand them. When the assistant attorney general controverts claims, in the court of claims, in "common parlance" the United States controverts them. In the case at bar, a former secretary of the interior controverted the Choctaw and Chickasaw claim. Adopting "common parlance," congress said that the United States controverted the claim.

If we understand the meaning of the act to be that the secretary controverted this claim, and that the act itself was not to be construed as an admission, *by congress*, of the validity of the claim, the provision is intelligible and sensible. But understood as our opponents understand it, it becomes absurd. It amounts, in effect, to this:

Congress *denies* the validity of the claim, provided this *denial* of its validity shall not be construed as an *admission* of its validity.

X.

The use made of the leased district by the United States from the date of the treaty of 1866, *until* 1890.

During the twenty-four years that followed the date of the cession of the leased district, by the Choctaws and Chickasaws, to the United States, no use was made of any part of that district, except for the settlement of Indians. This would seem to be strong if not conclusive proof that the United States understood, at the date of the treaty, and for a quarter of a century thereafter, that the treaty conferred no right to use the land for any other purpose.

XI.

Unjust discrimination in favor of the Creeks, Seminoles and Cherokees.

A denial of compensation to the Choctaws and Chickasaws, for their interest in the Wichita reservation, would present an indefensible discrimination in favor of the Cherokees, Creeks and Seminoles, and against the Choctaws and Chickasaws. In 1866 the United States paid the Creeks for their cession in trust $975,168, and in 1889 paid them $2,280,857.19 for an absolute title to the same land. House Report No. 3147, 51 Cong., 1 sess., pp. 13, 14. In 1866 the United States paid the Seminoles $325,362 for their cession in trust and in 1899 paid them for an absolute title to the same land $1,912,942.02. Id. p. 14. In 1891 the United States paid the Cherokees $8,000,000 for their interest in the "Cherokee Outlet."

XII.

The western boundary of the province ceded by France to the United States in 1803.

A question which has been discussed at considerable length, on both sides, is the question whether the territory ceded by the United States to the Choctaws, in 1820, extended westward beyond the 100th meridian of west longitude. It is material in this case only because of the bearing which its decision may have on the question whether the sum of $800,000, or the sum of $400,000, or some other sum, was paid for the lease, in 1855. In order to decide this question as to the extent of the territory ceded to the Choctaws, in 1820, it becomes necessary to ascertain whether, at the date of the Choctaw treaty of 1820, the United States owned any land west of the 100th meridian.

The province of Louisiana, ceded by France to the United States in 1803, extended from the Mississippi river, on the east, to the Rio Bravo del Norte, and Rocky Mountains on the west, and from the Gulf of Mexico, northward, beyond the fortieth parallel of north latitude. This is shown by the following documentary proofs:

A letter of instructions from James Madison, secretary of state, to Robert R. Livingston, minister to France, written within nine months after the cession of Louisiana to the United States, contains the following paragraph:

DEPARTMENT OF STATE, *January* 31, 1804.

SIR: With respect to the western extent of Louisiana, M. Loussat held a language more satisfactory. He considered the Rio Bravo or Del Norte, as far as the thirtieth degree of north latitude, as its true boundary on that side. The northern boundary, we have reason to believe, was settled between France and Great Britain by commissioners appointed under the treaty of Utrecht, who separated the British and French territories west of the Lake of the Woods by the forty-ninth degree of

latitude. American State Papers, Foreign Affairs, vol. 2, p. 574; Appendix to Record, p. 70.

This statement is repeated on page 575, in a subsequent letter from Mr. Madison to Mr. Livingston, dated March 31, 1804. M. Loussat was the commissioner who received the transfer of the province of Louisiana from Spain to France, and transferred it to the United States under the treaty of 1803.

James Madison, secretary of state, in his letter of instructions of April 15, 1804, to James Monroe and Charles Pinckney, ministers extraordinary to the court of Spain, says:

No final cession is to be made to Spain of any part of the territory on this side of the Rio Bravo, but in the event of a cession to the United States of the territory east of the Perdido; and, in that event, in case of absolute necessity only, and to an extent that will not deprive the United States of any of the waters running into the Missouri or the Mississippi, or of the other waters emptying into the Gulf of Mexico, between the Mississippi and the river Colorado emptying into the bay of St. Bernard.

American State Papers, Foreign Affairs, vol. 2, p. 630; Appendix to Record, p. 71.

The bay of St. Bernard is now known as Matagorda bay.

A letter of instructions from James Madison, secretary of state, to James Monroe and Charles Pinckney, ministers extraordinary to the court of Spain, dated July 8, 1804, contains the following paragraph:

It is to be understood that a perpetual relinquishment of the territory between the Rio Bravo and Colorado is not to be made, nor the sum of —— dollars paid, without the entire cession of the Floridas, nor any money paid in consideration of the acknowledgment by Spain of our title to the territory between the Iberville and the Perdido.

American State Papers, Foreign Affairs, vol. 2, p. 630; Appendix to Record, p. 71.

In a letter from James Monroe, minister extraordinary to Spain, to M. Talleyrand, a minister of the French Empire, dated Paris, November 8, 1804, he says:

Your excellency will receive within a paper containing an examination of the boundaries of Louisiana which, it is presumed, proves incontestably the doctrine above advanced, as also that the river Perdido, is the ancient, and, of course, present boundary of that province to the east, and the Rio Bravo to the west.

American State Papers, Foreign Affairs, vol. 2, p. 643; Appendix to Record, p. 72.

In a letter from the American ministers, Monroe and Pinckney, to the Spanish minister Cevallos, dated January 28, 1805, they say:

We have the honor to present to your excellency a paper on this subject which we presume proves in the most satisfactory manner that the boundaries of that province, as established by the treaties referred to, are the river Perdido to the east and the Rio Bravo to the west. The facts and principles which justify this conclusion are so satisfactory to our government as to convince it that the United States have not a better right to the island of New Orleans, under the cession referred to, than they have to the whole district of territory which is above described.

American State Papers, Foreign Affairs, vol. 2, p. 637; Appendix to Record, p. 72.

A letter from the American ministers, Messrs. Monroe and Pinckney, to the Spanish minister, dated April 20, 1805, contains the following paragraphs:

By the memorial which we had the honor to present to your excellency on the 28th of January last, the epoch of the discovery of the Mississippi and of the waters which empty into it and of the bay of St. Bernard, and of the taking possession of same and of the country dependent thereon, is proved by documents which can not be questioned. By these it is established, in respect to the Mississippi, its waters, and dependent country, as low down the river as the Arkansas by Messieurs Joliet and Marquette from Canada as early as the year 1673, and to its mouth by the Father Henison in 1680, and by De la Salle and Joutel, who descended the river with sixty men to the ocean and named the country Louisiana, in 1682; and in respect to the bay of St. Bernard in 1685. This was done, at those periods, in the name and under the authority of France, by acts which proclaimed her sovereignty over the whole country to other powers in a manner the most public and solemn, such as making settlements and building forts within it. Of these it is material to notice in the present inquiry two only, which were erected in the bay of St. Bernard, on the western side of the river Colorado, by M. de la Salle, who landed there from France with two hundred and forty persons in 1685.

The principles which are applicable to the case are such as are dictated by reason and have been adopted, in practice, by European powers, in the discoveries and acquisitions which they respectively made in the New World; they are principles intelligible and at the same time founded in strict justice. The first of these is that when any European nation takes possession of any extensive seacoast, that possession is understood as extending into the interior of the country to the sources of the rivers emptying within that coast, to all their branches and the country they cover, and to give it a right in exclusion of all other nations to the same. * * * The second is that whenever one European nation makes a discovery and takes possession of any portion of that continent, and another afterwards does the same at some distance from it, where

the boundary between them is not determined by the principle above mentioned, the middle distance becomes such of course. The justice and propriety of this rule is too obvious to require illustration. A third rule is that whenever any European nation has thus acquired a right to any portion of territory on that continent, that right can never be diminished or affected by any other power, by virtue of purchases made, by grants, or conquests of the natives within the limits thereof. It is believed that this principle has been admitted and acted on invariably since the discovery of America, in respect to their possessions there, by all the European powers. * * *

On the authority of the principle first above stated it is evident that, by the discovery and possession of the Mississippi, in its whole length, and the coast adjoining it, the United States are entitled to the whole country dependent on that river, its several branches, and the waters which empty into it within the limits of that coast. The extent to which this would go it is not in our power to say; but the principle being clear, dependent on plain and simple facts, it would be easy to ascertain it.

It is equally evident by the application of the second principle to the discovery made by M. de la Salle of the bay of St. Bernard, and his establishment there on the western side of the River Colorado, that the United States have a just right to a boundary founded on the middle distance between that point and the then nearest Spanish settlement, which, it is understood, was in the province of Panuco, unless that claim should be precluded on the principle first above mentioned. To what point that would carry us it is equally out of our power to say, nor is it material, as the possession in the bay of St. Bernard, taken in connection with that of the Mississippi, has been always understood as a right to extend to the Rio Bravo, on which we now insist.

American State Papers, Foreign Affairs, vol. 2, pp. 663, 664; Appendix to Record, p. 73.

A letter from James Monroe, secretary of state, to the Chevalier de Onis, the Spanish minister, dated June 10, 1816, contains the following paragraph:

DEPARTMENT OF STATE, *June* 10, 1816.

SIR: * * With respect to the western boundary of Louisiana I have to remark that this government has never doubted, since the treaty of 1803, that it extended to the Rio Bravo. Satisfied I am, if the claims of the two nations were submitted to an impartial tribunal, who, observing the principles applicable to the case, and tracing facts as to discovery and settlement, on either side, that such would be its decision. The discovery of the Mississippi, as low down as the Arkansas, in 1673, and to its mouth, in 1680, and the establishments of settlements on that river, and on the bay of St. Bernard on the western side of the Colorado, in 1685, under the authority of France, when the nearest settlement of Spain was in the province of Panuco, are facts which place the claim of the United States on ground not to be shaken.

American State Papers, Foreign Affairs, vol. 4, p. 430; Appendix to Record, p. 77.

Mr. John Quincy Adams, secretary of state, in his letter

of March 12, 1818, to Mr. de Onis, the Spanish minister at Washington, said:

The claim of France always did extend westward to the Rio Bravo, and the only boundaries ever acknowledged by her before the cession to Spain of November 3, 1762, were those marked out in the grant from Louis XIV to Crozat. She always claimed the territory which you call Texas as being within the limits and forming a part of Louisiana, which in that grant is declared to be bounded westward by New Mexico, eastward by Carolina, and extending inward to the Illinois and to the sources of the Mississippi and of its principal branches.

The boundaries of Louisiana, Mr. Adams says, are established by the following proofs:

(1) The discovery of the Mississippi, from near its source to the ocean, by the French from Canada, in 1683.

(2) The possession taken, and establishment made, by La Salle, at the bay of St. Bernard, west of the rivers Trinity and Colorado, by authority from Louis XIV, in 1685.

(3) The charter of Louis XIV to Crozat, in 1712.

(4) The historical authority of Du Pratz and Champigny, and of the Count de Vergennes.

(5) The geographical authority of De l'Isle's map, and especially that of the map of Don Thomas Lopez, geographer to the King of Spain, published in 1762. These documents were all referred to in the letter from Messrs. Pinckney and Monroe to Mr. Cevallos, of 20th April, 1805, since which time, and in further confirmation of the same claims, the government of the United States is enabled to refer you to the following:

(6) A map published by Homann, at Nuremberg, in 1712.

(7) A geographical work published in 1717, at London, entitled "Atlas Geographicus, or a Complete System of Geography, Ancient and Modern;" in which the map of Louisiana marks its extent from the Rio Bravo to the Perdido. In both these maps the fort built by La Salle is laid down on the spot now called Matagorda.

(8) An official British map published in 1755 by Bowen, intended to point out the boundaries of the British, Spanish, and French colonies in North America.

(9) The narrative published at Paris, of Hennepin in 1683, of Tonti in 1697, and of Joutel in 1713.

(10) The letter from Col. la Harpe to Don Martin d'Alarconne of 8th July, 1719 (A 1, B 2).

(11) The order from the French governor of Louisiana, De Bienville, to La Harpe of August 10, 1721 (C 3).

(12) The geographical work of Don Antonio de Alcedo, a Spanish geographer of the highest eminence; this work and the map of Lopez, having been published after the cession of Louisiana to Spain in 1762, afford decisive evidence of what Spain herself considered as the western boundary of Louisiana when she had no interest in contesting it against another State (B 4).

Mr. Adams cites the following proofs on the part of Spain:

(1) The voyages of Ponce de Leon, Vasquez de Ayllon, Panfilo de Narvaez, Fernando de Soto, Luis Moscoso, and other Spanish travelers in the 16th century, who never made any settlement upon any of the territories in question, but who traveled, as you observe, into countries too tedious too enumerate.

(2) The establishment of the new kingdoms of Leon and Santander in 1595, and the province of Cohaquila in 1600.

(3) The province of Texas founded in 1690.

Here, you will please to observe, begins the conflict with the claims of France to the western boundary of Louisiana transferred by the cession of the province to the United States. The presidios or settlements of Las Texas were, by your own statement, adverse settlements to that of La Salle, who, six years before, had taken formal possession of the country in the name of and by authority of a charter from Louis XIV. They were preceded by an expedition from Mexico the year before, that is, 1689, to hunt out the French remaining of the settlement of La Salle. Now, what right had the viceroy of Mexico to hunt out the French who had formed a settlement under the sanction of their sovereign's authority? You will tell me that from the time when Santa Fe, the capital of New Mexico, was built Spain considered all the territory east and north of that province, as far as the Mississippi and the Missouri, as her property; that the whole circumference of the Gulf of Mexico was hers; and that Philip II had issued a royal order to exterminate every foreigner who should dare to penetrate to it; so that the whole question of right between the United States and Spain with regard to this boundary centers in this: the naked pretension of Spain to the whole circumference of the Gulf of Mexico, with the exterminating order of Philip II on one side; and the actual occupancy of France, by a solemn charter from Louis XIV, on the other. Well might Messrs. Pinckney and Monroe write to Mr. Cevallos, in 1805, that the claim of the United States to the boundary of the Rio Bravo was as clear as their right to the island of New Orleans. * * *

From this work of Joutel it likewise appears that the fort and colony left by La Salle at the westward of the Colorado was destroyed, not as you state by the Indians, but by the Spaniards from Mexico, who, until that time, had never had any settlement of any kind nearer than Panuco, and who, by your own account, had no other right or authority for this act than the royal order of Philip II to exterminate all foreigners penetrating into the Gulf of Mexico.

The settlement of La Salle, therefore, at the head of the bay of St. Bernard, westward of the river, which he called Riviere aux Bœufs, but which you call Colorado of Texas, was not, as you have represented it, the unauthorized incursion of a private adventurer into the territories of Spain, but an establishment having every character that could sanction the formation of any European colony upon this continent, and the viceroy of Mexico had no more right to destroy it by a military force than the present viceroy would have to send an army and destroy the city of New Orleans. It was a part of Louisiana discovered by La Salle under formal and express authority from the King of France; and the royal exterminating order of Philip II was but one of the multitude of sanguinary acts which signalized the reign and name of that monarch, while the name of La Salle is entitled to stand high in the glorious role of the benefactors of mankind. After this statement, founded upon the most authentic documents, the foundation of the presidio of Texas, in 1693, was, by your own showing, an unlawful enroachment upon the

territories of France which, by the first of the three principles laid down by Messrs. Pinckney and Monroe at Aranjuez, and above referred to, extended, on the coast of the Gulf of Mexico, half way to the nearest Spanish settlement of Panuco, viz., to the Rio Bravo.

American State Papers, Foreign Affairs, vol. 4, pp. 471, 473, 478, 479; Appendix to Record, pp. 78 to 84.

A letter from John Quincy Adams, secretary of state, to Don Luis de Onis, the Spanish minister, contains the following paragraphs:

DEPARTMENT OF STATE, WASHINGTON, *October* 31, 1818.

SIR: Your letter of the 24th instant, and the proposals contained in it, offered as the basis of a treaty for the adjustment of all the subjects in discussion between the United States and Spain, have been received and laid before the president of the United States.

I am directed by him to forbear entering into any examination of the historical disquisition, concerning the original pretensions of Spain to all the territories bordering on the Gulf of Mexico and the whole country included in the French colony of Louisiana, which you have thought proper to introduce into your note. The right of the United States to the river Mississippi and all the waters flowing into it, and to all the territories watered by them, remains as entire and unshaken by anything now adduced by you, as by anything which had ever preceded it, in the discussions between the two governments. It is established, beyond the power of further controversy; nor could it answer any useful purpose to reproduce proofs which have already, more than once, been shown, and which, remaining unimpaired, must henceforth be considered by the United States as not susceptible of refutation.

American State Papers, Foreign Affairs, vol. 4, p. 530; Appendix to Record, p. 78.

The western boundary is also shown to have been west of the 103d meridian by the following maps:

De l'Isle's map, Paris, 1703. Rec. p. 78, Diagram 124.

Senex's map, London, 1710. Rec. 78, Diagram 127.

Moll's map, London, 1711. Rec. p. 80, Diagram 130.

Moll's map, London, 1715. Rec. p. 80, Diagram 133.

De l'Isle's map, Amsterdam, 1720. Rec. p. 82, Diagram 145.

De l'Isle's map, Amsterdam, 1722. Rec. p. 83, Diagram 147.

Popple's map, London, 1733. Rec. p. 84, Diagram 153.

Popple's map, London, 1735. Rec. p. 84, Diagram 156.

De l'Isle's map, Amsterdam, 1739. Rec. p. 85, Diagram 159.

De l'Isle's map, Amsterdam, 1741. Rec. p. 82, Diagram 142.

Boehme's map, 1846. Rec. p. 85, Diagram 162.

De l'Isle's Atlas Nouveau, vol. 2, No. 33. Rec. p. 88, Diagram 181.

Popple's map, about 1737. Rec. p. 89, Diagram 184.

G. L. Le Rouge, Paris, 1778. Rec. p. 86, Diagram 168.

Du Val's map, Paris, 1684. Rec. p. 90, Diagram 187.

Lea's map, London, about 1685. Rec. p. 90, Diagram 190.

Bernard's map, Amsterdam, 1720. Rec. p. 91, Diagram 196.

This is also shown by ten of the fourteen maps appended to the counsel's brief, viz: Nos. 1, 2, 3, 4, 5, 6, 7, 11, 13 and 14.

XIII.

The western boundary of the land ceded, by the United States, to the Choctaws, in 1820.

The territory ceded in 1820 by the United States to the Choctaws is bounded in the second article of the treaty as follows:

> Beginning on the Arkansas river, where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian Fork, and up the same to its source; thence due south to the Red river; thence down Red river three miles below the mouth of Little river, which empties itself into Red river, on the north side; thence a direct line to the beginning. 7 Stat. 210.

The longitude of the source of the Canadian is 103° 30′. Our opponents contend that this treaty did not extend the north line of the cession beyond the 100th meridian. They base this view of the treaty upon the following grounds:

1. In 1820 the source of the Canadian "was universally believed to be the source of the Red river."

2. On no map, extant in 1820, was the source of the Canadian located west of the 100th meridian.

3. In 1820 the source of the Canadian was located "about the 100th meridian," on the maps of Pike, Melish, Darby, Arrowsmith, and Pinkerton, which were "the standard maps of the day."

4. Although no meridians of longitude are numbered, on the so-called Quapaw "treaty map," yet the source of the Canadian must be located, on that map, at 100° west longitude, because that map somewhat resembles Pike's, and on Pike's the source of that river is located at 100° 20′ or 100° 5′ west longitude.

5. "Although the only boundary lines which are specifically referred to in the treaty, as being 'on the above map,' are those which bounded the eastern portion of the cession," there can be no doubt that the parties to the treaty intended to make the 100th meridian the western boundary of the treaty.

6. The Quapaw cession only extended westward to the 100th meridian, and, therefore, the Choctaw cession only extended westward to that meridian.

7. The treaty of 1820 was rescinded by the treaty of 1830, and, therefore, the cession of 1820 only extended to the 100th meridian.

8. Although the letter of Major Long, locating the source of the Canadian west of the 103d meridian, had been on file in the proper department, from one to two months, there is no express proof that the president or secretary read it before the ratification of the Choctaw treaty of 1820.

9. The land west of the 100th meridian was ceded to Spain in 1821, and, therefore, the United States could not have ceded, or intended to cede it, to the Choctaws, by the treaty of 1820.

10. The Choctaws did not demand possession of this land until 1854.

These contentions of counsel are considered on pages 41 to 48 of this brief and on pages 76 to 118 of my brief in cause No. 338, The Wichita and Affiliated Bands of Indians *v.* The Choctaw Nation *et al.*

XIV.

Reply to statements of the appellant's brief.

The opinion of the court below (Rec. 392) states that certain maps "did in fact delineate the stream subsequently known as the Canadian, with its source west of the one hundredth meridian." This statement, which it is submitted is erroneous, will be discussed in the argument. Page 4.

The following is the statement of the court of claims:

While it may be true that no map, published prior to 1820, delineated the Canadian river *by that name*, with its source west of the 100th meridian, yet there were maps in existence which did, in fact, delineate the stream *subsequently known* as the Canadian, with its source west of the 100th meridian.

It is true that when De l'Isle's map of 1720 was published, 180 years ago, the Canadian river had not received its present name. But it is also true that the Arkansas and the Canadian are both delineated *with great accuracy*, not only on that map, but also on De l'Isle's map of 1739, and on Boehme's map of 1746, copies of which are appended to the counsel's brief. Those maps clearly and unmistakably exhibit a south branch of the Arkansas, corresponding exactly with the stream now known as the Canadian, and having its source, not only west of the 100th meridian, but west of the 104th meridian. The second map appended to his brief is De l'Isle's map of the western hemisphere, published in 1720. It places the source of the Canadian west of 274°, Ferro longitude, which is reduced to Greenwich longitude by subtracting

274° from 360° and adding 18° 9′ to the remainder, the result being 104° 9′. The fourth map appended to his brief is De l'Isle's, published in Amsterdam in 1739, and the fifth is A. G. Boehme's, published in 1746. On both of these maps, as on the one just referred to, rivers corresponding closely to the Arkansas and Canadian, are delineated with the source of the Canadian west of 274° Ferro, or 104° Greenwich longitude.

When this treaty (Quapaw treaty of 1818) was made, the real source of the Canadian fork of the Arkansas, or, as it is now called, the Canadian river, was *universally believed* to be the source of the Red river (called in the treaty "Big Red river"), and the Canadian was itself *universally supposed* to be a comparatively short stream, rising *at or slightly east of* the one hundredth meridian. Page 4.

The *standard maps* of the day placed the source of the Canadian *about* the one hundredth meridian. As to the authority of Pike's chart, it may fairly be said to have been, in spite of all its defects, the *best map* of that particular region that had yet been made. That it was generally received as authority is shown by the fact that it was *substantially followed, in all later maps, both English and American*, until the actual geography of the region was discovered and made known by Major Long. Page 59.

The counsel proceeds to name the four other "standard maps," Pike's being the *standard of standards*. They are Melish's, 1816; Darby's, 1818; Pinkerton's, 1815; and Arrowsmith's, 1816; and they are the tenth, eleventh, thirteenth and fourteenth of the maps appended to the counsel's brief. Pike's "chart," in two parts, embraces the eighth and ninth appended maps. What is meant by the assertion that the source of the Canadian was *universally* believed to be the source of the Red river? The word "universally" is a word of very broad signification. Does the counsel mean that this belief was entertained throughout the entire universe, or that everybody on earth believed that the sources of the Red and Canadian rivers were identical? Probably not. But if he meant anything pertinent to this case, he meant that this belief was general, not only

among the people of the United States, but also among the Choctaws and Chickasaws,—for the Choctaws and Chickasaws are to be reckoned with in this business. And yet, even in that limited sense, the word is absolutely unwarranted by the facts. Not one person in one thousand in the United States believed that the sources of the Red and Canadian rivers were identical, or entertained any belief whatever on the subject. Not a single Indian in the southwest believed that the source of the Red river was the source of the Canadian. The counsel thinks his "standard maps" prove his assertion. Let us inspect those maps. On not one of them is the source of the Canadian made the source of the Red river. On not one of them is the source of the Canadian located at the 100th meridian. On the eighth appended map Pike locates the source of the Canadian at 100° 12′ west longitude and 33° 20′ north latitude. On the ninth appended map he locates the source of the Red river at 110° 5′ longitude and 38° 20′ latitude. Instead of being identical these two river heads are separated by ten degrees of longitude, or 565 miles, and by five degrees of latitude, or 282 miles. Moreover, the route of the Spanish cavalry that marched from Santa Fé, to capture Pike, in 1806, is delineated, by Pike, along the north bank of Red river, from its source downwards.

On the ninth map appended to the counsel's brief, Pike makes the longitude of Santa Fe 110° 45′. But his four disciples, by whom he is "substantially followed," make the longitude respectively 105° 30′, 106° 30′, 104° 50′, and 104° 25′. Between Pike's "standard" and his disciples' "standards," there is a difference of six degrees of longitude, amounting in that latitude to 340 miles. The true longitude, as indicated on the Land Office map for 1897, is 106°.

A comparison of the general course of Pike's Canadian river with the general course of that river, as delineated by his *followers*, can hardly fail to amuse the court. The *general course* laid down by Pike, on the eighth of the counsel's maps, is nearly straight from southwest to northeast. But upon the tenth and eleventh appended maps, Darby's and Melish's, the Canadian is shaped like a new moon, with both horns pointing upwards. While Pike has dropped the source of the Canadian down two degrees, or 120 miles below its mouth, its source on Melish's map is higher than its mouth, and it first descends 30 miles and then rises nearly 30 to its mouth; and on Pinkerton's map, its source being 20 miles lower than its mouth, it descends 30 miles and then rises 50 miles to its confluence with the Arkansas.

On the counsel's eighth appended map Pike makes the *latitude* of the source of the Canadian 33° 10′ north. But the tenth, Darby's, makes it 35° 15′, the thirteenth makes it 33° 52′, and the fourteenth, Pinkerton's, makes it 33° 42′. Between Pike and his followers there is a difference of 2° 5′, or 125 miles.

Pike makes the longitude of the mouth of the Arkansas 91° 54′, and the distance between Santa Fe and the mouth of the Arkansas 18° 51′, or 1,003 miles. But on the tenth appended map (Darby's) that distance is only 14° 30′, or 822 miles; on the eleventh (Melish's) it is 15° 20′, or 869 miles; on the thirteenth it is 13° 40′, or 775 miles; and on the fourteenth (Pinkerton's) it is 13° 45′, or 779 miles. Pike and his followers differ to the extent of 289 miles.

On the counsel's eighth appended map, Pike makes the longitude of the mouth of the Canadian 96° 45′. The counsel's tenth map (Darby's) makes it 96° 25′; his eleventh (Melish's) 97° 5′; his thirteenth, 94° 45′; and his four-

eenth (Pinkerton's) 94° 30′. Its exact longitude is 95° 5′. Pike and his disciples differ here to the extent of 2° 15′, or 126 miles.

Pike, on the counsel's eighth appended map, makes the ongitude of the source of the Canadian, not 100°, but 00° 12′; the tenth (Darby's) makes it, not 100°, but 9° 30′; the thirteenth, not 100°, but 97° 5′, and the four-eenth (Pinkerton's) not 100°, but 97° 15′. Pike and his disciples differ to the extent of 3° 7′, or 176 miles of ongitude, and 13,250 square miles of territory. Such s the precision with which Pike is "*practically followed*" by Melish, Darby, Arrowsmith and Pinkerton.

Having asserted that, in 1818, 1820, "the standard maps of the day" were those of Pike, Melish, Darby, Arrowsmith, and Pinkerton, and that Pike's map was "substantially followed" by the others, he says, on page 57 of his brief:

> The treaty map is based on Pike's chart. * There are no indications of latitude or longitude; but the map is so obviously based on Plate 1 of Pike's chart * * that the latitude and longitude of the latter may properly be referred to in order to show what was meant by the former.

Now, the maps of Arrowsmith and Pinkerton, published in 1815 and 1816, bear as close a resemblance to the so-called "treaty map" as does Pike's. There are no stronger reasons for assuming that Pike's longitudes are to be understood as the longitudes of the "treaty map," than for assuming that Arrowsmith's, or Pinkerton's, are to be so understood. But Arrowsmith locates the source of the Canadian on the meridian of 97° 5′, and Pinkerton on that of 97° 15′, either of which meridians would cut off not only all the land west of 100°, but also all the leased district and most of the Chickasaw nation.

Passing now from the counsel's "*standard maps*" to the maps of De l'Isle and Boehme, we shall seem to emerge from Cimmerian darkness into the clear light of

day. On the second of the maps appended to the counsel's brief, De l'Isle, in 1820, made the longitude of Santa Fe 272° Ferro, or 106° 9′ Greenwich. It is the same on the fourth appended map, which is De l'Isle's map of 1739. It is also the same on Boehme's map of 1746, which is the fifth of the counsel's appended maps. And that is within nine minutes of the exact longitude of Santa Fe, which, as I have stated, is 96°. On each of these maps the source of the Canadian is placed west of 104° 30′, and that of the Red river west of 103° 30′.

But, in point of accuracy, these three derided maps of De l'Isle and Boehme present a still more remarkable contrast with the counsel's "standard maps" of Pike, Melish, Darby, Arrowsmith and Pinkerton. The actual longitude of the mouth of the Canadian is, as I have stated, 95° 5′. Pike, on the counsel's eighth map, makes it 96° 45′, Darby's map makes it 96° 25′, Melish's 97° 5′, the twelfth 94° 45′, and Pinkerton's 94° 30′. But De l'Isle's map of 1720, which is the second appended to the counsel's brief, makes it 282° Ferro, or 95° 9′ Greenwich, which is within four minutes of the true longitude; De l'Isle's map of 1739,—the counsel's fourth map,—and Boehme's map of 1746,—the counsel's fifth appended map,—both make it 82° 25′ Ferro, or 95° 44′ Greenwich, which is within thirty-nine minutes of the true longitude.

The counsel thinks that this accuracy, on the part of De l'Isle and Boehme, was accidental. Pity it is that some accident like unto this could not have befallen Pike and his four disciples. But it was not an accident. The Spaniards reached Santa Fe about 1542. Am. Cyc. v. 16, p. 618. It has been the capital of New Mexico ever since 1640. Its longitude was known, in Madrid and Paris, long before the maps of De l'Isle and Boehme were made. It seems incredible that the sources of the Red

and Canadian rivers, which were so near to Santa Fe, could have been unknown to the Spaniards, for eighty years, or that information on that subject could have been inaccessible to Boehme and De l'Isle. The geographical knowledge of these regions attainable in the United States, in 1720, or in 1818, was as nothing compared with that attainable in Paris and Madrid. Prior to the acquisition of Louisiana by the United States, in 1803, what interest had the American people in the longitude of the sources of the Red and Canadian rivers, any more than in the longitude of the source of the Amazon? What means had they for acquiring knowledge, on the subject, without recourse to Madrid, or Paris, or to European maps?

Upon what rational ground can the counsel contend that these so-called standard maps prove, or tend to prove, that the 100th meridian was the western boundary of the land ceded to the Choctaws, in 1820, or that it was universally believed, prior to 1818, that the source of the Red river was identical with the source of the Canadian? Is that proved by Pike's map, which not only gives different sources to those rivers, but makes the longitude of the source of the Canadian, 100° 12′, instead of 100°, and would carry that cession so far west of the 100th meridian as to add 900 square miles to its area? Is it proved by Darby's,—the tenth appended map,—which, not only represented different sources of the Red and Canadian rivers, but made the longitude of the source of the Canadian, 99° 30′, instead of 100°, and would cut off 2,552 square miles from the western borders of the cession? Is it proved by Melish's, the eleventh of the counsel's "standard" maps, which makes that longitude, not 100°, but 99° 50′, and would cut off 850 square miles from the western part of the cession? Is it proved by the thir-

teenth map, which makes that longitude, not 100°, but 97° 5′, and would cut off from the cession, not only all the land west of the leased district and all the leased district, but also 5,104 square miles from what is now the Chickasaw nation? Is it proved by his fourteenth "standard" map, (Pinkerton's,) which makes that longitude, not 100°, but 97° 15′, and would cut off from the Choctaw cession, not only the leased district and all land west thereof, but also 4,354 square miles of the Chickasaw nation? Is it for the counsel to base upon these maps a contention which is not sustained, or warranted, or excused, or palliated by one of them? Could there be a flimsier pretext for the robbery of an Indian tribe?

On page 92 of his brief, the counsel, referring to the date of the Quapaw treaty, (1818) says:

> No map existed until some time afterwards that showed the source of the Canadian west of the one hundredth meridian.

And yet the counsel himself has appended to his brief three maps, which had existed more than seventy years before the date of the Quapaw treaty, each one of which shows the source of the Canadian west of the 104th meridian. These are the second, fourth and fifth of his appended maps, viz: De l'Isle's maps of 1720 and 1739, and Boehme's map of 1746. But the counsel goes still further in disproof of his own assertion. The eighth map appended to his brief is one of Pike's absurd productions. On this map the source of the Canadian is located west of 100°, on the meridian of 100° 12′, cutting off 900 square miles west of the 100th meridian.

On page 96 the counsel for the United States says:

> By the Spanish treaty the United States relinquished disputed claims, but no territory.

His argument, in maintenance of this assertion, will be found on pages 96 to 107 of his brief. The upshot of it is this: The United States could not have ceded any territory by that treaty, because during its negotiation the Spanish minister, Mr. de Onis, denied that the territory of the United States extended westward to the Rio Bravo del Norte, and, therefore, so far as territory west of the Mississippi was concerned, the treaty was a mere delimitation of boundaries. But, as shown on pages of this brief, and on pages 79, 80, and 81 of my brief in cause No. 338, the fact is that in 1685 the province of Louisiana, extending from the Mississippi to the Rio Bravo, became the property of France by the right of discovery, was ceded by France to Spain in 1762, was retroceded to France in 1800, and was ceded by France to the United States in 1803. The pretensions set up by Mr. de Onis, for the purpose of securing a high price for Florida, did not change the facts of history, nor touch the title of the United States. Nor did they have the effect to convert the cession of Texas to Spain into a mere delimitation of boundaries. De Onis himself subsequently stated, in a printed memoir, that Spain had acquired Texas in exchange for Florida. (Am. St. Papers, For. Rel. v. 4, p. 693.) I have considered this subject on pages 104 and 105 of my brief in No. 338.

On page 108, the counsel says:

Some oratory was expended against the treaty in Congress.

This remark of counsel is aimed at a "party" of the name of Henry Clay, by whom "oratory was expended," in the House of Representatives, on the 3d of April, 1820, as follows:

It results then that we have given for Florida, charged and encumbered as it is, first, unincumbered Texas; second, $5,000,000; third, a sur-

render of all our claims upon Spain not included in that five millions; and fourth, if the interpretation of the treaty which he had stated were well founded, about 1,000,000 acres of the best unseated land in the State of Louisiana, worth perhaps $10,000,000. Ann. Cong. 16 Cong. 1 Sess. v. 2, pp. 1691, 1724, 1725, 1726, 1729, 1730, 1731; Appendix to Rec. 199.

On page 111 of his brief, the counsel says:

The ceding country cannot grant lands in the ceded territory, even before ratification. The reason for this has been stated by this court as follows: "After the treaty is made there is not in either (the ceding country, or the country receiving the cession) the union of possession and the right to the territory, which must concur to give *plenum dominium et utile*. To give that there must be the *jus in rem* and the *jus in re*, or what is called in the common law of England the *juris et seisinae conjunctio*." Davis *v.* Police Jury, 9 How. 280, 289.

The counsel misunderstands both the rule and the authority cited. The rule is that, as between the parties to a ratified treaty, its date is the date of signing; but as to other parties, not advised of the signing and provisions of the treaty, its date is the date of exchange of ratifications. A treaty of cession signed last, but ratified first, will override a treaty signed first, but ratified last, provided the grantee in the treaty first ratified had no notice of the signing and contents of the other. The title to the land will vest in the grantee of the cession first ratified. The right of the other grantee will be a right, not to the land itself, but to compensation for damages incurred,—such compensation to be secured by stipulation, or by war, or otherwise. United States *v.* Arredondo, 6 Pet. 691; Haver *v.* Yaker, 9 Wall. 32, 34.

In Davis *v.* Police Jury, 9 How. 280, (cited by counsel) the facts were these: The treaty of St. Ildefonso, by which Spain ceded Louisiana to France, was signed October 1, 1800, and ratifications were exchanged. But the ceremony of formally delivering that province to Louisiana was not performed until November 30, 1803, exactly seven months after the date of the treaty by which France ceded the province to the United States. On the 19th of February, 1801, the privilege of a ferry across the

Mississippi between Natchez and Vidalia was conceded to Thomas Thompson by Calvo, the Spanish governor of Louisiana. It was not a cession of territory effected by a treaty between two nations, but a ferry privilege granted by a subordinate officer to a subject. The question was whether the ferry privilege overrode *pro tanto* the cession of 1800 from Spain to France, and the cession of 1803 from France to the United States. It was not a question between a cession of territory signed first and ratified last, and another cession of the same territory signed last and ratified first, the grantee in the treaty first ratified having no notice of the fact, date and tenor of the other treaty. It was a question between a cession of a province signed first and duly ratified, and a ferry privilege signed last and never ratified. The decision of the court was merely an enunciation of one of the doctrines of the cases of United States *v.* Arredondo, and Haver *v.* Yaker, cited on pages 113 and 114 of my brief in No. 338; Wichita Band *et al. v.* Choctaw Nation *et al.*

The counsel asserts, on page 75, that my tracing on No. 29, opposite page 82 of the record, "shows the confluent as much longer than the main stream, which the orignal map does not do." This is an error. The original map, from which my tracing was made, is the same map of which his second appended map purports to be a copy. On his map and on my own the stream, now called the Canadian, is delineated as shorter than the stream called the Arkansas. Whichever stream the counsel prefers to call the "main stream," his map and mine are, on this point, alike.

The cession of the "leased district," in 1866, being absolute on its face, the court below had no jurisdiction to go behind the plain words of cession, and inquire into any supposed intention of the parties to the treaty of 1866, to create a trust in the land ceded. Page 24.

The word "cede," standing unqualified in a treaty, may, as I have said, import a transfer of paramount dominion and of nothing else, or a transfer of subordinate dominion and of nothing else, or a conveyance of the legal title to public property in trust, or a conveyance of the legal title to private property in trust, or a conveyance of the beneficial ownership of public property, or a conveyance of the beneficial ownership of private property. Which of these meanings it bears, in a particular case, can only be determined by recourse to other words of the treaty, or to extrinsic facts. But for the words "up the Canadian to its source," there is but one possible meaning. The word "source," applied to a river, is absolutely free from ambiguity. And yet the counsel, having denied the right of the court of claims to interpret the word "cede," in the treaty of 1866, assumes the right himself to interpret the words "up the Canadian to its source,"—in the treaty of 1820,—to interpret them to mean, not "up the Canadian to its source," but "up the Canadian to the 100th meridian of longitude." Certainly the rules of equity are not to be adjusted to suit the convenience of the counsel.

But then, as I have attempted to show on pages 115, 116 and 117 of my brief in cause No. 338, the nature and extent of the Quapaw title do not concern the Choctaws and Chickasaws.

By inserting the words "R des Acansas," on the tracing of the map of the Western Hemisphere, in a place where they do not belong, and by omitting them from the tracing of the map of America (cl'm'ts' exhib. No. 34, opp. Rec. 84), the attorney for the Chickasaws succeeded in completely perverting the testimony of De l'Isle's maps, making them show precisely the contrary of what they did show, and apparently misleading the court below. Page 76.

This, too, is a *mistake*. The words "R des Acansas" *do* belong on the Arkansas. They do not belong on the

Canadian. They are *not* placed on the Canadian on the second map appended to the counsel's brief, which is his copy of the map of the Western Hemisphere. They *are* placed on the Canadian on the counsel's fourth map, the map of America; but they do not belong there. The evidence of De l'Isle's map has not been perverted by us. The three maps under consideration,—the counsel's copies as well as ours,—all show precisely what we claim, that the Arkansas is longer than the Canadian, and that the source of the Canadian is west of the 104th meridian, and also that the province of Louisiana extended westward beyond that meridian.

On pages 56 and 57 of his brief, the counsel says:

> The map at the head of the Quapaw treaty is a part of the treaty. * * It is true that the only boundary lines, which are specifically referred to in the treaty, as being "on the above map," are those which bounded the *eastern portion* of the cession; but there can be *no doubt* that the whole map represents the understanding and intention of the parties to the treaty, and that the map was embodied in the treaty, in order to leave *no doubt* as to the extent of the country ceded thereby.

In the counsel's brief, these words "no doubt" are very abundant and very cheap.

If the court will refer to the so-called "treaty map," which is the twelfth map annexed to the counsel's brief, they will behold, not an ordinary draftsman's delineation, but an artist's picture of a Quapaw warrior, arrayed in plume, quiver, pipe, and fig leaf, *et preterea nihil*, seated on the *quid pro quo*, with the dollar marks inscribed thereon; pointing perhaps to the imaginary, but unnumbered, 100th meridian, while the American eagle, bearing the olive branch, hovers over the Quapaw, the map and the *quid pro quo*. The counsel would either have us believe that this cartographic masterpiece was drawn and painted in advance of the negotiations, or would have us believe that it was drawn and painted pending

the negotiations. If it was prepared in advance, the treaty was a "cut and dried" treaty, and there was no negotiation in the case. That it was drawn and painted during the negotiations is disproved by the inscription, which it bears in the following words:

Map of the Territorial Limits of the Quapaw cession, compiled and laid down by Rene Paul, August, 1818.

This obviously shows that the limits of the cession had been fixed by the treaty, before they were "compiled and laid down by Rene Paul." Did any of the Quapaw negotiators ever see or hear of this map? Where, when, and how did Paul, or anybody else, obtain the consent of the Quapaws to incorporate this *precise map* and *picture* into the treaty?

This error in the statement of the court below is the more remarkable because *the opinion had previously referred to the lease of* 1855, *and had said enough to show that* $800,000 *must have been paid for it*, (Rec. p. 391) although the opinion did not state any definite conclusion as to this. It would seem as if the learned writer of the opinion, when he came to the cession of 1866, forgot all about the lease of 1855, and treated the cession as if the United States had then, for the first time, acquired an interest in the land ceded to it; whereas, in point of fact, it already had the right to permanently settle the Indians from a very large region upon it.—a right which it might, if it saw fit, so use, by filling up the entire district with Indians, as to *exclude the Choctaws and Chickasaws from all enjoyment of the land whatever*. Pages 45, 46.

This statement of counsel is altogether erroneous. The court neither said, nor showed, nor implied that the sum of $800,000 was paid for the lease, either on the page indicated, or on any other page. The counsel's assertion that the United States had, under the treaty of 1855, the *right* to "exclude the Choctaws and Chickasaws from all enjoyment of the land whatever," is disproved by the counsel himself, on page 9 of his brief. On that page he quotes from article 9 of the treaty of 1855, as follows:

Provided, however, the territory so leased shall remain open to settlement by the Choctaws and Chickasaws, as heretofore.

The counsel apparently either thinks that the United States could have kept it open by closing it up, or thinks that the United States could, without dishonor, so use the lease as to annul this proviso.

Now the learned judge has, it is submitted, simply *assumed* that in 1866 the Indians understood the cession to be in trust, without any real proof of it whatever. Page 174.

The counsel is mistaken again. The acts and declarations of the commissioners, at the Fort Smith council, in 1865, *must* have caused the Choctaws and Chickasaws to believe that the cession was a cession in trust for the settlement of friendly Indians on the land. The unbroken chain of executive acts, extending down from 1866 to 1890, warranted, indeed necessitated, a continuance of that belief. So did the Cheyenne and Arapahoe act, which interpreted the cession as a cession in trust. The jurisdictional act has forbidden the use of this interpretation in the case at bar, but the interpretation itself was not repealed, but still stands as the judgment of Congress. The vagary that haunts the minds of the counsel is, that, because the Choctaws and Chickasaws did not demand compensation for the lands, while they were used, as they were in fact used from 1866 to 1890, in strict accordance with the terms of the trust, they could not have believed themselves entitled to compensation after breach of the trust. But what imaginable occasion was there for a demand of compensation, before the lands were diverted from the purposes of the trust?

In the opinion of the court of claims on page 420 of the Record occurs the following statement:

Stripped of all technical considerations, the practical effect of the claim for the absoluteness of the cession is such as to involve the taking,

by the white man, for a consideration to be applied to the benefit of the black man, some millions of acres of land belonging to the red man: the transfer so operating as to enable the whites to keep the land, and the red people to get the consideration only by surrendering its equivalent to the blacks.

On page 202 of his brief, the counsel says: "It is submitted that this is wholly erroneous." He proceeds to establish his assertion that the court erred. He thinks the fact that the sum of $300,000 (facetiously styled the consideration of the cession of 1866) was to go to the freedmen, if they were removed, did not make that seem any the less the consideration for the cession, because article 4 of the treaty imposed on the Choctaws and Chickasaws the burden of giving the freedmen, while they remained, as much land as they should cultivate for the support of their families. In other words, article 4 imposed a burden which could only be removed, either by the gift of the $300,000 to the departing freedmen, or by the gift of citizenship and 40 acres of land to each remaining freedman. Therefore the sum of $300,000 was the consideration for the cession. The counsel's reasoning is unsound. The statement of the court is not erroneous. It is absolutely true.

The suggestion of the learned judge, that "every stipulation that the country should be kept intact as Indian country would thus (*i. e.*, if the cession were absolute) be violated," is, it is submitted, merely begging the question. Page 216.

This is a remarkable assertion. Does the counsel doubt that a conveyance of the absolute beneficial ownership of the land would have swept away all the prior treaty guaranties that the leased district should be kept intact as Indian country? Does he imagine that this consideration does not tend to the conclusion that the cession was not absolute?

After the cession of the remaining interest of the Choctaws and Chickasaws in the land, it continued to be, as it had been before, reserved for Indian settlement. Page 219.

If the cession was a cession in trust for the settlement of friendly Indians on the land, it certainly continued to be reserved for Indian settlement, and, without a breach of the trust, could not have been diverted to any other use. But if the cession was absolute, it was competent for the United States to make any other use of the land. The fact that the United States used the land for Indian settlement, from the date of the treaty of 1866 until 1891, tends to prove that the cession was a cession in trust.

It is therefore clear that the court below has erred in holding that what was done in the case of the Creeks, Seminoles, and Cherokees, has any bearing on the cession of the leased district. Page 228.

On the contrary, the cases of the Creeks and Seminoles are precisely analogous to that of the Choctaws and Chickasaws. The Creeks and Seminoles, respectively, conveyed land in trust for the settlement of friendly Indians to the United States, and received, for such conveyances, in trust, respectively, $975,168 and $325,362. Subsequently they conveyed to the United States absolute titles to the same lands, and received therefor, respectively, $2,280,857 and $1,912,942.02.

It is therefore absolutely preposterous for the claimants to seek to put forced constructions upon the treaty, or to change the plain language of its terms, on the ground that, as "an unlettered people," they cannot be supposed to have understood all that it meant. Pages 183, 184.

The Choctaws and Chickasaws, as the counsel well knows, have asked for a liberal construction of the treaty, *not* on the ground of their *illiteracy*, but on the ground of their *dependence*, *weakness*, and *helplessness*,—on the ground

set forth, by this court, in the case of the Choctaw Nation *v.* United States, 19. U. S. 1, 28.

The counsel for the United States has dug up four alleged admissions by the Choctaws and Chickasaws of the absolute character of the cession of 1866. They are curiosities, and are exhibited on pages 174 to 177 of his brief. The first is the Choctaw act of November 27, 1867. These are the words of the act:

Sec. 3. That the national attorney be and he is hereby instructed to respectfully bring to the notice of the Commissioner of Indian Affairs of Washington city, that this nation will not consent to give the freedmen residing among them the forty-acre lots of land, including the right of suffrage, mentioned in the third article of the treaty of April 28, 1866, when they have submit|ted| humbly to the forced sale of the "leased district," lying west of the 98th degree west longitude, *for about two and a half cents per acre, for objects of negro colonization upon their borders.*

The counsel considers this an admission that the cession was a conveyance of the absolute beneficial ownership of the land.

The second alleged admission is stated by the counsel on page 176 of his brief as follows:

The next statement is found in the Chickasaw protest of 1872, which contains these words: "It is believed that the only rights given up by the treaty of 1866 are the right to hold slaves, the right to the leased district, so called, between the 98th and 100th meridians of west longitude, *upon certain conditions therein set forth*, and the unrestricted right of self-government."

On pages 17, 18, 19, 20 of this brief I have explained the nature of these conditions.

The third of these admissions is alleged, on page 177 of the counsel's brief, to have been made in a memorial of the Chickasaw delegates addressed to the president of the United States. The object of that memorial was to secure the removal of the freedmen, in pursuance of the stipulation of article 3 of the treaty of 1866. It had no relation to the title to the leased district. The entire ar-

ticle was copied literally into the memorial, which contained nothing in the remotest degree resembling an interpretation of the cession, or an admission that it was an absolute conveyance.

The fourth alleged admission of the absolute character of the cession is set forth on page 177 of the brief in the following words:

Precisely the same words are used on page 17 of the same document, in a statement, dated April 22, 1884, made by Halbert E. Paine, then and now the attorney for the Chickasaws.

In 1884 I was employed by the Chickasaws to attend to their business before the interior department and congress. My employment had no connection with the title to the leased district. The question whether the cession of 1866 was absolute, or in trust, had never occurred or been suggested to me. I learned that a bill had been presented, in congress, conferring Chickasaw citizenship on the freedmen. There were no Chickasaws in Washington at that time. It seemed to me that congress ought not to pass the bill without hearing the Chickasaws, and, in order to secure delay, I submitted a statement to congress, in which I set forth the *substance of the language* of article 3 of the treaty, with no reference to any question except that of the right of the freedmen to Chickasaw citizenship. I not only had no authority from the Chickasaws to interpret the treaty, but had no purpose to interpret it,—indeed had never communicated, directly or indirecty, with the Chickasaws on the subject.

This proviso does not relate to what the United States is to do with the land acquired by this cession, but *exclusively* to the disposition and uses of the purchase money, *as the court below admits.* Page 28.

This is erroneous. What the court said was this:

Following the cession is a proviso relating to the disposition and uses of the fund.

The word "exclusively" is interpolated by counsel. The disposition and uses of the fund provided for were such as necessarily related to the title of the land. For the fund was to be used to remove the Choctaw and Chickasaw freedmen, whom the United States agreed to remove within a prescribed period of time, and there was no district available for their colonization except the leased district. This proviso implied that the title was encumbered with a trust for the settlement of freedmen on the land.

Moreover there was absolutely nothing on which to base the idea that the "leased district" was sold for "objects of negro colonization." Page 175.

On the contrary, article 3 itself obviously implies that one of the uses of the land was to be the settlement of freedmen removed from the Choctaw and Chickasaw nations.

It is true that a deed, "absolute" on its face, may be shown to be a mortgage or to be subject to conditions; but it is not true that a treaty can be dealt with in any such way. A treaty is "the law of the land," and must control the court; the court can have no control over the provisions of a treaty. Page 40.

But it is for the court to determine whether a treaty is or is not "absolute on its face." Evidently the judges and publicists, who enunciated the rules set forth on pages 6, 7 of this brief and on pages 1 to 13 of my brief in cause No. 338, differ with the learned counsel on this subject. The court did not attempt to *avoid* the treaty on the ground of duress or fraud. On the contrary, the right to do so was expressly disclaimed by the court. Rec. p. 409. The court interpreted the treaty; but did not annul it.

The counsel asserts, on page 178, that the 4th and 5th articles of the unsigned treaty of 1865 prove that the fifth proposition of the commissioners' ultimatum was embodied in the 30th, 31st, and 37th articles of the treaty of 1866. He is mistaken. The language of the ultimatum was "lands *must* be set apart." The taking effect of articles 30, 31, and 37 was left to the option of the Choctaw and Chickasaw legislatures, whose decision was adverse, and the acts never took effect. Moreover, the ultimatum required lands to be "set apart for the friendly tribes in Kansas and *elsewhere*." The word *elsewhere* was applicable to the locations of all friendly tribes, whether north, south, or west of the Indian territory. But articles 30, 31, and 37 made no provision except for Indians north of the Indian territory. And, finally, those articles did not make provision for the settlement of *tribes* at all, but only for making Choctaw and Chickasaw citizens of *individual* Indians who had resided north of the Indian territory.

On page 209 of his brief the counsel asserts that under articles 30 and 31 of the treaty of 1866 the right of the Kansas Indians to settle down at once in the Choctaw and Chickasaw territory east of the 98th meridian "was absolute whether the councils agreed to the proposed plan or not,"—that the taking effect of those articles was not dependent on the action of the councils.

What was the meaning of the words "may at once come into the said Choctaw and Chickasaw nations" in article 31? The counsel in his quotation omits material parts of article 30. These are its words:

Article 30. The Choctaw and Chickasaw nations will receive into their respective districts, east of the ninety-eighth degree of west longitude, in the proportion of one-fourth in the Chickasaw and three-fourths in the Choctaw Nation, civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory, not exceeding ten thousand in number, who shall have in the Choctaw and Chickasaw nations, respectively, the same rights as

the Choctaws and Chickasaws, of whom they shall be the fellow-citizens, governed by the same laws and enjoying the same privileges, with the exception of the right to participate in the Choctaw and Chickasaw annuities and other moneys, and in the public domain, should the same, or the proceeds thereof, be divided *per capita* among said Choctaws and Chickasaws, and among others the right to select land as herein provided for Choctaws and Chickasaws, after the expiration of the ninety days during which the selections of land are to be made, as aforesaid, by said Choctaws and Chickasaws.

The only property right, which articles 30 and 31 purported to secure to any Kansas Indians, was the single right to a quarter section of land, *provided* the Choctaw and Chickasaw legislatures should, as suggested in article 11, decide upon a survey and allotment of the Choctaw and Chickasaw lands, such quarter section not to be selected until after the Choctaws and Chickasaws had made their selections. It was not contemplated that the Kansas Indians should become *landless* citizens of the Choctaw and Chickasaw nations. But if their legislature should reject the proposition to survey and allot their lands, those Indians could have no land, and their admission would not be within the object or scope of the treaty. If, on the other hand, those legislatures should agree to the survey and allotment of their lands, the right of the Indians would be secured, and the only question as to their acquisition of the land would be a question of time.

The meaning of the treaty then was that when their rights became once fixed by such legislation, the Kansas Indians might "at once come into the Choctaw and Chickasaw nations," without waiting two, three, or four years for the completion of the surveys, maps and selections provided for. This article was evidently so understood by the United States. The Choctaws and Chickasaws did not decide to survey and divide their lands, and *therefore* not a single Kansas Indian was ever located east of the 98th meridian. The counsel thinks the government had the right to locate them there, but *has waived it for* 34 *years.*

The counsel, on pages 202–213, assails the court's conclusion that "the fifth stipulation is either implied from the language of the third article, or omitted altogether from the treaty." He thinks this stipulation is embodied in articles 30, 31 and 37. He is mistaken. Not one of these three articles ever became operative.

But if these three articles had gone into operation, they would not have embraced the fifth branch of the Fort Smith ultimatum. The requirement is that the land must be set apart for the friendly tribes in Kansas, or *elsewhere.*" The word "elsewhere" is applicable, as I have said, to the localities of all friendly tribes outside of Kansas. But articles 30, 31, 37 only purport to provide for the case of Indians north of the Indian territory.

Indians residing elsewhere are provided for, not in article 4, but only in article 5 of the unsigned treaty. Article 5 of the unsigned treaty applies to all friendly Indians, whether in Kansas or elsewhere.

On pages 206, 207, the counsel assails the court's opinion that "the fifth stipulation meant *tribal* occupancy, and a future agreement with reference to this kind of an occupancy, and there is no such agreement to be found in article 30."

The counsel is mistaken. The fifth stipulation meant exactly what the court said it meant. But the provision of articles 30 and 31 is for making Choctaw and Chickasaw citizens of individual Indians.

The counsel asserts (pages 16 and 17) that in 1866 the sum of $150,000 was paid to the Choctaws and the sum of $50,000 to the Chickasaws, as part of the consideration for the cession of the leased district. This is erroneous.

Not a penny was paid for that purpose. These sums were lent to the Choctaws and Chickasaws, to be repaid from their funds in the treasury of the United States. In fact, the counsel himself, on page 16, contradicts this statement. He says that article 41 of the treaty of 1866 provided that these sums should be *advanced*, "to be repaid out of the said moneys when due, or out of other moneys in the hands of the United States."

The counsel asserts (page 25) that "the court has undertaken to reform the treaty of 1866." This is a mistake. The court has not undertaken to reform the treaty. It has undertaken to interpret the treaty. This error of the counsel is also based on the assumption that the word "cede" *per se* imports an absolute conveyance.

The court of claims, *referring to the leased district only*, said: (Rec. 403, 419.)

> There is nothing in the record to indicate that the Choctaws and Chickasaws had any information as to the purpose of the government, *except as embraced in the fifth proposition, and fifth article* of the unsigned treaty submitted at Fort Smith.

The counsel perverts this into an assertion relating to the Choctaw and Chickasaw *country east of the leased district*. He says: "The court evidently forgot all about the 4th article of the unsigned treaty." And yet he well knows that the 4th article contains no reference whatever to the leased district,—that it refers only to land east of the 98th meridian. He concludes as follows on page 213:

> The learned judge's idea of the connection between the fifth stipulation and the cession of the "leased district," therefore, being manifestly due to his overlooking the fourth article of the unsigned treaty, must be regarded as wholly erroneous, and the conclusion must be that the court below has erred in supposing that the fifth stipulation was not substantially embodied in articles 30, 31 and 32.

With characteristic brevity he has corraled a large herd of errors in this paragraph.

On page 241 of his brief the counsel says:

> This is a serious departure from the usual position of a court of equity, in which the interests of the *cestuis que trustent* are held to be of primary importance, the possible reversionary interests of the creator of the trust being wholly subordinated to them.

The counsel evidently thinks that the trust was such as would be created if A should convey to B the legal title to lands, for the permanent settlement of C thereon. In that case C would at once become a beneficiary of the trust. The grantor of the deed would constitute *him a cestui que trust.* But the trust created by this treaty was very different. No particular person was by the treaty constituted a *cestui que trust.* But A, instead of constituting particular persons *cestuis que trustent*, empowered B, not only to select *cestuis que trustent*, but also to determine their number. The counsel not only ignores this peculiarity of the trust, but also thinks that the trust would authorize the United States to settle 1,060 Indians on 743,610 acres of the land, in such a way that each man, woman and child would receive 701½ acres,—160 acres as an allottee of the legal title, and the cash proceeds of 541½ acres. He thinks that the court of claims, in taking a different view of the cession, slighted the *cestuis que trustent.* I respectfully submit that the court went to the utmost verge of its equity powers, when it gave 160 acres of land, in fee, to each of these men, women and children, under a treaty which contemplated the investment of the Indian settler, not with the fee of the land, but only with its use.

The last 40 pages of the brief are devoted to an attempt to show that, although the so-called Wichita reservation was never, by any treaty, or statute, assigned to the 1,060 persons constituting the Wichita and affiliated bands, yet the fact of their location on that tract of land,

by the sufferance of the United States authorities, entitles each man, woman and child, under the treaty of 1866, to 701½ acres of land,—to 160 acres in fee and to the proceeds of the sales of 541½ acres. The successful demonstration of such a proposition would seem to require considerably more than forty pages of argument.

If the counsel means, in his statement at the head of page 188, that the clause, which interpreted the cession, was singled out for opposition, in Congress, he is mistaken. It was the appropriation, as a whole, to which objection was made.

Referring to a memorial of the Choctaws and Chickasaws, addressed to the 51st Congress, the counsel, on page 189, says:

> It also misrecited the fifth stipulation presented at the Fort Smith council.

This is a mistake. The alleged erroneous version not only appeared in the report of the Commissioner of Indian Affairs, who was the president of the Fort Smith council, but actually appears in the original papers on file in the Indian office. Rec. pp. 74, 141; Appendix to Rec. p. 156.

On page 217 of his brief the counsel contends that the word "territory," in article 43 of the treaty of 1866, does not include the leased district, because neither the word "limits," in article 42, nor the word "country," in article 39, includes that district. This is an exaggerated *non sequitur*. The language of article 43 is this: "The United States promise and agree that no white person, except * * * or persons traveling through, or

temporarily sojourning in, the said *nations*, or either of them, shall be permitted to go into said *territory*." If the word "territory" had not included the leased district, the language would have been, "the United States promise and agree that no white person, except * * * or persons traveling through, or temporarily sojourning in, said *nations*, or either of them, shall be permitted to go into said *nations*." Moreover, the word "territory" includes the leased district once in article 3, and fourteen times in article 8 of this very treaty.

The counsel says, on page 233: "It is submitted that the confusion is in the mind of the learned judge." I venture to suggest that the confusion is in the mind of the learned counsel. He thinks that when an Indian nation conveys to the United States a tract of land, annexing to the grant the condition that it shall be used for the settlement of other Indians to be selected by the United States, the only parties interested are the United States and the selected Indians. He thinks that, because such Indians, as are selected and settled, by the United States, become beneficiaries of the trust, the grantors of the land, who create the trust, lose all interest therein. He is oblivious of the creator of the trust, who, upon a breach thereof, becomes the reversioner of so much of the estate as is diverted from the purposes of the trust.

The counsel says, on page 45, that the court of claims stated, on page 406 of the record, that the Choctaws and Chickasaws parted with all interest in the leased district for $300,000. The counsel is mistaken. The court made no such statement. The counsel is equally mistaken, in his assertion (page 45) that the United States paid the Choctaws and Chickasaws $1,100,000 for the leased dis-

trict. The facts are these: In 1855 the United States paid the Choctaws and Chickasaws $800,000 for a lease of the leased district containing 7,713,239 acres, AND a quit-claim of a tract of 8,225,220 acres west of the leased district, which latter tract was worth, in 1866, at the government price of $1.25 or $2.50, either $10,381,525, or $20,763,050. Not a penny of the $300,000 entered into the consideration for the purchase of the land. Not more than $400,000 has from first to last ever been paid for the 7,713,239 acres of land in the leased district, which was worth in 1866, at the government price, from $9,641,548 to $19,283,096.

The counsel assails the court of claims (page 30) for looking at outside facts, in its interpretation of the ceding clause of the treaty of 1866, before considering the context of the treaty. But surely the court ought to have some discretion in the arrangement of topics in its opinions. It ought not to be put in a straight jacket.

A sharp criticism of the court of claims, covering three pages (30, 31, 32) of the counsel's brief, concludes with these words:

None of these provisions can possibly affect the character of the cession.

This is erroneous. The third article of the treaty itself shows that the sum of $300,000 was not a consideration for the cession of the land, and thereby tends to show that the cession, being without consideration, was not a conveyance of the absolute beneficial ownership of the land. Moreover, the stipulation of the United States to remove the freedmen tends, as I have said, to show that the leased district was to be used for the colonization of such freedmen; for there was no other district available for their colonization.

A criticism of the court of claims covering five pages of the counsel's brief (33 to 37) culminates as follows:

Why should not the literal wording of the treaty express the intention of the parties? The opinion gives no answer to this question; and, until it is satisfactorily answered, the reasonable understanding of the matter must be that the language of the treaty, plainly importing an absolute cession, expresses precisely what the parties intended.

This is all based on the unwaranted assumption that the word "cede," standing unqualified in a treaty, *per se* and necessarily imparts the conveyance of the absolute beneficial ownership of the land.

The court below *strives to justify its assumption* that the Choctaws and Chickasaws believed, in 1866, that the cession was in trust for Indian settlement. Page 179.

In order to *justify* the application of language like this to a judicial tribunal, it would seem that either the court ought to be very "low down" or the counsel very "high up."

There is absolutely nothing in the treaty, from one end to the other, nor in any of the circumstances under which it was made, nor in any contemporaneous statements, or transactions, to give these words any other meaning. Page 184.

That sounds the crack of doom for the Choctaws and Chickasaws. It is "*Mene! Mene! Tekel Upharsin.*"

On page 193 the counsel, referring to a report of the Indian office, says:

He failed to call attention to any of the misstatements of the memorial. On the whole this communication, as well as the committee's report, might fairly be regarded as a brief in support of the claim.

On page 195, referring to reports of committees of the Senate and House, he says:

The memorials contained all the erroneous statements of the prior memorials, as did also the reports.

And on page 196 he says :

The House report (House Rep. No. 1661, fifty-second Congress, first session,) cannot even claim the merit of colorable originality.

The counsel for the United States seems to be out of humor, not only with the court of claims and the counsel for the Chickasaws, but also with the "rest of mankind."

In fact, taking the opinion of the court below, as it stands, the *suspicion* arises that this evidence *aliunde* has been looked at first, and has so affected the mind of the learned judge as to make him afterwards see, in the treaty, the doubtful and ambiguous provisions, which he says authorize a recourse to evidence *aliunde*. Page 30.

It is to be hoped that the court of claims may survive the shock of the counsel's *suspicion*. And yet the condition of a "suspect" is not a pleasant predicament for a court. However, it is gratifying, as well as surprising, to observe that the genesis of this suspicion has not exhausted the learned counsel, nor its recoil disabled him.

But it is not practicable, within the limits of this brief, to consider all the charges which the counsel brings against the court of claims. With the impetuosity and vigor of youth and the assurance which self-conscious power lends, he hurls his missiles right and left at that "erring" and "assuming" and "overlooking" and "forgetting" and "mistaking" and "misunderstanding" and "misstating" tribunal. But his missiles are not the deadly darts of Ulysses, nor yet Mauser nor Krag-Jorgensen projectiles. They have not exterminated the court; nor have they perceptibly rent or flecked the judicial ermine.

HALBERT E. PAINE,
Counsel for Chickasaws.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 338.

THE WICHITA AND AFFILIATED BANDS OF INDIANS,

APPELLANTS,

v.

THE CHOCTAW NATION AND THE CHICKASAW NATION, AND THE UNITED STATES.

Appeal from Court of Claims.

BRIEF FOR CHOCTAWS AND CHICKASAWS.

Before attempting to establish the title of the Choctaws and Chickasaws, and to controvert the positions of the appellants' counsel, I beg leave to refer to the opinion delivered by the dissenting judge in the court of claims. The following is the first clause of the third article of the treaty concluded between the United States and the Choctaw and Chickasaw nations, on the twenty-eighth of April, 1866:

The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the ninety-eighth degree west longitude, known as the leased district, PROVIDED, &c.

The dissenting judge concludes that the word "cede" necessarily imports an absolute conveyance, and that, in this clause, an absolute cession is expressed in words so "free from doubt and ambiguity" as to leave no room for construction or interpretation; and therefore no evidence *aliunde* is admissible to show the intention of the parties to have been that the cession should be a cession in trust. His conclusion is stated in the following clauses of the dissenting opinion, Rec. p. 89:

In case of doubt, it is permissible for the court to consider the history of the times, but that is not this case. It is not a question of construction, for, as before said, the language of the cession is free from doubt and ambiguity, and, therefore, needs no interpretation. * * Tested by the rules of law, applicable to the case, the claimants have no "right, title and interest" in and to the lands in controversy, for the reason that, by the treaty of 1866, they made, in language importing but one meaning, an absolute cession thereof to the government; and their rights being fixed by that law, equity will not intervene to relieve them from the consequences of their own act.

It may be assumed for the purposes of the argument, that this clause, standing alone, expresses a *presumptively* absolute cession and that the burden is on the appellees to show that it was a cession in trust. But it is clear, I think, upon principle and authority, that proof *aliunde* is admissible to show that the cession was intended, by the parties to the treaty, as a conveyance in trust. I also think that other provisions of the treaty are inconsistent with the position that an absolute cession was intended by the parties.

In different treaties the meaning and effect of the words, "cede" and "cession," are very different. The same words, in slightly modified forms, are common to several European languages. In some treaties the cessions are transfers of dominion over the ceded territory, but not of

property therein. Others are transfers of dominion over, and of property in, the territory. Some are cessions, by way of mortgage, to secure the discharge of obligations; others are cessions in trust. Some are cessions in perpetuity; others for limited periods. When the word, "cede," or "cession," occurs in a treaty, unless there are other words therein, to show to which of these classes the cession belongs, it becomes competent and necessary to resort to evidence *aliunde*, for the purpose of determining the character of the cession. This is the doctrine of the accepted authorities on international law, and of the American and English courts.

We shall see, at once, the necessity of a recurrence to evidence *aliunde*, to ascertain the significance and effect of the word, "cede," if we attempt to ascertain, from the face of this ceding clause, some of the characteristics of the cession. Is it merely a cession of dominion over the land? Or, is it a cession both of dominion over and of property in the land? This clause furnishes no answer to these questions. For an answer we must go outside the clause. We must ascertain whether this land was the public property of the Chickasaw nation, or the individual property of the citizens of that nation. In the Choctaw treaty of October 18, 1820, the United States "do hereby cede to said nation a tract of country," &c. Was this a cession of dominion over the ceded land? If it was a cession of dominion, was the dominion so ceded paramount? Or, was it subordinate, the paramount dominion being retained by the United States? Was it a cession of property in the ceded tract? The word, "cede," in the treaty will not answer either one of these questions. How much real and personal property was ceded, with the dominion of Porto Rico, in the recent Spanish treaty? The word "cede" will not answer that question. It will be

necessary to ascertain *aliunde* how much of the land and other property was owned by Spain. Does the word "cede," in the treaty of 1866, import an absolute cession, or a cession in trust, or a mortgage? The clause gives no answer to this question; for the word "cede" may import either of these cessions. If the presumption is in favor of the absolute cession, it is not a conclusive presumption.

The question, here, is not whether the language of a written agreement can be changed by parol evidence, nor is it the single question whether a deed, absolute on its face, can be shown, by evidence *aliunde*, to be a deed in trust. The questions, so far as the point now under consideration is concerned, are (1) whether the first clause of the treaty imports conclusively or only presumptively an absolute cession; (2) whether other provisions of the treaty make the cession a cession in trust; and (3) whether, if there is nothing in other parts of the treaty, to qualify this ceding clause, proof is admissible to show that it was intended as a cession in trust.

The question whether a deed, absolute upon its face, can be shown, by evidence *aliunde*, to be a deed in trust, even though the trust may have been created by parol, is settled in the affirmative, in those jurisdictions in which the creation of trusts by parol is not interdicted by statute. Babcock *v.* Wyman, 19 How. 289; Russell *v.* Southard, 12 How. 154; Conway *v.* Alexander, 7 Cranch, 238; Morris *v.* Nixon, 1 How. 126; Osterman *v.* Baldwin, 6 Wall. 116; Morris *v.* Nixon, 17 Pet. 109; Flagg *v.* Walker, 113 U. S. 659; Foy *v.* Foy, 2 Hayw. 141; Jackson *v.* Moore, 6 Cow. 220; Walton *v.* Conley's admr., 14 Wend. 63; Van Buren *v.* Olmstead, 5 Paige, 9; Jenkins *v.* Eldridge, 3 Story, 293; Stafford *v.* Wheeler, 93 Pa. St. 462; McLaurin *v.* Partlow, 53 Ill.

340; Beadle *v.* Beadle, 2 McCrary, 586; Edrington *v.* Harper, 3 J. J. Marshall, 355; Pierson *v.* Pierson, 5 Dec. Ch. 11; Norman *v.* Burnett, 25 Miss. 183; Smith *v.* Eckford, 18 S. W. 210; Cordova *v.* Lee, 14 S. W. 208; Barrill *v.* Hanrick, 42 Ala. 60; Greenl. Ev. 266; Podmore *v.* Gunning, 7 Simons, 644; Lloyd *v.* Spillote, 2 Atk. 150; Ross *v.* Newall, 1 Wash. Rep. 14; Walkins *v.* Stockett, 2 Harr. and Johns. 435; Strong *v.* Stewart, 4 Johns. Chy. 167; English *v.* Lane, 1 Porter, Ala. 318; Hayworth *v.* Worthington, 5 Black, 361; King *v.* Newman, 2 Munf. 40; Dunham *v.* Dey, 15 John. 555; Overton *v.* Bigelow, 3 Yerg. 513.

In Babcock *v.* Wyman, 19 How. 289, the deed in question was absolute, on its face. The court said:

Three points may be considered as embracing the merits of this case: 1. Was the deed, executed by Nehemiah Wyman to Babcock, for the eleven and one-half acres of ground, given in trust? 2. Can this trust be established, by parol evidence? 3. Does the statute of limitation, or lapse of time, affect the claimant's rights?

The court decided, on the evidence, that the deed was given in trust, and held that the trust could be established by parol proof. And the court cited, in support of this ruling, a multitude of authorities.

In Mead *v.* Randolph, 8 Tex. 191, the court said:

> It seems, then, now to be beyond question that parol evidence is admissible, to prove that a deed or instrument, absolute on its face, was executed and delivered, upon certain trusts not reduced to writing, and which the grantee promised to perform, and that the same may be established.

The court, after referring to Carter *v.* Carter, 5 T. R; Stamper *v.* Johnson, 3 T. R., and other cases, said that, although the question whether a deed, absolute on its face, was a mortgage, had arisen oftener than the question whether such a deed was a deed in trust, the principle,

involved in both cases, was the same, and that, if evidence was admissible to show that one was a mortgage, evidence was also admissible to show that the other was a deed in trust.

In Gay *v.* Hunt, 1 Murphey, 141, a person, being subject to intoxication and therefore fearing imposition, conveyed his property, by an absolute deed, to another, for the benefit of his child, a minor; but no declaration, to this effect, appeared in the deed. Parol evidence was admitted to prove the trust. In Clark *v.* Haney, 62 Tex. 511, a deed of mortgaged lands was executed by the mortgagors, husband and wife, to the mortgagee, upon the mortgagee's oral promise, to the wife, to sell the land, discharge the debt, and pay back the surplus, or reconvey any portion unsold. The deed was held to be a deed in trust. The court said:

> Even in those states where the seventh section of the statute of frauds, 29 Car. 2, Chap. 3, forbidding express verbal trusts, is in force, promises of this nature have been enforced; deeds apparently absolute have had parol trusts engrafted upon them, to prevent fraud, although the trust was express and, as such, forbidden by the statute (Jones *v.* McDougal, 32 Miss. 179; Arnold *v.* Cord, 16 Ind. 177; Nelson *v.* Wornall, 20 Iowa, 469; and see Babcock *v.* Wyman, 19 How. 289), and parol express trusts are not forbidden.
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> This section is not in force in our state, and it is the current of decision, here, that parol evidence is admissible to prove that a deed, absolute on its face, was executed and delivered upon certain trusts, not reduced to writing, and which the grantor promised to perform. Mead *v.* Randolph, 8 Tex. 191; McClenny *v.* Floyd, 10 Tex. 159; Gibbs *v.* Penny, 43 Tex. 560.

Is it contended that, although a deed, on its face presumptively absolute, may be shown to be a deed in trust, a cession by treaty, on its face presumptively absolute, cannot be proved to be a cession in trust? A cession by treaty is a sovereign's deed. So far as the question now under consideration is concerned, it is like a citizen's deed. And a sovereign, who voluntarily enters a court as a party, surrenders, *pro hac vice*, his sovereign char-

acter, and subjects himself to the rules of law and equity, which apply to other parties.

Where the terms of a stipulation admit of more senses than one, the promise is to be performed in that sense in which the promiser understood, at the time, that the promisee received it. It is not the sense, in which the promiser actually intended it, that always governs the interpretation of a promise; nor is it the sense in which the promisee actually received the promise. It is the sense in which the promiser and promisee both understood the promise,—in which the promiser made and the promisee accepted it.

In the interpretation of this treaty, the following rules of international law are to be observed: (1) The intention of the parties must prevail; a disposition of territory will have the effect literally implied in the terms used, if such shall appear to have been the intention of the parties; but its signification will be enlarged, or restricted, if it shall appear that the parties, at the time, so understood it. (2) An interpretation, which leads to an absurdity, is to be rejected. The same rules of interpretation are to be applied to treaties as to other contracts, United States *v.* Percheman, 7 Pet. 51; Wheaton Int. Law, P. 3, c. 2, § 17; Gardner, Inst., c. 12, § 13.

In re Ross, 140 U. S. 453, the court said:

> it is a canon of interpretation to so construe a law, or a treaty, as to give effect to the object designed, and, for that purpose, all of its provisions must be examined in the light of attendant and surrounding circumstances. To some terms and expressions a literal meaning will be given, and to others a larger and more extended one. The reports of adjudged cases and approved legal treatises are full of illustrations of the application of this rule. The inquiry, in all such cases, is as to what was intended in the law by the legislature, and in the treaty by the contracting parties.

In Geoffroy *v.* Riggs, 133 U. S. 258, the supreme court was called upon to interpret the treaty of February 23,

1853, between the United States and France. That treaty contained the following clause:

In all the states of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property, by the same title, and in the same manner as the citizens of the United States.

The question, in the case, was whether citizens of France could inherit real property in the District of Columbia. The court held that, within the meaning of the treaty, the District of Columbia was one of the "states of the union."

Vattel says:

Since the sole object of the lawful interpretation of a deed ought to be the discovery of the thoughts of the author or authors of that deed, whenever we meet with any obscurity in it, we are to consider what probably were the ideas of those who drew up the deed, and to interpret it accordingly. This is the general rule for all interpretations. It particularly serves to ascertain the meaning of particular expressions, whose signification is not sufficiently determinate. Pursuant to this rule, we should take those expressions in their utmost latitude, when it seems probable that the persons speaking had in contemplation everything which, in that extensive sense, they are capable of designating; and, on the other hand, we ought to restrict their meaning, if the author appears to have confined his idea to what they comprehended, in their more limited signification. Let us suppose that a husband has bequeathed to his wife *all his money*. It is required to know whether this expression means only his ready money, or whether it extends also to that which is lent out, and is due on notes and other securities. If the wife is poor,—if she was beloved by her husband,—if the amount of the ready money be inconsiderable, and the value of the other property greatly superior to that of the money, both in specie and in paper,—there is every reason to presume that the husband meant to bequeath to her, as well, the money due to him, as that actually contained in his coffers. On the other hand, if the woman be rich,—if the amount of the ready specie be very considerable, and the money due greatly exceeds, in value, all the other property,—the probability is that the husband meant to bequeath to his wife his ready money only.

By the same rule we are to interpret a clause in the utmost latitude that the strict and appropriate meaning of the words will admit, if it appears that the author had in view everything which that strict and appropriate meaning comprehends; but we must interpret it in a more limited sense, when it appears probable that the author of the clause did not mean to extend it to everything which the strict propriety of the terms might be made to include. As, for instance, a father, who has an only son, bequeaths to the daughter of his friend *all his jewels*. He has a sword enriched with diamonds, given him by a sovereign prince. In this case, it is certainly very improbable that the testator had any intention of making over that honorable badge of distinction to a family of aliens.

The sword, therefore, with the jewels with which it is ornamented, must be excepted from the legacy, and the meaning of the words restricted to his other jewels. Vattel, Law of Nations, Book 2, c. 17, § 270.

If, however, the technical or other terms relate to things that have different degrees, we ought not scrupulously to adhere to definitions, but rather to take the terms in a sense agreeable to the context; for a regular definition describes a thing in its most perfect state; and yet it is certain that we do not always mean it in that state of its utmost perfection, when we speak of it. Now the interpretation should only tend to the discovery of the will of the contracting parties; to each term we should, therefore, affix that meaning which the party, whose words we interpret, probably had in contemplation. * * Id., § 277.

There is not, perhaps, any language that does not also contain words which signify two or more different things, and phrases which are susceptible of more than one sense. Thence arises ambiguity in discourse. * * The following is the rule that ought to direct the interpretation, in this as well as in the preceding case: We ought always to affix such meanings to the expressions as are most suitable to the subject or matter in question. For, by a true interpretation, we endeavor to discover the thoughts of the person speaking, or of the contracting parties in a treaty. Now it ought to be presumed that he who has employed a word, which is susceptible of many different significations, has taken it in that sense which agrees with his subject. Id. §§ 279, 280.

Every interpretation that leads to an absurdity ought to be rejected; or, in other words, we should not give to any piece a meaning from which any absurd consequences would follow, but must interpret it in such a manner as to avoid absurdity. * * The rule which we have just mentioned is absolutely necessary, and ought to be followed even when the text of the law or treaty does not, considered in itself, present either obscurity or ambiguity in the language. For it must be observed that the uncertainty of the sense we are to give to a law, or a treaty, does not solely proceed from the obscurity, or other defect, in the expression; but also from the limited nature of the human mind, which cannot foresee all cases and circumstance, nor take in, at one view, all the consequences of what is decreed or promised; and finally from the impossibility of entering into that immense detail. Laws and treaties can only be worded in a general manner; and it is the interpreter's province to apply them to particular cases, according to the intention of the legislature or of the contracting powers. Now, we are not, in any case, to presume that it was their intention to establish an absurdity; and, therefore, when their expressions, taken in their proper and ordinary meaning, would lead to absurd consequences, it becomes necessary to deviate from that meaning just so far as is sufficient to avoid absurdity. Id. § 282.

The reason of the law, or of the treaty,—that is to say, the motive which led to the making of it, and the object in contemplation, at the time,—is the most certain clue to lead us to the discovery of its true meaning. * * The consideration of the reason of a law, or promise, not only serves to explain the obscure or ambiguous expressions, which occur in a piece, but also to extend or restrict its several provisions, independently of the expressions, and in conformity to the intention and views of the legislature, or the contracting parties, rather than to their words. For, according to the remark of Cicero, the language invented to explain the will ought not to hinder its effect. Id. § 289.

Grotius says:

The best rule of interpretation is to guess at the will by the most probable signs, which signs are of two sorts, words and conjectures; which are sometimes considered separately, sometimes together. If no conjecture guides us otherwise, the words are to be understood according to their propriety, not the grammatical one, which regards the etymon and original of them, but what is vulgar and most in use; for use is the judge, the law and rule of speech. * * Conjectures are necessary when words and sentences are of several significations, which the rhetoricians call doubtful and ambiguous. * * The principal heads, from which these conjectures arise, are the matter, the effect, and the circumstances or connection. First. From the matter, as the word *day* (if a truce be made for thirty days) ought not to be understood of natural days, but of artificial ones, as agreeable to the subject-matter. So the word *giving* is taken for a forbearance, according to the nature of the affair it is employed in. So the word *arms* sometimes signifies instruments of war, sometimes armed soldiers, and is to be interpreted either in this or that sense as the matter in hand requires. Secondly. From the effect, where the main thing to be observed is whether the word, taken in its common sense, does produce an effect contrary to reason. For when a word is ambiguous, we must rather take it in that sense which is liable to no absurdity. Lastly. From the circumstances and connection of the words with others, either spoken in the same place, or by the same person. That which proceeds from the same will, though delivered in some other place, or upon some other occasion, has thereby a connection which gives room for reasonable conjectures; for, in a dubious case, the will is presumed to be consonant to itself. Grotius, Book 2, c. 16, §§ 1, 2, 4, 5.

On the other hand, words are to be taken even more strictly than the propriety will bear, if it be necessary in order to avoid an injustice or an absurdity; and without such a necessity, if there be a manifest equity or advantage in the restriction, we are to confine ourselves within the narrowest bounds of their propriety, unless circumstances persuade us otherwise. Id. § 12.

Rutherforth says:

Sometimes common usage has given two senses to the same word, one of which is more confined or includes fewer particulars; and this is called its strict sense; the other is more comprehensive, or includes more particulars; and this is called its large sense. Thus the word, "ware-house," is sometimes used in a large sense, to signify any place where a dealer in any sort of goods, or wares, lays them up, till he wants to bring them out to a place of sale; and it is likewise used in a strict sense, to signify the very place of sale; and then is not otherwise distinguished from a shop than as the former is a close and the latter an open place of sale. When we meet with a word of this sort, in a law, and are doubtful in which of the senses the legislator used it, we must have recourse to some other marks besides his words, to ascertain his meaning. Either of the senses is within the letter of the law, but, because other marks must be used to ascertain the meaning of the legislator besides his words, the interpretation is of the mixed sort.

Rutherforth, Inst., Book 2, c. 7, § 10.

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Public treaties are to be interpreted like other laws and contracts. Such is the inevitable imperfection and ambiguity of all human language that the mere words alone of any writing, literally expounded, will go a very little way towards explaining its meaning. Wheaton, International Law, Part 3, c. 2, § 17.

When the same provision, or sentence, expresses two meanings, that one which most conduces to carry into effect the end and object of the convention, should be adopted. Phillimore, sec. 73.

Treaties of every kind are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction, and course of reasoning, which we apply to the interpretation of private contracts. 1 Kent Comm. 174; Maryatt v. Wilson, 1 Bos. and Pull. 438, 439; Kent, International Law, 391.

If, as the supreme court has repeatedly held, a deed, absolute on its face, can be shown, by extraneous proof, to be a deed in trust; if it was legitimate for the supreme court to hold that the word "state," in the jurisdictional provision of the constitution, does not include the District of Columbia, but in the French treaty of February 23, 1853, does include the District of Columbia; if, as Vattel holds, evidence *aliunde* is admissible to show that a bequest, of *all* the testator's jewels, does not include the diamonds on the hilt of his sword, and that a bequest, of *all* the testator's money, does not include his money lent, but only the money in his coffers; if, as Grotius holds, it is legitimate for the courts to decide, upon evidence *aliunde*, whether the word, "day," used in a treaty, means day, as distinguished from night, or means the day of twenty-four hours, or whether the word "arms," in a treaty, means armed men, or merely weapons; if, as held by Rutherforth, it is competent to show whether the word, "warehouse," means a place for storage merely, or a place for both storage and sale; if, in the case at bar, it is not only competent, but absolutely necessary, to ascertain from outside proofs whether the Choctaws and Chickasaws have ceded to the United States dominion merely, or both dominion and property; if, as held by all the authorities, when a word,

employed in an instrument, has several meanings, it is admissible to show in which sense it was there used, it would seem to be competent, on the same ground of principle, to ascertain from outside evidence whether this cession is an absolute conveyance, a mortgage, or a cession in trust.

The other material statements of the dissenting judge, adverse to the title of the appellees, will be considered in connection with the subjects to which they respectively relate.

One of the numerous proofs, presented by the Choctaw and Chickasaw nations, to show that the cession under consideration is a cession in trust, is the trustee's acknowledgment of the trust, which acknowledgment will be hereafter considered.

If the common law relating to trusts, as it stood before the enactment of the statute of frauds, is applicable to the treaty, the trust, in this case, not only may have been created by parol, but may also be proved by parol. If the common law, as modified by the statute of frauds, is applicable, the trust may have been created by parol, but must be proved by written evidence. But if the public law of nations is applicable to this treaty, then the trust may have been created by parol, and can also be proved by parol. For, assuredly, the public law cannot be more narrow, or technical, than the common law. But let us assume, for the purpose of the argument, that the United States and the Choctaw and Chickasaw nations have accepted the common law, modified by the statute of frauds, as the rule for the determination of the question whether the treaty of 1866 effected an absolute cession or a cession in trust. It will be found that the trust, in this case, has been, not only proven by written evidence, but also created by written instruments.

When the trustee acknowledges the trust in writing, even under the statute of frauds, that acknowledgment becomes an accomplished fact. His character as trustee is fixed. It is not competent for him, when called to account by the beneficiary of the trust, to turn around and deny that he is a trustee. He will, notwithstanding that denial, still be a trustee. His assertion, that he is not a trustee, will be as futile as would be his assertion that two and two are not four, but are five. It is the same whether the trustee is a sovereign in court, or a citizen in court. When Congress, in the act of March 3, 1891, declared the United States to be a trustee, that relation was fixed. If, in subsequent legislation, Congress had declared that the United States was not a trustee, the United States would, nevertheless, still have remained a trustee.

First.

The Choctaw and Chickasaw Title.

The Choctaws and Chickasaws contend that the cession, stipulated in the first clause of the third article of the treaty of 1866, was a conveyance in trust—a conveyance not absolute, but conditional,—the condition being that the United States, the grantee of the trust estate, should "settle" friendly Indians on the ceded lands, the government being empowered, within certain limits, to select the friendly Indians to be located thereon, in execution of the trust.

This interpretation of the treaty seems to be supported by the rule of judicial interpretation applicable to Indian treaties; by the acts and relations of the parties, prior to the Fort Smith council; by the proceedings of that council; by certain provisions of the treaty; by the subse-

quent action of the executive department of the government; by the subsequent action of Congress; and by the consideration that the cession of 1866, if an absolute conveyance, would have involved great injustice to the Choctaws and Chickasaws.

I.

The rule of judicial interpretation applicable to Indian treaties.

The supreme court has repeatedly held that treaties with Indian nations are to be liberally construed in favor of the Indians;—that the relation existing between the United States and these nations, which has been likened to the relation between guardian and ward, necessitates this rule of interpretation. In Choctaw Nation *v.* United States, 119 U. S. 1, 27, the court said:

> As was said by this court recently in the case of United States *v.* Kagama, 118 U. S., 375, 383: "These Indian tribes are the *wards* of the nation; they are communities *dependent on the United States;* dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. *From this very weakness and helplessness*, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the *duty of protection* and with it the power. This has always been recognized by the executive and by congress, and by this court whenever the question has arisen." It had accordingly been said in the case of Worcester *v.* Georgia, 6 Peters, 515, 583: "The language used in treaties with the Indians should never be construed to their prejudice. * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."
>
> The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the control of the former, and which, while it authorizes the adoption, on the part of the United States, of such a policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing;

and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules, framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws.

The rules to be applied, in the present case, are those which govern public treaties, which, even in controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations. And it is the treaties made between the United States and the Choctaw nation holding such a relation, the assumptions of fact and of right which they pre-suppose, the acts and conduct of the parties under them, which constitute the material for settling the controversies which have arisen under them. The rule of interpretation, already stated as arising out of the nature and relation of the parties, is sanctioned and adopted by the express terms of the treaties themselves. In the 11th article of the treaty of 1855, the government of the United States expresses itself as being desirous that the rights and claim of the Choctaw people, against the United States, "shall receive a just, fair and liberal consideration." * *

The counsel for the appellants contend that this rule of interpretation is not applicable to the treaty of 1866, because, as they assert, the Choctaws and Chickasaws were not "unlettered people," in 1866; but were "capable of dealing at arm's length" with the United States. They assume that the fact, which fixed the relation defined by the court, was the "illiteracy" of the Choctaws and Chickasaws. This is evidently a mistake. The main facts, which fix this relation, are, on the one side, the *weakness, helplessness* and *dependence* of the Indians, and, on the other, the *paramount power* and *sovereignty* of the United States. The Choctaws and Chickasaws were, in 1866, as in 1820, weak dependent tribes. They were absolutely in the power of the government of the United States. With this power was coupled a correlative obligation of the government, not only to protect them from wrongs at the hands of others, but also to abstain itself from taking advantage of them, by means of harsh and overreaching bargains.

The reason, for the application of the rule of interpre-

tation of Indian treaties adopted by the supreme court, was very much stronger, in the case of the treaty of 1866, than in the case of the treaty of 1820; for, at the commencement of the negotiation of the treaty of 1866, the Choctaws and Chickasaws *were placed under duress* by the authorities of the United States. On the first day of the Fort Smith council, September 8, 1865, the commissioners addressed the Indians as follows:

> Portions of several tribes and nations have attempted to throw off their allegiance to the United States, and have made treaty stipulations with the enemies of the government, and have been in open war with those who remained loyal and true, and at war with the United States. All such have rightfully *forfeited all annuities and interests in lands* in the Indian territory. But, with the return of peace, after subduing and punishing severely, in battle, those who caused the rebellion, the president is willing to hear his erring children in *extenuation of their great crime.* (Appendix to Record, 1867, 163.

On the next day, the commissioners addressed the Indians as follows:

> The following-named nations and tribes have, by their own acts, by making treaties with the enemies of the United States, at the dates hereafter named, *forfeited all right to annuities, lands and protection* by the United States: The different nations and tribes having made treaties with the rebel government are as follows, viz: The Creek nation, July 10, 1861; Choctaws and Chickasaws, July 12, 1861; Seminoles, August 1, 1861; Shawnees, Delawares, Wichitas, and affiliated tribes, residing in leased territory, August 12, 1861. * *
>
> We, as representatives of the president, are empowered to enter into new treaties with the proper delegates of the tribes located within the so-called Indian territory, and others above named, living west and north of the Indian territory. Such treaties *must* contain substantially the following stipulations. * * Rec. 74, 75.

Inasmuch as nations, if they enter courts of equity, must appear therein, not as sovereigns, but as individuals, it would seem that a court of equity should scrutinize contracts between absolute sovereignties and dependent tribes as liberally, in favor of the latter, as contracts between guardian and ward, in favor of the ward, and should enforce as rigid an accountability for property of the dependent tribe, acquired by the sovereign, as for the ward's property acquired by the guardian.

II.

The acts and relations of the parties prior to the Fort Smith council.

It seems to me that the circumstances which attended the emigration of the Choctaws and Chickasaws to the Indian Territory, the guaranties which induced them to emigrate, and their relations to the United States, prior to the Fort Smith council, conspire to prove that the cession of 1866 could not have been intended, either by the Indians, or by the United States, as an absolute conveyance exempt from the trust, or condition, to settle friendly Indians on the ceded land.

The aboriginal title of the Choctaws to the land in Mississippi, which they ceded to the United States, in 1820, is carried back, by authentic history, more than 200 years. So, also, is the aboriginal title of the Chickasaws to the lands in Mississippi, Tennessee, and Alabama, which they ceded to the United States in 1832. More than 100 years ago the boundaries of these respective nations were defined in treaties with the United States. The area of the Choctaw lands exceeded 15,000,000 acres. The territory of the Chickasaws was more extensive than that of the Choctaws. Their governments were known to history more than a century before the government of the United States existed.

In 1803 Bonaparte, then first consul of France, ceded the province of Louisiana to the United States. That province extended from the Mississippi river westward to the Rio Bravo del Norte and Rocky Mountains, and from the Gulf of Mexico northward beyond the fortieth degree of north latitude. It included the territory subsequently ceded to the Choctaws by the United States.

In 1820 the demand of citizens of the United States for Choctaw lands, in Mississippi, had become well nigh irresistible, and the Choctaws were induced to cede to the United States a portion of their Mississippi lands described by metes and bounds, in exchange for a tract of land, described by metes and bounds, west of the Mississippi river. The eastern boundary of the cession to the Choctaws, as prescribed in the treaty, was a line extending from the intersection of the southern boundary of the Cherokee country with the Arkansas river, to a point on the Red river three miles below the mouth of Little river; its northern boundary the Arkansas and Canadian rivers; its southern boundary the Red river; and its western boundary a line extending due south from the source of the Canadian to Red river.

During the ten years, which followed the cession of 1820, the demand of the citizens of Mississippi for Choctaw lands became more and more urgent; and the legislature of that state, in order, apparently, to make their residence therein intolerable to the Choctaws, extended over them the laws of the state. The result was that in 1830, the United States secured another treaty, by which the Choctaws ceded to the United States all the lands still held by them, in the state of Mississippi. As stated by the court in Choctaw Nation *v.* United States, 119 U. S. 1, these lands amounted to 10,000,000 acres. No land was ceded to the Choctaws by this treaty. It was stated, in the preamble of the treaty, that the president had declared his inability to "protect the Choctaw people from the operation" of the laws of the state of Mississippi, and that the object of the treaty was to enable the Choctaws to "live under their own laws." As the court said, in the case above mentioned:

Great pressure had to be brought to bear upon the Indians to effect their removal; and the whole treaty was evidently and purposely executed, not so much to secure to the Indians the rights, for which they had stipulated, as to effectuate the policy of the United States in regrad to their removal. The most noticeable thing, upon a careful consideration of the terms of this treaty, is that no money consideration is promised, or paid, for a cession of lands, the beneficial ownership of which is assumed to reside in the Choctaw nation, and computed to amount to over ten millions of acres.

But the treaty held out to the Choctaws an inducement for the cession, and for their emigration to the west, which was more effective than any compensation, in money, could have been. It opened to them a way of escape from the galling control of the whites, and guarantied to them the enjoyment of unrestricted self-government, in the wilderness west of the Mississippi. The treaty contained a provision which was to them of the greatest possible moment. It was this:

Art. IV. The government and people of the United States are obliged to secure, to the said Choctaw nation of red people, the jurisdiction and government of all persons and property, that may be within their limits west, so that no territory, or state, shall ever have a right to pass laws for the government of the Choctaw nation of red people and their descendants, and that no part of the land granted them shall ever be embraced in any territory, or state; but the United States shall forever secure said Choctaw nation from and against all laws, except such as, from time to time, may be enacted in their own national councils, not inconsistent with the constitution, treaties and laws of the United States, except such as may and which have been enacted by congress, to the extent that congress, under the constitution, are required to exercise a legislation over Indian affairs. Appendix, 14

This article secured to the Choctaws rights which they have prized more highly and guarded with more intense solicitude than any other possession.

In 1832 conditions, similar to those which occasioned the emigration of the Choctaws to the country west of the Mississippi river, constrained the Chickasaws to sell their lands located in the states of Mississippi, Tennessee, and Alabama. In 1834 another treaty was made with the Chickasaws. It contains the following provision:

Art. 2. The Chickasaws are about to abandon their homes, which they have long cherished and loved; and, though hitherto unsuccessful, they still hope to find a country, adequate to the wants and support of their people, somewhere west of the Mississippi, and within the territorial limits of the United States; should they do so, the government of the United States hereby consent to protect and defend them against the inroads of any other tribe of Indians, and from the whites; and agree to keep them without the limits of any state or territory.

Subsequently they emigrated to the country of the Choctaws west of the Mississippi. In 1837 the Chickasaws, with the consent of the United States, purchased an undivided one-fourth interest in the land of the Choctaws.

In 1854 numerous tribes, or bands, of wandering Indians, including the Wichita and affiliated bands, who are parties to this cause, resided in the state of Texas. Many of them were horse-thieves and murderers. The citizens of Texas were anxious to be relieved of their presence. No lands were accessible, for the colonization of these Indians, except the western portion of the country of the Choctaws. In 1855 the United States obtained, from the Choctaws and Chickasaws, a lease of that part of their country which was included between the 98th and 100th meridians. This land was leased for specific uses. The condition of the lease was that the land should be used for the permanent settlement of certain Indian tribes.

Meantime the country between the Red and Canadian rivers, west of the 100th meridian, which had been taken from the Choctaws and ceded to Spain, in 1821, had, upon the annexation of Texas, become again a part of the United States. The Choctaws then insisted that it was incumbent on the United States to make good the title conveyed to them in 1820; and in 1854 they importunately demanded repossession of the land. In response to this demand the United States, in the treaty of 1855, combined with the lease of the land between the

98th and 100th meridians the purchase of a relinquishment of the rights of the Choctaws in the land west of the 100th meridian. The dissenting judge says (p. 79) that this relinquishment was "but a correction of the cession of 1820, in accordance with the intention of the parties." He is evidently mistaken. The treaty embraced the following articles:

Art. 7. So far as may be compatible with the constitution of the United States, and the laws, made in pursuance thereof, regulating trade and commerce with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits; excepting, however, all persons, with their property, who are not, by birth, adoption, or otherwise, citizens or members of either the Choctaw or Chickasaw tribe.

Art. 9. The Choctaw Indians do hereby absolutely and forever quitclaim and relinquish to the United States all their right, title, and interest in and to any and all lands west of the one hundredth degree of west longitude, and the Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude for the permanent settlement of the Wichita and such other tribes or bands of Indians as the government may desire to locate therein, excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas river and whose permanent locations are north of the Canadian river, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas, which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the president for their government: *Provided, however*, That the territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore.

Art. 10. In consideration of the foregoing relinquishment and lease, and, as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct. (App. 27, 28.

It was provided in articles 2, 3, and 9 of this treaty, not only that the leased land should remain open to settlement by the Choctaws and Chickasaws, but also that it should be a part of the Choctaw district, and that the Choctaw government should have jurisdiction over all Choctaws and Chickasaws residing therein, and, moreover, that the president should make no rule or regula-

tion, for the government of other Indians located therein, inconsistent with the rights and interests of the Choctaws and Chickasaws.

In 1859 agents of the United States located the Wichita and affiliated bands on a tract of 154,093 acres of land in the northwestern corner of the so-called Wichita reservation, the entire area of that reservation amounting to 743,610 acres. The Wichita reservation is located between the 98th and 100th meridians in the northeast corner of the district, which was leased by the Choctaws and Chickasaws to the United States, in 1855. Soon after the commencement of the late civil war, these Indians went to the state of Kansas, whence they returned, at the close of the war.

In 1864 new conditions confronted the government. It seemed necessary, not only to secure the right to locate Indians in the leased district, *without regard to their former residence or ranges*, but also to secure the right to locate such Indians on the lands of the Cherokees, Creeks and Seminoles. By the treaty of 1855 the United States had already acquired, from the Choctaws and Chickasaws, the right to locate, in the leased district, Indians whose residence and ranges were within certain designated limits; and the instrument, which secured this right, clearly defined the purpose for which it was granted and received. But this instrument was only a lease. In the character of lessee the United States could not make conveyances in fee to Indian colonists; and conveyances in fee were essential in a scheme for the permanent settlement of Indians on those lands. It was therefore important to substitute, for the lease of 1855, a cession in fee.

But the United States had never acquired the right to colonize Indians on lands of the Cherokees, Creeks, or

Seminoles. It, therefore, became important to secure, from those tribes also, conveyances in fee for the colonization of friendly Indians. Accordingly a council was convened at Fort Smith, on the 8th of September, 1865, which was attended by commissioners of the United States, and by representatives of seventeen tribes of Indians, including the Choctaws, Chickasaws, Cherokees, Creeks, and Seminoles; and negotiations were commenced, which culminated in the several treaties, of 1866, between the United States and the five civilized tribes.

The question now is whether the prior acts and relations of the parties tend to prove that the cession, made in the treaty of the Choctaws and Chickasaws, was a conditional and not an absolute conveyance. It will be shown that *not more* than $400,000, in money, has ever been paid, or promised to the Choctaws and Chickasaws, for the 7,713,239 acres of land embraced in the leased district. It will be shown that the sum of $300,000, mentioned in the treaty of 1866, was proposed as the consideration, not for the cession of the leased district, but for the grant of citizenship and forty acres of land to each of the Choctaw and Chickasaw freedmen. I assume, then, for the present, that the only money consideration ever paid, or promised, for the leased district, was a sum not exceeding $400,000, promised in the treaty of 1855.

But the consideration which had the greatest weight, with the Choctaws and Chickasaws, was the undertaking of the United States to locate Indians on the leased land. Their experience with their enterprising white neighbors, on their eastern and southern frontiers, had convinced them that it would be well to interpose a "buffer" of red men, on their western frontier, and, to that end, to secure from the United States an undertaking to settle Indians on the land, and to exclude white settlers therefrom.

Another consideration reconciling them to the lease was that, by its terms, 20,000 Choctaws and Chickasaws retained their right to settle on the leased lands, and, while residing there, were to be subject to the jurisdiction of the Choctaw government. Still another element of the consideration was the promise that, for the government of the other Indians to be located on the land, by the United States, the president should make no regulations inconsistent with the rights and interests of the Choctaws and Chickasaws.

If the cession of 1866 was an absolute cession, every element of the consideration, for which the Choctaws and Chickasaws had, from first to last, parted with the land, was swept away, excepting only the payment, *not exceeding* $400,000, made in 1855. The obligation of the United States to locate Indians on the land was extinguished. It was to be used for general settlement, or for any other purpose, at the discretion of the government. The Choctaws and Chickasaws were excluded from the land. The Choctaw nation was deprived of jurisdiction of settlers already there. The leased land ceased to be a part of the Choctaw district. The obligation of the United States to make no regulations, for the government of Indians in the district, inconsistent with the rights and interests of the Choctaws and Chickasaws, was extinguished.

Whatever was paid for the lease, in 1855, was paid for a lease subject to all these conditions; and, if the cession of 1866 was an absolute conveyance, all these conditions were swept away, and the United States became the beneficial owner of the entire leased districts, without paying any consideration whatever for the substitution of the beneficial ownership of the land, in lieu of the conditional leasehold interest acquired by the treaty of 1855.

But a court of equity cannot uphold a purchase, by a

guardian from a ward, of an estate worth many millions, for a sum *not exceeding* $400,000. Unless some additional consideration can be shown, the purchase will be set aside. Only one other consideration is to be found in the prior acts and relations of the parties. That is the condition that the United States shall settle friendly Indians on the lands. And that condition transforms the cession from an absolute into a conditional conveyance,—from an absolute cession into a cession in trust.

In view of the facts above stated, it would seem to be inconceivable that the Choctaws and Chickasaws could have intended, by an absolute cession, in 1866, of the land leased in 1855, without any consideration additional to that paid for the lease, to invest the United States with the absolute beneficial ownership of 7,713,239 acres of land, which was worth, at the price fixed by the act of May 20, 1862, from $9,000,000 to $19,000,000. It seems incredible that they could have intended, on such terms, to surrender their title to, and their guarantied jurisdiction over more than one-third of their entire territory, and to divert it from Indian occupancy, to which it had been dedicated, to general settlement, under the land laws of the United States. It seems, if possible, still more incredible that the treaty-making authorities of the United States could have intended to exact such a hard bargain from these Indians, who not only were dependent wards of the nation, but had *actually been placed under duress*, at the commencement of the negotiation of the treaty, and constrained to accede to terms proposed by the United States.

III.

The proceedings of the Forth Smith Council.

The trust in the case now under consideration, although it had its incipiency in the treaty of 1855, first appeared,

as a feature of the cession of 1866, in a written submission by the United States, to the Choctaw and Chickasaw nations, of a definite proposition, which was also an ultimatum, as one of the bases of a contemplated treaty between the United States and those two nations, followed by an acceptance of the proposition so submitted

The treaty was signed at Washington in 1866, but the preliminary negotiations were conducted, and the substance of its provisions determined on, at Fort Smith, in 1865. It was not signed at Fort Smith, in 1865, because the Indian commissioners had not been authorized, by their respective governments, to sign it. Such authority was subsequently conferred upon commissioners of the respective nations, and the treaty itself was signed the next year, at Washington, without further negotiation as to the use for which the land was ceded, or as to the consideration for the cession.

The following documents, outside the treaty, and prior, in date, to its formal execution, constitute legitimate aids in its interpretation :

On pages 33, 34, of the report of the commissioner of Indian affairs, for 1864, appears this statement:

> Under these circumstances, I feel that I cannot too strongly urge the importance of preserving the Indian country for the use of the Indians alone, and in all treaties or other arrangements, which may hereinafter be made with its former owners insisting upon, and, if need be, enforcing such terms as will secure ample homes within that country for all such tribes, as, from time to time, it may be found practicable and expedient to remove thereto.

The commissioners of the United States, in their address to the delegates of the Indian nations, at the council held at Fort Smith, September 9, 1865, which address is now on file in the Indian office, said :

> Brothers: After considering your speeches, made yesterday, the commissioners have decided to make the following reply and statement of the policy of the government.

Brothers: We are instructed, by the president, to negotiate a treaty, or treaties, with any, or all, of the nations, tribes, or bands of Indians, in the Indian Territory, Kansas or the plains west of the Indian Territory and Kansas.

* * * * * * * *

The president is anxious to renew the relations, which existed at the breaking out of the rebellion.

We, as representatives of the president, are empowered to enter into new treaties, with the proper delegates of the tribes located within the so-called Indian Territory, and others above named, living west and north of the Indian Territory.

Such treaties *must* contain substantially the following stipulations:

1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.

2. Those settled in the Indian Territory must bind themselves, when called upon by the government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory, and with the United States.

3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes, on an equal footing with the original members, or suitably provided for.

4. A stipulation, in the treaties, that slavery or involuntary servitude shall never exist, in the tribe, or nation, except in punishment of crime.

5. A portion of the lands, hitherto owned and occupied by you, *must be set apart for the friendly tribes, now in Kansas and elsewhere*, on such terms as may be agreed upon by the parties and approved by government, or such as may be fixed by the government.

6. It is the policy of the government, unless other arrangements be made, that all the nations and tribes, in the Indian Territory, be formed into one consolidated government, after the plan proposed by the senate of the United States for organizing the Indian Territory.

7. No white person, except officers, agents, and employes of the government, or of any internal improvement authorized by the government, will be permitted to reside in the territory, unless formally incorporated with some tribe, according to the usages of the band.

Brothers: You have now heard and understand what are the views and wishes of the president; and the commissioners, as they told you yesterday, *will expect definite answers* from each of you, upon the questions submitted.

This address, in manuscript, in the Indian office, bears the following indorsement:

We propose to renew the treaty stipulations that existed previous to, or at the breaking out of, the rebellion, so far as regards the annuities.

The government will insist on purchasing a portion of their lands for the settlement of friendly Indians.

No part of any moneys expended by the president, in providing for the relief of destitute Indians, which were reduced to want on account of their friendship for the government, will be refunded.

A stipulation of general amnesty must be incorporated, and no individual shall be proscribed, or any act of confiscation, or forfeiture, passed,

against those who remained friendly to the U. S.: but they shall enjoy equal privileges with the other members of the nations. Rec. 74, 75.

To this address the Choctaw and Chickasaw delegates made a reply, which is now on file in the Indian office, and contains the following paragraphs:

The committee, on the part of the Choctaws and Chickasaws, reply to the propositions made on the part of the United States, as the basis of new treaties that * * *

On certain terms, on which we can doubtless agree with you, *we are willing to admit the settlement of other tribes within our territory, as proposed in the 5th article.* Rec. 76.

The following reply to the address of the United States commissioners is also on file in the Indian office:

We, the delegation on the part of the loyal element of the Choctaw people, came here with the expectation of meeting our southern brethren here, and to see what sort of a treaty would, or could, be made with the government of the United States. * * *

In answer, therefore, to your propositions to the several tribes of Indians, *we say that the first, second, third, fourth fifth, and sixth articles meet our approval.* We respectfully suggest that the seventh article may be changed to read thus:

"No white person, except officers, agents, and employés of the government or of any internal improvement company authorized by the government of the United States; also no persons of African descent, except our former slaves or free persons of color who are now or have been residents of the territory, will be permitted to reside in the territory, unless formally incorporated with some tribe according to the usages of the band." Rec. 77, 78.

Mr. Cooley, the president of the commission, said to the delegates, or agents, of the Indians:

The agents will be supplied with printed copies of the address, and *are requested to go, with an interpreter, to their respective tribes, for the purpose of fully explaining what is said there.* Rec. 154.

The minutes of the council for September 21, 1865, contain the following entry:

At 2 o'clock p. m. the council met, pursuant to adjournment. Called to order by President Cooley. Commissioner Parker stated that the joint committee of the Choctaw and Chickasaw delegations had reported to the committee of the commission certain amendments and modifications of the proposed treaty; that the commission had had the same under consideration, and the commissioners declined to accede to them, or to change, in any respect, the treaty as submitted. The delegations would be furnished with a copy of the treaty, and, whenever they determined to approve it, by notifying the Commissioner of Indian Affairs of the fact, they would be invited to come to Washington to consummate the treaty.

In anticipation of the speedy termination of the council, Commissioner Parker, on behalf of the commission, returned thanks to the various delegations then present, for their attendance, and wished them a happy journey home.

After some congratulatory remarks, by Delegate R. M. Jones, R. Field, E. C. Boudinot and Commissioner Cooley, President Cooley adjourned the council and the commission, to meet again, at the call of the secretary of the interior.

CHARLES E. MIX, *Secretary.*

This treaty, which the commissioners peremptorily refused to modify, and which was taken by the Choctaw and Chickasaw delegates to their respective nations, contained the following article:

Article 5. The Choctaw and Chickasaw tribes agree to a modification of the ninth article of the treaty concluded, in the city of Washington, on the 22d of June, A. D. 1855, by which they agree that all of that portion of their common territory west of the 98th degree of west longitude, leased to the United States, may be used for the permanent settlement of the Wichita and such other tribes, or bands, of Indians, as the government may desire to locate thereon, *without exception, or restriction, as to the character of the tribes.*

The ninth article of the treaty of 1855 excluded from the leased district all the Indians of New Mexico, and all those whose usual ranges were then north of the Arkansas river, and whose permanent locations were north of the Canadian. But that article, as modified by this fifth article of the proposed treaty, provided for the location, in that district, of any tribe which the government might desire to locate therein; and the United States expressly and imperatively required that the treaty should embrace this provision.

The proceedings of the Fort Smith council appear at pages 34, 296 and 312 of the report of the commissioner of Indian affairs for the year 1865.

IV.

The provisions of the treaty.

The treaty, all its provisions being considered, shows, upon its face, that the cession was, not an absolute, but

a conditional conveyance. It contains the following provisions:

Article 3. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, provided that the said sum shall be invested and *held by the United States* at an interest not less than five per cent., in trust for the said nations *until the legislatures of the Choctaw and Chickasaw nations, respectively, shall have made such laws, rules, and regulations* as may be necessary to give all persons of African descent resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by or belonging to said nations, respectively, and also to give to such persons who are residents, as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided, and immediately *on the enactment of such laws, rules, and regulations* the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter, less such sum, at the rate of one hundred dollars *per capita*, as shall be sufficient to pay such persons of African descent before referred to as, within ninety days after the passage of such laws, rules, and regulations, shall elect to move, and actually remove, from the said nations respectively. And *should the said laws, rules, and regulations not be made* by the legislatures of said nations, respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper, the United States agreeing, within ninety days from the expiration of said two years, *to remove from said nations all such persons of African descent as may be willing to remove*, those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars or any part thereof, but shall be upon the same footing as other citizens of the United States in said nations.

Article 10. The United States reaffirms all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw nations, entered into prior to the late rebellion, and in force at that time, not inconsistent herewith; and further agrees to renew the payment of all annuities and other moneys accruing under such treaty stipulations and acts of legislation from and after the close of the fiscal year ending on the thirtieth of June, in the year eighteen hundred and sixty-six.

Article 11. * * *Should the Choctaw and Chickasaw people*, through their respective legislative councils, *agree to the survey and dividing their land* on the system of the United States, the land aforesaid, east of the 98th degree of west longitude, shall be, in view of the arrangements hereinafter mentioned, surveyed, and laid off in ranges, townships, sections and parts of sections: * *

Article 12. The maps of said surveys shall exhibit, as far as practicable, the outlines of the actual occupancy of members of the said nations, respectively, and when they are completed, shall be returned to the said land office, at Boggy Depot, for inspection by all parties interested, when *notice for ninety days* shall be given of such return. * *

Article 15. *At the expiration of the ninety days' notice aforesaid, the selection*, which is to change the tenure of land, in the Choctaw and Chickasaw nations, from a holding in common, to a holding in severalty, *shall take place*, when every Choctaw and Chickasaw shall have the right to one quarter section of land. * *

Article 25. During ninety days from the expiration of ninety days' notice aforesaid, the Choctaws and Chickasaws shall have the exclusive right to make selections, as aforesaid. * *

Article 30. The Choctaw and Chickasaw nations shall receive into their respective districts, east of the ninety-eighth degree of west longitude in the proportion of one-fourth in the Chickasaw, and three-fourths in the Choctaw nation, *civilized Indians, from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory*, not exceeding 10,000 in number, who shall have, in the Choctaw and Chickasaw nations, the same rights as the Choctaws and Chickasaws, of whom they shall be the fellow-citizens, governed by the same laws, and enjoying the same privileges, with the exception of the right to participate in the Choctaw and Chickasaw annuities and other moneys, and in the public domain, should the same, or the proceeds thereof, be divided per capita among the Choctaws and Chickasaws, and, among others, the right to select land, as herein provided for Choctaws and Chickasaws, *after the expiration of the ninety days*, during which the selections of lands are to be made, as aforesaid, by said Choctaws and Chickasaws. * *

Article 31. And whereas some time must necessarily elapse *before the surveys, maps, and selections*, herein provided for, *can be completed*, so as to permit the said Kansas Indians to make their selections, in their order, *during which time* the United States may desire to remove the said Indians, from their present abiding places, it is hereby agreed that the said Indians may at once come into the Choctaw and Chickasaw nations, settling themselves temporarily as citizens of the said nations, respectively, upon such land as suits them and is not already occupied.

Article 37. In consideration of the right of selection, hereinbefore accorded to certain Indians other than the Choctaws and Chickasaws, the United States agree to pay to the Choctaw and Chickasaw nations, out of the funds of Indians removing into said nations, respectively, under the provisions of this treaty, such sum as may be *fixed by the legislatures of said nations*, not exceeding one dollar per acre. * *

Article 45. All the rights, privileges, and immunities heretofore possessed by said nations, or individuals thereof, or to which they were entitled under the treaties and legislation heretofore made and had in connection with them, shall be, and are hereby declared to be, in full force, so far as they are consistent with the provisions of this treaty.

Article 46. Of the moneys stipulated to be paid to the Choctaws and Chickasaws under this treaty for the cession of the leased district, and the admission of the Kansas Indians among them, the sum of one hundred and fifty thousand dollars shall be advanced and paid to the Choctaws, and fifty thousand dollars to the Chickasaws, through their respective treasurers, as soon as practicable after the ratification of this treaty, *to be repaid out of said moneys or any other moneys of said nations in the*

hands of the United States; the residue, not affected by any provision of this treaty, to remain in the treasury of the United States at an annual interest of not less than five per cent., no part of which shall be paid out as annuity, but shall be annually paid to the treasurer of said nations, respectively, to be regularly and judiciously applied, under the direction of their respective legislative councils, to the support of their government, the purposes of education, and such other objects as may be best calculated to promote and advance the welfare and happiness of said nations and their people respectively. *Appropriations &c.*

Upon a careful examination of the treaty it will appear, I submit, that no consideration for the cession is *expressed* in the treaty, and also that the fifth of the Fort Smith propositions is not *expressly* incorporated into any of its articles. The sum of $300,000, named in the third article of the treaty, was not the consideration, or any part of the consideration moving from the United States to the Choctaw and Chickasaw nations, for the cession of the leased district. That article commences as follows:

The Choctaws and Chickasaws, in consideration of the sum of $300,000, hereby cede to the United States the territory west of the ninety-eighth degree west longitude known as the leased district.

This language, if disconnected with the context, obviously imports that it was the purpose of the parties to the treaty, that the United States should pay the sum of $300,000 to the Choctaws and Chickasaws as the consideration for the conveyance of this land. But the other provisions of the treaty show that such was not their purpose. This money was to remain in the treasury two years unless, before the expiration of that period, the Choctaws and Chickasaws should elect to confer, and should confer, upon their freedmen "*all the rights, privileges, and immunities (including the right of suffrage) of citizens of said nations*," except in their annuities, moneys, and public domain," and should also give to their freedmen,—men, women, and children,—each forty acres of land. If their freedmen, who were estimated to number 3,000, should emigrate, this sum of $300,000 was all to

be paid to them,—$100 to each emigrant. If none of the freedmen should emigrate, and if the Choctaws and Chickasaws should fail to confer upon each freedman citizenship and forty acres of land, the whole of the $300,000 was to remain the property of the United States. If a part only of the freedmen should emigrate, and the Choctaws and Chickasaws should grant citizenship and forty acres of land to those refusing to emigrate, the Choctaws and Chickasaws were to receive the balance of the $300,000, after deducting the amount paid to the emigrants. Only in the event that the Choctaws and Chickasaws should grant citizenship and forty acres of land to each of the freedmen, and all the freedmen should refuse to emigrate, was the sum of $300,000 to become wholly the property of the Choctaws and Chickasaws.

But this sum was not, nor was any part of it, to be paid to the Choctaws and Chickasaws, as the *consideration* for the cession of the leased district. It was to be paid to them as a consideration for the grant of forty acres of land and of citizenship, including the right of suffrage, to each of their freedmen.

In accordance with the stipulations of article 46, the United States loaned to the Choctaws and Chickasaws the sum of $200,000. This loan was to be repaid out of the $300,000 mentioned in the first article, if that money should become the property of the Choctaws and Chickasaws. If it should not become their property, the loan was to be repaid out of any funds of those nations in the treasury of the United States.

But the counsel for the appellants contended that the "fifth proposition" was embodied in articles 30, 31 and 37 of the treaty of 1866. In order correctly to understand this branch of the case, it will be necessary to consider this "fifth proposition," in connection with certain

provisions of the treaty of 1866. The following is the fifth proposition, in the form set forth by Mr. Cooley, president of the council, and commissioner of Indian affairs, on page 34 of his annual report for the year 1865.

A part of the Indian country to be set apart, *to be purchased*, for the use of such Indians, from *Kansas or elsewhere*, as the government may desire to colonize therein.

The following is the form reported on page 319 by Mr. Mix, the secretary of the council.

A portion of the lands, hitherto owned and occupied by you, must be set apart for the friendly tribes, *now in Kansas and elsewhere*, on such terms as may be agreed upon, by the parties, and approved, by the government, or such as may be fixed by the government. [sic.]

The proposition, in the second form above set forth, which, for the present, I will suppose to be the correct form, required lands to be set apart for two distinct classes of Indians, (1) friendly tribes *then* in Kansas, and (2) friendly tribes *then* located "*elsewhere*." The word "elsewhere" embraced any and all country, in which such tribes were *then* located, except the state of Kansas. This word being present in the fifth proposition, that proposition is obviously not embodied in article 30 of the treaty of 1866. For the provisions of that article have no applicability to tribes not located either in Kansas or north of the Indian Territory.

The assumption that the word "*elsewhere*" covered no localities within or west of the Indian Territory, but only localities north of that Territory, is not warranted by anything in the context of the fifth proposition, or in the proceedings of the Fort Smith council, or in the facts of the case. On the contrary, Mr. Cooley, the president of the commission, said to the Indians that the commissioners were empowered to treat with the delegates of the tribes located *within* the so-called *Indian Territory*, and others living *west and north* of that Territory. The Choc-

taws, Chickasaws, Cherokees, Creeks and Seminoles were not the only Indians, to whom the seven propositions were addressed. As shown on page 318 of the report of the commissioner of Indian affairs for 1865, these propositions were addressed to seventeen different tribes. Having enumerated these tribes, Mr. Cooley on the second day of the Fort Smith council said to the Indians:

> We, as representatives of the president, are empowered to enter into new treaties with the proper delegates of the tribes located within the so-called Indian Territory, and others, above named, living west and north of the Indian territory. Rec. 75.

He stated that the agents would be supplied with printed copies of the address; and they were requested to go with interpreters, to their respective tribes for the purpose of fully explaining what was said therein. Wichita delegates attended the council. So did the agent of the Wichita and affiliated bands.

The counsel for the appellants insisted that the leased district could not have embraced any of the land required, by the fifth proposition, to be set apart for friendly Indians, because that proposition required "a portion of the lands hitherto owned and *occupied*" by the Indians, to whom the seven propositions were addressed, to be set apart for friendly Indians. He regarded the word "occupied" as decisive on this point. He asserted that "it does not appear" that the Choctaws and Chickasaws "occupied any of the leased district," in 1866.

I think that he not only mistook the effect of the word "occupied," as used in this proposition, but also overlooked the circumstances which occasioned its use, as well as the facts connected with the occupancy of the leased district. He assumed that the import of the fifth proposition was that the lands, to be set apart for friendly Indians, should be, not only owned, but *actually* "*occupied*"

by the Indians who set them apart for that purpose. Now the Chickasaw district contains 4,650,935 acres of land. But in 1866 the Chickasaws, including men, women and children, numbered less than 4,650. There must have been, at that time, less than 1,500 Chickasaw families. If each family had "occupied" 500 acres, they would have occupied less than 750,000 acres,—less than one-sixth of the district. But, in fact, they must have occupied less than one-twelfth of their land. And yet, upon the assumption of the counsel for the United States, the portion, to be set apart for friendly Indians, was to be taken from the one-twelfth which they occupied, and not from the eleven-twelfths which they did not occupy.

Perhaps it will be said that if land was owned by *one* tribe, and not occupied by *another*, it was, in the sense of the fifth proposition, constructively, although not actually, occupied by the Indians who owned it. This would end the controversy, so far as the bulk of the leased district is concerned. For the Choctaws and Chickasaws owned the whole of the leased district, in 1866, and only a very small part of it was occupied by other tribes.

But counsel may contend that the so-called lease, of the land between the 98th and 100th meridians, to the United States, *per se* terminated the occupancy of the Choctaws and Chickasaws. This contention is inconsistent, not only with the general nature and scope of the lease, but also with particular words used therein, with other provisions of the treaty of 1855, and with provisions of the Choctaw constitution of 1860. The so-called lease amounted to nothing more than a permit to and undertaking by the United States to settle Indians on the land. It had not the qualities of an ordinary lease. The ordinary lease confers upon the lessee the right to occupy the land, and transfers the lessor's occupancy to the lessee.

But this so-called lease did not confer upon the United States the right ever to occupy the land,—did not transfer the occupancy of the Choctaws and Chickasaws to the United States. It merely authorized the United States to place Indians upon the land.

Upon the location of a tribe, or band, of Indians on any part of the land, by the United States, the occupancy of that part of the land, by the Choctaws and Chickasaws, was suspended. Until they were placed there, the occupancy of the Choctaws and Chickasaws, whatever it was, remained unchanged. The lease conferred upon the United States no power to make any change, in the status of the land, or in the relations of the Choctaws and Chickasaws thereto, otherwise than by placing Indians on the land. If the man who owns and occupies a farm, a part of which is wild land not in *actual* use, occupies the wild land, as well as the cultivated fields, certainly the Choctaws and Chickasaws, in 1855, occupied all the leased district, and in 1866, occupied all of that district, except the small portions occupied by other Indians.

The treaty of 1855, the very treaty by which the land, between the 98th and 100th meridians, was leased to the United States, provided that this land should be a part of the Choctaw district, accessible to Choctaw officers and Choctaw people. Article 2, of that treaty, having defined the boundaries of the Chickasaw district, as they now exist, article 3 was framed as follows :

Article 3. The remainder of the country held in common by the Choctaws and Chickasaws shall constitute the Choctaw district; and their officers and people shall, at all times, have the right of safe conduct and free passage through the Chickasaw district. Appendix, 87.

The first clause of this article made the land between the 98th and 100th meridians a part of the Choctaw district. The last clause was necessary, because the first clause placed the Chickasaw district between two parts of

the Choctaw district. Again, there is a provision in the eleventh article of the treaty of 1855, which, not only recognizes the continuance of the general occupancy of the Choctaw and Chickasaw nations, but continues the right of the citizens of those nations to settle on particular tracts:

Provided, however, the territory, so leased, *shall remain* open to settlement by Choctaws and Chickasaws, *as heretofore*.

Moreover, the Choctaw constitution of 1860 contains the following provisions:

District Boundaries.

For the convenience and good government of the people of the Choctaw nation, we do make, ordain and establish four districts, in this nation, to be known by the following names and boundaries, viz. Mosholatubbee district, Pushamataha district, Apuckshunnubbee district and Hotubbee district. * *

The boundaries of Hotubbee district shall be embraced within the limits of the ninety-eighth and one hundredth degree of west longitude, and between Red river and Canadian river, known as the "Lease Land."

Article 4, Judicial Department.

Section 2. Until Hotubbee district shall be duly organized, and officers elected therein, under this constitution, the supreme court shall be composed of three supreme judges, one to be chosen from Apuckshunnubbee district, one from Pushamataha district, and one from Mosholatubbee district, one of whom shall be styled chief justice and two of whom shall constitute a quorum to do business.

Article 7, General Provisions.

Section 1. Until Hotubbee district shall be duly organized, the principal chief of the Choctaw nation shall exercise such authority, over *the citizens of this nation, living in that district*, as he may deem expedient for the protection of person, life, and property.

These documents, taken together, *amount to a recital that the leased district was occupied, to a greater or less extent, by Choctaws;* and that recital is competent *prima facie* evidence of the fact recited. For when any fact of a public nature is relevant to the issue, any statement of it, made in a constitution, public law, or treaty, is relevant and competent *prima facie* evidence of such fact. Rex *v.* Francklin, 17 State Trials, 636; Rex *v.* Sutton, 4 Maule and Selwyn, 532.

The object which the commissioners had in view, in the use of the words "owned and occupied," in the fifth proposition submitted to the seventeen tribes, was not to exempt tribes, owning but not occupying lands, from the requirement to stipulate, in their treaties, to set apart portions of such lands for friendly Indians; but to exempt tribes, like the Wichita and affiliated bands, occupying but not owning lands, from the requirement to stipulate, in their treaties, to set apart portions of such land for friendly Indians. Such must be the effect of the use of these words. For this is the only rational explanation of their use. The requirement that a tribe should set apart a portion of the land, which it owned and occupied, but not a portion of the land, which it owned and did not occupy, would not have been a reasonable requirement. It would have imposed an obligation unnecessarily and uselessly burdensome. The reasonable requirement would have taken the opposite direction. If any discrimination was to be made, between lands owned and occupied and lands owned and not occupied, such discrimination, in order to be reasonable, must have subjected to contribution, not the occupied but the unoccupied lands.

The effect of this proposition, of article 11, to the Choctaw and Chickasaw legislatures, to admit civilized Kansas Indians to the Choctaw and Chickasaw country east of the 98th meridian, if it had been adopted by those legislatures, would have been, not to secure a transfer of the trust, of which the United States were trustees, from the leased district to the territory east of the 98th meridian, but only to enlarge the territorial area covered by the trust, so far as the Kansas Indians were concerned. The effect would have been, not to deprive the United States of the right to locate Kansas Indians in the leased district, but to secure, to the United States, additional land, for

the settlement of the Kansas Indians. Under article 3, the leased district would have still remained subject to the condition to settle Kansas Indians, as well as other Indians, on the land.

The eleventh article of the treaty submitted to the Choctaw and Chickasaw legislatures the determination of the question, whether the Choctaw and Chickasaw lands should be surveyed and allotted. In the same article, it was provided that if they should decide in favor of such survey and allotment, the survey should be made at the cost of the United States. In article 12, it was provided that maps of the surveys should be made and returned to the land office, at Boggy Depot, and that a notice of such return should be given for ninety days thereafter. In articles 15 and 25, it was provided that during ninety days, after the expiration of such notice, the Choctaws and Chickasaws should have the exclusive right to make their selections from the surveyed lands. And, in sections 1 and 30, it was provided that, *after the expiration* of the ninety days, during which the selections of land were to be made by the Choctaws and Chickasaws, the Kansas Indians should have a right to select lands. If the legislatures of the Choctaw and Chickasaw nations should decide to survey and allot their lands, the Kansas Indians were to become land owners and citizens in those nations. If the legislatures should decide not to survey and allot their lands, the Kansas Indians were to have no rights *under those articles*, in the Choctaw and Chickasaw nations.

But the counsel for the appellants contended that article 31 provided for the admission of the Kansas Indians, into the Choctaw and Chickasaw nations, *immediately after the ratification of the treaty*. I do not so understand that article. I think it authorized their admission immediately *after*, but not before, *a determination, by the Choctaw and*

Chickasaw legislatures, to survey and allot the lands. Among the difficulties, encountered by our opponents' theory of this article, are the following:

(1) If the United States had admitted the Kansas Indians, to the Choctaw and Chickasaw nations, immediately after the ratification of the treaty, they would have been bound to remove them when the legislatures of those nations decided not to survey and sell their lands.

(2) If the language of the treaty were this: "Whereas *some time must necessarily elapse before the Choctaw and Chickasaw legislatures can act upon the question of surveying and allotting the Choctaw and Chickasaw lands, during which time* the United States may desire to remove the said Indians from their present abiding places, it is hereby agreed that the said Indians, may at once come into the Choctaw and Chickasaw nations, settling themselves temporarily as citizens of said nations,"—if this were the language of article 31, it might, of course, be claimed that the United States had secured an arrangement for the admission of the Kansas Indians immediately after the ratification of the treaty, the Indians being liable to summary removal, in the event of adverse action by the Choctaw and Chickasaw legislatures.

But the provision of article 31 is very different. It is this: "And whereas *some time must necessarily elapse, before the surveys, maps, and selections,* herein provided for *can be completed,* so as to permit the said Kansas Indians to make their selections, in their order, *during which time* the United States may desire to remove the said Indians, &c." The time, during which the United States might desire to change the location of the Kansas Indians, was, by the terms of the article, made to commence, *not with the ratification of the treaty, but with the commencement of the surveys.* Now the surveys and the completion of the

maps, exhibiting not only the subdivision lines, but also "as far as practicable the outlines of the actual occupancy of members of the said nations, respectively," would necessarily have been the work of many months, if not of several years; and, therefore, it was important, to the United States, to secure the admission of the Kansas Indians immediately after the determination, by the Choctaw and Chickasaw legislatures, of the question on which hinged the question of admitting or excluding those Indians.

My construction of article 31 is confirmed by the fact that the United States never settled any Kansas Indians, or other Indians, in the country of the Choctaws and Chickasaws east of the 98th meridian.

The fifth proposition is not "embodied" in article 37 of the treaty. That article relates only to the terms, on which the Kansas Indians were to be admitted to the country of the Choctaws and Chickasaws, if their legislatures should determine to survey and allot their lands. And the terms prescribed, in article 37, are not the terms prescribed in the fifth proposition. The fifth proposition required the terms to be fixed, either by the parties, with the approval of the government, or by the government itself. Article 37 requires the terms to be fixed, neither by the parties, with the approval of the government, nor by the government, but by the Choctaw and Chickasaw legislatures, within limits precribed in the treaty.

There is another reason why articles 30, 31, and 37 fail to "embody" the fifth proposition. That proposition contained the word "*must*." "A portion of the lands * * *must* be set apart." This language is imperative. It is not satisfied by a conditional stipulation,—a stipulation to take effect, *if* the Choctaw and Chickasaw legislatures shall so decide. It requires an unconditional stipulation,—a stipulation to take effect when the treaty is rati-

fied. But articles 30, 31, 37 contain no such unconditional stipulation. It was left to the legislatures of the Choctaw and Chickasaw nations to say whether the Kansas Indians should be admitted to their country east of the 98th meridian; and their legislatures said "no." The result was that no provision was consummated, in this treaty, for the admission of the Kansas Indians to any part of the Choctaw and Chickasaw territory, except in the third article of the treaty.

But there is still another reason why articles 30, 31, and 37 fail to "embody" the fifth proposition. That proposition requires land to be set apart for "friendly Indians in Kansas or elsewhere," (including of course friendly Indians north of the Indian Territory) whether such Indians are, or are not, civilized. But the provision of articles 30, 31, and 37, conditional as it is, only applies to civilized Indians. Articles 30, 31, and 37 exclude, while the fifth proposition includes, uncivilized friendly Indians north of the Indian Territory.

The result is that article 30, even if it could, as it could not, have become operative, without the antecedent consent of the Choctaw and Chickasaw legislatures to the survey and allotment of the Choctaw and Chickasaw lands, would have wholly failed to "embody" so much of the fifth proposition as related to Indian tribes other than those located north of the Indian Territory. The conditional stipulation, embraced in this article, did not become operative because the Choctaw and Chickasaw legislatures did not consent to the survey and allotment of the Choctaw and Chickasaw lands. If it had become operative, it would only have met the requirements of the fifth proposition as to the northern Indians. But inasmuch as it was a *conditional* stipulation, which was not to take effect unless, or until, the legislatures of the Choctaw and

Chickasaw nations should decide to survey and allot their lands, this article 30 did not practically meet the requirements of the fifth proposition that "land *must* be set apart," *even as to the northern Indians.* It only provided that lands should be set apart for them, *if the Choctaw and Chickasaw legislatures should thereafter so decide.*

The dissenting judge says, on page 82, that, "by articles 30, 31, 37 of the treaty last named, it is provided that the Choctaw and Chickasaw nations will receive, even before a survey of the lands has been made, civilized Indians from the tribes generally known as the Kansas Indians, being to the north of the Indian Territory, not exceeding 10,000 in number, into their respective districts east of the ninety-eighth degree of west longitude, &c.," and that "those provisions are in accord with the fifth proposition." But he overlooks these two facts, among others: (1) that the condition of the admission of those Indians was that the Choctaw and Chickasaw legislatures should first consent to the survey and allotment of their lands; and (2) that those legislatures refused to consent to such survey and allotment.

Inasmuch as article 30 did not set apart any land for the settlement of Indians, but merely left it to the Choctaw and Chickasaw legislatures to determine whether any land east of the 98th meridian should, or should not, be set apart for that purpose, it follows that, unless the cession of article 3 was a cession in trust for the settlement of Indians on the land between the 98th and 100th meridians, there was, in the treaty of 1866, no compliance with the requirement, of the fifth proposition, that land should be set apart, by the treaty, for Indian settlement; and no land was set apart, by the treaty, for that purpose. If the cession of article 3 was not a cession in trust for the settlement of friendly Indians in the leased district, the treaty

of 1866, instead of conveying the land, in fee, to the United States, in trust for the settlement of friendly Indians on the land, actually empowered the United States to extinguish the leasehold title, which had been secured by the treaty of 1855, to Indians settled on the land and left the United States free to appropriate to their own use the proceeds of the 7,713,239 acres of land, between the 98th and 100th meridians, after having shaken off their obligation to compensate the Choctaws, for the 8,000,000 acres ceded to Spain, by the payment of five cents per acre therefor.

One of two things, therefore, must be true. It must be true that the cession of article 3 was a cession, in trust, for the settlement of friendly Indians on the land; or it must be true that, so far as the Choctaws and Chickasaws were concerned, the authorities of the United States used the fifth proposition merely as a pretext, to cover the acquisition of an absolute title to the leased district, exempt from a trust for the settlement of Indians, and open to general settlement. There is no ground for this grave charge against the commissioners who negotiated the treaty, or the senate who advised its ratification, or the president who ratified it.

It appears, then, that no consideration for the cession is *expressed* in the treaty of 1866, and also that the fifth of the Fort Smith propositions is not *expressly* incorporated into any of the provisions of that treaty. But the leased district contains 7,713,239 acres of land. The minimum and maximum prices of pre-empted public lands, fixed by the act of May 20, 1862, 12 Stat. 392, were $1.25 and $2.50, respectively, per acre, which must have been less than their cash value. These lands were then worth $9,647,798 or $19,295,596. According to Senate Report No. 552, 52d Congress, 1st session, pages 10 and 16, the value of these lands, in 1892, exceeded

$40,000,000. The assumption that the Choctaws and Chickasaws would have conveyed, or the United States would have consented to acquire, lands of such value, without any consideration, would of course be unreasonable. It would seem that there must have been some *implied* consideration for the cession.

But if the conveyance was absolute, no consideration can be discovered, unless the price paid for the land was the pardon of the Choctaws and Chickasaws for their participation in the war of the rebellion. This supposition seems to be excluded by the fact that the Cherokees, Creeks and Seminoles also participated in the rebellion, and yet no authority has ever denied that their cessions, made also in 1866, were conditional conveyances. If, on the other hand, the cession of the Choctaws and Chickasaws was a conditional cession, for the settlement of Indians on the land, a consideration for the conveyance is easily found. The condition to settle Indians on the land constituted the consideration.

Possibly an additional element of the consideration is to be found in an implied contingent purpose to locate, in the leased district, such Choctaw and Chickasaw freedmen as should be willing to emigrate from the Choctaw and Chickasaw nations. A careful analysis of the provisions of article 3 of the treaty will, I think, suggest such a possible element of the consideration. For the United States did undertake to remove such of the Choctaw and Chickasaw freedmen as should be willing to emigrate. But if they were to remove them, it would be necessary to locate them somewhere. There was no land accessible, at that time, for that purpose, except the leased district.

I submit, therefore, that the treaty, on its face, strongly suggests that the cession was, not an absolute, but a conditional conveyance.

V.

The subsequent action of the executive department of the government of the United States.

The dissenting judge is of the opinion that the proofs, which I am about to offer as aids in the interpretation of this treaty, are not admissible because interpretations of a law or treaty, by officials charged with its execution, are not competent proofs when the provision to be interpreted has only one possible meaning. But if the word "cede" may be used, in a treaty, in many different senses, as I have attempted to show, there would seem to be no valid objection to the use of these proofs, even if they amounted to nothing more than interpretations of the treaty by officials charged with its execution.

1. The commissioners, who represented the United States at the Fort Smith council, in 1865, were D. N. Cooley, Elijah Sells, Thomas Wistar, W. S. Harney and E. S. Parker. Mr. Cooley was president of the council, and was also, at the time, commissioner of Indian affairs. In his annual report for 1865, he said:

> With the Choctaws and Chickasaws a treaty was agreed upon, based on the seven propositions heretofore stated, in addition to which these tribes agreed to a thorough friendly union among their own people and forgetfulness of past doings and the opening of the leased lands to the settlement of any tribes whom the government of the United States might desire to place thereon. * * * This treaty, after its approval by the councils of the Choctaws and Chickasaws, is to be signed, in this city, by three delegates from each nation, to be sent here for that purpose.

2. The commissioner of Indian affairs, who presided in the negotiation of the treaty of 1866, in his report for 1866, relating to that treaty, said:

> Four principal points came up for settlement, to wit: * Cession of lands by the several tribes, to be used for the settlement thereon of Indians whom it is in contemplation to remove from Kansas. * The first tribe, with which arrangements were consummated, were the Seminoles. *

The Indians cede the government the entire domain secured to them by the treaty of 1856. * The next treaty, in this series, was made with the confederate nations of Choctaws and Chickasaws. * The Indians cede to the government the whole of that tract of land known as the leased lands. * Appendix, 157.

If this language of the commissioner implies that either one of these cessions was a conveyance in trust, it obviously implies that the other was a conveyance in trust. He makes no discrimination between them. And yet, under the treaty of 1866, the United States paid the Seminoles for this cession, as a conveyance in trust, the sum of $325,362; and afterwards, under the act of March 2, 1889, 25 Stat. 1004, paid them, for an absolute cession of the same land, the additional sum of $1,912,942.02.

3. The secretary of the interior in an official communication dated May 1, 1879, said:

* The title acquired by the government, by the treaties of 1866, was secured in pursuance and furtherance of the same purpose of Indian settlement, which was the foundation of the original scheme. That purpose was the removal of Indian tribes from the limits of the political state and territorial organizations, and their present permanent location upon other lands sufficient for the needs of each tribe. These lands being ample in area for the purpose, it has become a settled policy to locate other tribes thereon, as fast as arrangements can be made; and provision has been constantly made, by treaties, agreements and acts of congress, to effect these objects.

That purpose is expressly declared in the said treaties. The cessions of the Creeks and Seminoles are stated to have been made, "in compliance with the desire of the United States to locate other Indians and freedmen thereon." These words must be held to create a trust equivalent to what would have been imposed had the language been, "for the purpose of locating Indians and freedmen thereon."

The lands ceded by the Choctaws and Chickasaws were, by article 9 of the treaty of June 22, 1855, "leased to the United States, * for the permanent settlement of the Wichita and such other tribes, or bands, of Indians, as the government may desire to locate therein." The treaty of 1866 substituted a direct purchase for the lease, but did not extinguish or alter the trust. App. 16.

4. In the president's proclamation of February 12, 1880, relating to the Indian Territory, he says:

Which territory is designated, recognized, and described by the treaties and laws of the United States, and by the executive authorities, as Indian country, and, as such, *is subject only to occupation by Indian tribes*, officers of the Indian department, military posts, and such persons

as may be privileged to reside and trade therein, under the intercourse law of the United States. (App. 168

5. The report of the Indian office, transmitted by the secretary of the interior to the president, February 17, 1882, contains the following statements:

The lands to which the United States holds the legal title, within the Indian Territory, are reserved, by treaty stipulation and acts of congress, and are not, and never have been, public lands subject to general occupation.

The treaties, by which the United States acquired title to any of the lands in the Indian Territory, or obtained the conditional right to control the disposal of any of said lands, were the treaties with the Seminoles of March 21, 1866, with the Choctaws and Chickasaws of April 28, 1866, with the Creeks of June 14, 1866, and with the Cherokees of July 19, 1866.

The lands reconveyed to the United States by the foregoing treaties are, therefore, held subject to the trust named. They can be appropriated only to the uses specified, and to those only by the United States, and then only in the manner provided by law. Miscellaneous immigration, even by the intended beneficiaries, would be unauthorized and illegal.

The Choctaw and Chickasaw cession of April 28, 1866, (14 Stats. 769), was by the tenth section thereof made subject to the conditions of the compact of June 22, 1855 (11 Stats. 613), by the ninth article of which it was stipulated that the lands should be appropriated for the permanent settlement of such tribes, or bands, of Indians as the United States might desire to locate thereon.

The title of the United States to lands in the Indian Territory is, as heretofore shown, subject to specific trusts, and it is not within the lawful power of either the legislative, or executive, departments of the government, to annihilate such trusts, or to avoid the obligation arising thereunder. Such trusts are for the benefit of Indian tribes and Indian freedmen. App. 169

6. A report of the Indian office, dated January 31, 1884, transmitted by the secretary of the interior to the senate, contains the following statement relating to the Indian Territory:

No part of said territory remains free from appropriation either to a direct trust, assumed by treaty, or by reservations for tribes thereon under executive order, except that portion still claimed by the state of Texas, and lying between Red river and the North fork of the same. (App. 17

7. On the 14th of February, 1884, the secretary of the interior, in response to a resolution of inquiry adopted by the senate, said:

These lands were acquired by treaties with the various Indian nations or tribes in that territory in 1866, to be held for Indian purposes, and to some extent for the settlement of the former slaves of some of said nations, or portions thereof. Such are the purposes for which said lands are now being used or held according to the common understanding of the objects of the treaties by which they were acquired, and from these arise the necessity for, or obligation to keep said lands in their present condition of occupancy or otherwise.

8. A proclamation of the president, dated July 1, 1884, relating to the Indian Territory, contains the following statement:

Which territory is designated, recognized, and described by the treaties and laws of the United States and by the executive authorities as Indian country, and as such is subject to Indian occupation only.

9. In an official communication from the secretary of the interior to the president relating to the Indian Territory, dated January 26, 1885, the secretary refers to a former decision, "that no part of said territory remains free from appropriation, either to a direct trust assumed by treaty, or by reservations for tribes thereon under executive order, except that portion still claimed by the state of Texas and lying between Red river and the North fork of the same," and says:

This status of the land, as thus determined, has been adhered to by this department; and on April 26, 1879, February 12, 1880, and in July, 1884, proclamations were issued by the president, warning unauthorized persons against going upon these lands.

Objection will be made to the occupation of any part of the Indian Territory by other than Indians, on the ground that the government set apart the territory for the exclusive use of the Indians and covenanted that no others should reside therein. It is not denied that the treaties so provide. It is, however, within the power of the government, with the consent of the Indians interested, to change this provision of the treaties so that these desirable unoccupied lands may be placed within the lawful reach of the settlers.

10. An official report of the Indian office, dated January 26, 1885, contains the following:

The title acquired by the government, by the treaties of 1866, was secured in pursuance and furtherance of the same purpose of Indian settlement which was the foundation of the original scheme. That purpose was the removal of Indian tribes from the limits of the political state and territorial organizations, and their permanent location upon other lands sufficient for the needs of each tribe.

These lands being ample in area for the purpose, it has become a settled policy to locate other tribes thereon, as fast as arrangements can be made, and provisions have been constantly made, by treaties, agreements, and acts of congress, to effect these objects. App. 171.

The foregoing documents are official acts of the president, secretary of the interior and commissioner of Indian affairs. They are something more than mere interpretations of the treaty. They are adjuncts,—or rather integral parts of the acknowledgment of the trust which was consummated by the act of congress approved March 3, 1891. On page 89, the dissenting judge says: "The claimants are seeking an interpretation of the treaty from external facts which question the good faith and acts of the treaty-making power. That, I contend, the congress have not committed to judicial scrutiny or action." It is difficult to see how a request for such an interpretation of the treaty, as shall carry out the intent of *both parties*, can be justly characterized as an imputation on the good faith of the treaty-making power. In view of the fact that, until the time of Secretary Noble, the president and senate, constituting the treaty-making power, and also the secretaries of the interior and the house of representatives, all, without exception, held this cession to have been intended as a conveyance in trust, this statement of the dissenting judge would seem to be an evident mistake. If there is any imputation of improper action, on the part of the United States, in this transaction, it would seem to come from those who assert that the treaty-making power obtained, from the Choctaws and Chickasaws, for a merely nominal consideration, an absolute conveyance of 7,713,239 acres of land.

VI.

Subsequent action of congress.

In 1889 the demands of the whites, for the lands of the Indians within the Indian Territory, had become as clamorous as they had been seventy years before for their lands east of the Mississippi river. The government was compelled to abandon the policy, which had dedicated the Indian Territory to the exclusive use of the Indians, and to take measures to secure large bodies of land, in that territory, for general settlement, under the laws of the United States applicable to public lands. But the treaties of 1866 were obstacles to the execution of this new policy. The government removed these obstacles, to a considerable extent, by payments to the civilized tribes as follows, viz: to the Creeks, for an absolute conveyance of their land, $2,280,857.19, in addition to the sum of $975,168, which had been paid for the conditional conveyance of 1866; to the Seminoles, for an absolute conveyance of their land, $1,912,942.02, in addition to the sum of $325,362 paid for the conditional cession of 1866; to the Cherokees $1.42 per acre; and to the Choctaws and Chickasaws $2,991,450, for the Cheyenne and Arapahoe reservation.

The 15th section of the act of congress approved March 3, 1891, 26 stat. 1025, contains the following provision:

> And the sum of two million nine hundred and ninety-one thousand four hundred and fifty dollars be and the same is hereby appropriated, out of any money in the treasury not otherwise appropriated, to pay the Choctaw and Chickasaw nations of Indians for all the right, title, interest, and claim, which said nations of Indians may have in and to certain lands now occupied by the Cheyenne and Arapahoe Indians under executive order; said lands lying south of the Canadian river, and now occupied by the Cheyenne and Arapahoe Indians; said lands have been ceded in trust, by article three of the treaty between the United States and the

said Choctaw and Chickasaw nations of Indians, which was concluded April 28, 1866, and proclaimed on the 10th day of August of the same year.

For more than a quarter of a century the government had invariably held the cession of 1866 to be a cession in trust, when President Harrison, on the 18th of February, 1892, sent a message to congress, giving his reasons for delaying the payment of the money appropriated by the act of March 3, 1891, and expressing the opinion that the treaty had invested the United States with the absolute beneficial ownership of the land. This message was referred to the committee on Indian affairs, in each house of congress. The senate committee submitted Senate Report No. 552, 52d Congress, 1st session, and with the report the following resolution:

Resolved, That for reasons set forth in the report of the Committee on Indian Affairs upon the president's message of February 18, 1892, upon the appropriation of March 3, 1891, for payment to the Choctaw and Chickasaw nations for their interest in the Cheyenne and Arapahoe reservation, in the Indian Territory, submitted with this resolution, that it is the opinion of the Senate that there is no sufficient reason for interference in the due execution of the law referred to. Appendix, 239

The debate commenced April 27, 1892; and on the 9th of May the senate came to a vote. An amendment was proposed as follows:

Provided, however, that, in the opinion of the senate, the president should require the leases and the conveyances, which shall be executed by the Choctaw and Chickasaw nations of Indians, mentioned in said appropriation, to contain a full and complete relinquishment of all the right, title, interest, and claim of said nations of Indians in and to all the lands between the 98th and 100th meridians of west longitude, formerly owned by them, and of all claim to reimbursement and compensation for and on account of the same. Appendix, 239.

This amendment was rejected by a vote of yeas 13, nays 41. The resolution was then adopted by a vote of yeas 43, nays 13. Cong. Rec. 52d Cong. 1st sess., p. 4093. The house of representatives by a vote of yeas 163, nays 47, adopted a resolution in the identical words of the senate resolution.

On the 17th of December, 1892, the house of representatives adopted the following resolution:

Resolved by the senate and house of representatives, that the secretary of the treasury be, and he is hereby, directed to retain and cover back into the treasury $48,800 of the appropriation made by congress, to pay the Choctaw and Chickasaw tribes of Indians for their interest in land of the Cheyenne and Arapahoe reservation, dated March 3, 1891, which amount has been ascertained, by a recount of the allottees of the said Cheyennes and Arapahoes, to be, by that amount, more than is due the said Choctaws and Chickasaws, upon the purchase and settlement for their said interest. App. 46.

The senate adopted the following amendment to this resolution, in which amendment the house concurred:

Provided, however, that neither the passage of the original act of appropriation to pay the Choctaw and Chickasaw tribes of Indians, for their interest in the lands of the Cheyenne and Arapahoe reservation, dated March 3d, 1891, nor of this resolution shall be held, in any way, to commit the government to the payment of any further sums to the Choctaw and Chickasaw Indians, for any alleged interest in the remainder of the lands situate in what is commonly known and called the leased district. App. 47.

The reasons assigned by the president, for his refusal to execute the law, were met by the committee as follows:

In the message of the president, transmitted to congress February 17, 1892, he says:

"After a somewhat careful examination of the question I do not believe that the lands for which this money is to be paid were, to quote the language of section 15 of the Indian appropriation bill already set out, 'ceded in trust by article 3 of treaty between the United States and said Choctaw and Chickasaw nations of Indians, which was concluded April 28, 1866.'"

The president is of the opinion that the lands in question were not ceded in trust to the United States by this treaty. He thinks that an absolute, unqualified title was conveyed by the treaty, and as he elsewhere says, that the United States paid the Choctaws and Chickasaws therefor the sum of $300,000. On the contrary, your committee believe that the estate conveyed was a trust estate only; that whereas the treaty of 1855 empowered the United States to locate upon these lands only those Indians whose ranges were included within certain specified limits, this treaty of 1866 authorized the United States—

(1) To locate upon these lands Indians like the Cheyennes and Arapahoes, whose ranges were not within the limits designated in the treaty of 1855, and whom, prior to the treaty of 1866, the United States had no right to locate upon the lands;

(2) To locate upon the lands Choctaw and Chickasaw freedmen;

(3) Deprived the Choctaws and Chickasaws themselves of the right to settle thereon.

The treaty disposed of this sum of $300,000 as follows:

It was to remain in the treasury of the United States. If the Choctaws and Chickasaws should decide not to confer citizenship upon their freedmen, and the United States should remove the freedmen with their consent from the Choctaw and Chickasaw nations, then the sum of $300,000 was to be held in trust for the freedmen. If the Choctaws and Chickasaws should decide not to admit their freedmen to citizenship, and the freedmen should decline to be removed from the Choctaw and Chickasaw nations, then this sum of $300,000 was to remain the property of the United States. But if within two years the freedmen should be invested with citizenship, and should refuse to leave the Choctaw and Chickasaw nations, then, and only then, was the money to be paid to the Choctaws and Chickasaws.

The purpose of this provision relating to the $300,000 was not to pay for the land. Its object was to cover the cost of the removal of the freedmen if the Choctaws and Chickasaws should not admit them to citizenship, or to compensate the Choctaws and Chickasaws in some measure for the benefits conferred upon the freedmen by conferring citizenship upon them, in case this should be done. These benefits were material and substantial; in addition to all the civil and political rights enjoyed by the Indians themselves, they acquired property rights such as were conferred upon no freedmen outside of the Indian Territory. They have the free use of lands just as the Indians have, and the benefit of excellent schools, for the support of which they have never contributed in any way a single cent. To have these rights conferred upon 3,000 freedmen the government agreed to pay $300,000. The Choctaws agreed to it, the Chickasaws did not. This sum was fixed at $300,000 because the number of freedmen were estimated at 3,000, and it was agreed that each freedman, in case of removal, should receive for the expenses incident to emigration the sum of $100.

The Choctaws admitted their freedmen to citizenship and received their share of the sum of $300,000, less $7,200 paid to freedmen who promised to emigrate from the Choctaw nation. App. 208.

The committee proceed to set forth, at length, on pages 11, 12, 13, and 14 of the report, the grounds on which they base the conclusion that the estate conveyed by the treaty was a trust estate only. Their statement merits careful consideration.

The committee then reply to another statement of the president:

But the president, referring to the leased district, says:

"As to these lands, the government had already, under the treaty of 1855, secured the right to use them perpetually for the settlement of friendly Indians. This was not true as to the other tribes referred to."

This statement, if material to the question now at issue, means, first, that by the treaty of 1855 the government acquired the right to locate upon these lands *any* Indian tribes which it might be convenient for the government to locate thereon, without restriction or limitation; and, secondly, that the government, by the treaty of 1855, acquired the right to allot these lands in severalty to such Indians. On both of these points, your committee think, the president is mistaken.

The treaty of 1855 secured to the government the right to locate on the lands in controversy those Indian tribes whose homes and ranges were within certain designated limits, and no others. The following is the text of the treaty:

"The Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude, for the permanent settlement of such other tribes or bands of Indians as the government may desire to locate therein; excluding, however, all the Indians of New Mexico, and also all those whose usual ranges at present are north of the Arkansas river, and whose permanent locations are north of the Canadian river, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas."

Moreover, the treaty of 1855 did not grant, or purport to grant, to the United States any right to allot these lands in severalty to individual owners, or to transfer the ownership of the lands. As to these lands the treaty of 1855 was not a deed in fee simple, but only a lease from the Choctaws and Chickasaws to the United States. It empowered the United States, not to convey, but only to sublet the lands. The words of the treaty are:

"The Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude."

Until the Choctaws and Chickasaws assented to the provisions of the act of March 3, 1891, they were never willing nor did they ever consent that these lands should be opened to settlement by whites, or allotted, or conveyed in severalty, to whites, blacks, or Indians. (App. 218.

In answer to a third reason assigned by the president, for his refusal to execute the law, the committee say:

The president expresses the opinion that the conditions attached to the cessions in the Creek and Seminole treaties of 1866 were the same as those which were attached to the lease in the Choctaw and Chickasaw treaty of 1855, and that, therefore, the claim of the Choctaws and Chickasaws that the cession in their latter treaty of 1866 was encumbered by a condition, or trust, is not supported by any analogies of the Creek and Seminole cases. This is a mistake. The trusts created in the Creek and Seminole treaties of 1866 were trusts (1) for the location of friendly indians, in general, without restriction, and (2) for the location of freedmen. Neither of these two trusts were created by the Choctaw and Chickasaw treaty of 1855. Neither of them existed, in the case of the leased district, until created by the Choctaw and Chickasaw treaty of 1866. The trust created by the Choctaw and Chickasaw treaty of 1855 was a trust not to locate Indians in general, but to locate certain Indians whose ranges were included within the boundaries designated in the treaty. This treaty of 1855 contained no trust whatever for the location of freedmen. That trust was first created, for the leased district, by the Choctaw and Chickasaw treaty of 1866.

It is true that these two trusts of the Choctaw and Chickasaw treaty of 1866 are not created by express words qualifying the grant. But this is also true of the Creek and Seminole treaties. In those treaties the trusts are not expressed, but are implied in words used in recitals only. They are not implied in either of those treaties, in words used in the

body of the grant. The recital in each case is in the following words: "In compliance with the desire of the United States to locate other Indians and freedmen thereon," etc. The words of the grant are even stronger in the Creek and Seminole treaties than in the Choctaw and Chickasaw treaty. The Choctaws and Chickasaws "cede," but the Creeks and Seminoles "cede and convey."

These trusts in the Choctaw and Chickasaw treaty of 1866 are implied in the language of the third article, in which the words of conveyance, the statement of the consideration, and the arrangements for the freedmen are placed in such juxtaposition as not only to warrant, but to necessitate, the inference that it was the object of the parties, and the effect of the treaties, to authorize the United States to locate upon these lands Indians whose ranges were not embraced within the limits designated in the treaty of 1855, and also to locate Choctaw and Chickasaw freedmen thereon, and that the cession was encumbered by corresponding trusts.

If this be not true, if the Choctaw and Chickasaw deed of 1866 was an absolute deed, while those of the Creeks and Seminoles were only deeds in trust, then gross injustice was practiced upon the Choctaws and Chickasaws by the United States in 1866, for the Creeks then received $325,362 for a deed in trust of only 2,169,080 acres of land, and the Seminoles received $975,168 for a deed in trust of only 3,250,560 acres; but for 7,713,239 acres of land, which had been previously held by the United States under a gratuitous lease for eleven years, the Choctaws and Chickasaws received not a single penny, unless the $300,000 provided for the freedmen be erroneously reckoned as compensation to the Choctaws and Chickasaws for the grant. And now the president having, in 1889, paid the Creeks for the same lands the additional sum of $2,280,857, and having, in the same year, paid the Seminoles for the same lands an additional sum of $1,912,942 02, has, for almost twelve months, refused to pay the Choctaws and Chickasaws the amount appropriated by the act of March 3, 1891.

The committee further answer the president as follows:

The treaty between the United States and Spain, by which the United States ceded these lands to Spain, in part payment for Florida, which was ratified February 19, 1821, is designated by the president as the treaty of 1819. And he designates the treaty by which the United States had previously ceded the same lands to the Choctaws as the treaty of 1820. He says:

"The boundary between the Louisiana purchase and the Spanish possession, by our treaty of 1819 with Spain, was, as to these lands, fixed upon the one hundredth degree of west longitude. Our treaty with the Choctaws and Chickasaws, made in 1820, extended their grant to the limit of our possessions. It followed, of course, that these lands were included within the bounds of the state of Texas, when that state was admitted to the union, and the release of the Choctaws and Chickasaws, whatever it was worth, operated for the benefit of the state of Texas, and not of the United States."

These statements are altogether erroneous. They mean that the lands in question had been sold to Spain before the Choctaw treaty of 1820 was made, and so were not ceded to the Choctaws by the treaty of 1820, and, therefore, the release of 1855 operated for the benefit of Texas, whose title was derived from Spain, and not for the benefit of the United States. But the facts are as follows:

The district west of the one hundredth meridian, as already shown, belonged to France, as a part of the province of Louisiana, from 1685 to 1762. In 1762 it was ceded by France to Spain. In 1800 it was retroceded by Spain to France. In 1803 it was ceded by France to the United States. In 1820 it was ceded by the United States to the Choctaws in part payment for their lands east of the Mississippi river. In 1821, while this district was the property of the Choctaws, the United States, without their consent or knowledge, ceded it to Spain in part payment for Florida. It afterwards became successively the property of Mexico and Texas. (American State Papers, vol. 2, pp. 574, 575, 630, 634, 637, 663, 664; vol. 4, pp. 471, 473, 478, 479; Henry Clay's speech, house of representatives, April 3, 1820; sixteen European maps, eighteenth century.)

The Spanish treaty was negotiated in 1819; but it was most vehemently opposed in the congress of the United States *and was rejected by the king of Spain.* While this rejected treaty was dead the United States, in 1820, conveyed the same land to the Choctaws, without disclosing to the Choctaws the facts connected with the defunct Spanish treaty. After the treaty had been dead and buried nearly two years, it experienced a resurrection and a ratification in 1821.

The government then found itself in this embarrassing predicament: The Choctaws, by the treaty of 1820, had conveyed to the United States all their lands in the State of Mississippi, and in payment therefor the United States had conveyed to the Choctaws all the lands included within certain defined boundaries west of the Mississippi river. The deed to the Choctaws embraced the district west of the one hundredth meridian, but afterwards, in 1821, the United States, without the consent or knowledge of the Choctaws, conveyed the same lands to Spain in part payment for Florida. It then became obligatory upon the United States, as already indicated, to take one of four courses, either to reconvey to the Choctaws a part of their lands in the state of Mississippi, or to convey to the Choctaws additional lands west of the Mississippi river, or to surrender the treaty of 1820 altogether and restore to the Choctaws all their lands in the state of Mississippi, and receive back the lands ceded to them west of the Mississippi river, or, finally, to compensate the Choctaws in money for those lands west of the one hundredth meridian which had been sold to, and paid for, by them, and subsequently, without their consent, conveyed to Spain. The United States chose the latter course, and by the treaty of 1855, for the sum of $800,000, secured from the Choctaws a quitclaim of their title to these lands and a lease of the lands between the ninety-eighth and one hundredth meridians of west longitude.

The president thinks that when the Choctaws and Chickasaws, for the sum of $800,000, relinquished their right of reclamation against the United States for the alienation of their lands, by a release or quitclaim of their interest in those lands, this release "operated for the benefit, not of the United States, but of the owner deriving title from Spain." But the Chickasaws assert, with good reason, as your committee think, that when they furnished the United States 6,589,440 acres of land, which was actually applied by the United States in part payment for Florida, the transaction inured to the benefit of the United States. They think that when an individual furnishes a debtor means to pay his debts, the transaction inures to the benefit of the debtor. But then it is not true that 'our treaty with the Choctaws and Chickasaws, made in 1820, extended their grant to the limit of our possessions." There was no such pro-

vision in the treaty of 1820. It occurred, for the first time, in the treaty of 1830, made ten years after the land had been sold to the Choctaws; and, while it did deprive the Choctaws of that part of their land which was sold to Spain in 1821, it did not curtail the area actually ceded by the United States to the Choctaws in 1820, nor did it impair their right of reclamation against the United States. App. 222.

The president, in his message of February 17, 1892, expressed the opinion that a considerable part of this sum of $800,000, was probably intended as rent for the leased district. He said:

It seems probable that a very considerable part of this consideration must have related to the leased lands, because these were the lands in which the Indian title was recognized and the treaty gave to the United States a permanent right of occupation by friendly Indians. App. 224

To this suggestion of the president the senate committee replied as follows:

One of the grounds assigned for the president's opinion is that the Indian title to the leased lands "was recognized" by the United States. This implies that the Indian title to the lands west of the one hundredth meridian was not recognized by the United States. But your committee think that this fact, if it were a fact, would have no bearing whatever upon the question of the apportionment of the consideration of $800,000 as between the conveyance and the lease. The Indians themselves recognized the fact that the legal title conveyed to them in 1820 had been extinguished by the conveyance to Spain in 1821. They knew that the United States, a sovereign power, invested with the right of eminent domain, had ceded their lands, by a valid treaty, to the king of Spain. But they believed that the ratification of the Spanish treaty in 1821 had not extinguished their right of reclamation against the United States for this transfer of their lands without their consent to a foreign power.

Your committee, therefore, believe that the entire sum of $800,000, paid in pursuance of the treaty of 1855, was but a small part of the value of the 6,589,440 acres of land west of the one hundredth meridian, and that the whole of that sum was fairly applicable to the quitclaim or release of that land west of the one hundredth meridian. App. 224

Further answering the president the committee say:

The president thinks that if an Indian nation, being the owner of a tract of land purchased from the United States and fully paid for, cedes the land back to the United States, by a conveyance in trust, the terms of the trust permitting the location of other Indians and of freedmen upon the land, but interdicting the location of white men thereon, the United States can evade the interdict, by locating other Indians upon the land and purchasing from them a release from the interdict, and can then open the land to settlement by white citizens. He thinks that, upon the assumption that the Choctaws and Chickasaws, in their lease of 1855 and in their cession of 1866, interdicted the location of whites upon the leased district, it was nevertheless competent for the United States

to cede the land to the Cheyennes and Arapahoes and then purcha
from the Cheyennes and Arapahoes their interest in the land, with t
right to open it to "white settlement," and that, by this device, t
United States could evade the interdict of the Choctaws and Chickasaw
He thinks that if the United States, after paying the Cheyennes a
Arapahoes for their interest in the lands, should be required to pay t
Choctaws and Chickasaws for exemption from the restrictions impos
by their conveyance, then the United States would, in effect, be r
quired to pay twice for the privilege of opening the land to "white se
tlement," or, as he expresses it, would be compelled to pay twice for t
same land.

On this point your committee are constrained to differ in opinion wi
the president. It certainly was competent for the United States
locate Cheyennes and Arapahoes upon these lands and afterward to pa
them whatever the United States saw fit to pay for a quitclaim of the
interest in the land and for their consent to the location of whit
thereon. But whatever effect such an arrangement might have as b
tween the United States and the Cheyennes and Arapahoes, it cou
have no effect whatever to release the United States from the restri
tions imposed in the treaties of the Choctaws and Chickasaws. In t
same way an individual holding land in trust might, by purchasing fro
his own grantee a release from the obligation of the trust imposed b
his grantor, divest his title of the trust and invest himself with an abs
lute title, and then resist his grantor's demand for redress by setting u
his grantee's release and his own payment to his grantee for such releas
If the United States saw fit not only to give the Cheyennes and Arap
hoes allotments in severalty of a part of the land, but also to pay the
money for their quitclaim of the residue and for their consent to i
occupation by white settlers, and attempted by that arrangement
evade the terms of the Choctaw and Chickasaw lease of 1855 and ce
sion of 1866, the United States ought to bear the expense of this spec
lation themselves and cannot rightfully recoup that expense from th
Choctaws and Chickasaws.

Your committee, therefore, conclude that the United States are n
the absolute owners of the leased district, but only hold a trust esta
therein; and they submit the following recapitulation of the grounds
which this conclusion is based:

(1) Under the treaty of 1855 the sum of $800,000 was paid for t
release of the land west of the one hundredth meridian and the lease
the land between the ninety-eighth and one hundredth meridians.

(2) Much the larger part of that payment was applicable to the relea
of the land west of the one hundredth meridian, and a small part, if an
of it to the lease of the land between the ninety-eighth and one hu
dredth meridians.

(3) In 1865 the commissioners, appointed by the president, official
notified the five civilized tribes at Fort Smith, that the lands to be treat
for were to be acquired for the use, not of white men, but of Indians.

(4) The Choctaws and Chickasaws, as well as the other civilized trib
formally accepted that basis of the proposed negotiations, and upon th
basis consented to treat, and did treat, in 1865.

(5) When the commissioners of the Choctaws and Chickasaws met
commissioners of the United States to negotiate the treaty of 1866, th
is no pretense that anything had been paid by the United States towa
the purchase of the land between the ninety-eighth and one hundre

meridians, although the United States had held that land under lease for eleven years.

(6) The treaty of 1866 provided no compensation for the transfer of the absolute ownership of the leased district. The sum of $300,000, named in the third section of that treaty, was to be paid to the freedmen, if they should be removed, but was to remain the property of the United States if citizenship should not be conferred upon the freedmen, and was only to be paid to the Choctaws and Chickasaws in the event that citizenship should be conferred upon the freedmen and they should refuse to emigrate.

(7) The sum of $300,000, named in the treaty of 1866, was not to compensate the Choctaws and Chickasaws for anything except for conferring citizenship and a right to forty acres of land each, upon the freedmen. If citizenship should not be conferred upon the freedmen, the United States, by the terms of the treaty, were to acquire whatever new interest the treaty conveyed in the land, without paying the Choctaws and Chickasaws a dollar for such conveyance.

(8) The effect of the treaty of 1866 was to authorize the government of the United States, whenever it should remove the freedmen, to locate them in the leased district.

(9) It was also the effect of the treaty of 1866 to open the leased district to settlement by friendly Indians *in general*; for the treaty of 1866 omitted the inhibition of the lease of 1855, which excluded from that district all Indians, except those residing or ranging within certain specified limits.

(10) The Creeks and Seminoles entered into treaties with the United States in 1866 upon the basis which had been proposed to and accepted by the five civilized tribes in 1865, and which excluded white settlers from the lands to be ceded to the United States.

(11) The United States, in 1866, paid the Creeks 30 cents per acre for 3,250,560 acres, and also paid the Seminoles $325,362 for 2,169,080 acres, but paid the Choctaws and Chickasaws nothing for 7,713,239 acres ceded, unless the sum of $300,000 provided as compensation for the possible grant of citizenship to the freedmen is to be regarded as payment for the land.

(12) In 1889 the United States paid the Creeks $2,280,857.10 for a release of their interest in the lands ceded by them in 1866, and also paid the Seminoles $1,912,942.02 for a release of their interest in the lands ceded by them in 1866.

(13) To assume that the cession of 1866 was intended, by the parties to the treaty, as an absolute conveyance, is to assume that the Choctaws and Chickasaws intended to convey, and the United States intended to acquire, without any compensation whatever, 7,713,239 acres of land, worth more than $10,000,000 in 1886 and worth more than $40,000,000 at the present time.

(14) As the supreme court has often held, treaties between the United States and the Indian tribes are not without necessity to be so construed as to work injustice upon the "wards of the nation;" but a construction of the treaty of 1866 which makes that treaty the conveyance of an absolute title to the United States will inflict a grievous and unnecessary wrong upon the Choctaw and Chickasaw nations.

(15) The propositions submitted to the civilized tribes by the United States in 1865 as the basis of the negotiation of the treaties of 1866, the provisions of the treaty of 1866, the facts and circumstances attending

the making of that treaty, and the contemporaneous dealings of the United States with the Creeks and Seminoles necessitate the conclusion that the cession made in the Choctaw and Chickasaw treaty of 1866 was intended as a conveyance, not of an absolute title, but only of a trust estate. App. 226.

The counsel for the appellants denied that the act of March 3, 1891, making compensation for the Cheyenne and Arapahoe reservation, furnished a binding legislative construction of the treaty of 1866. They based this denial upon three grounds:

1. That the act of March 3, 1891, was predicated upon a misconception of the facts;

2. That the act, conferring jurisdiction of the pending case, declared that the claim of the Choctaw and Chickasaw nations, to compensation for the Wichita reservation, was "controverted by the United States;"

3. That this jurisdictional act provided "that nothing, in this act, shall be accepted, or construed, as a confession that the United States admit that the Choctaw and Chickasaw nations have any claim to, or interest in, said lands."

The statement that this claim was controverted by the United States did not imply that any official controverted it on any ground involving the question whether the cession of 1866 was absolute, or in trust; or on any ground other than the ground that subsequent possessory rights of the Wichitas impaired the title of the Choctaws and Chickasaws. Nor did it imply that congress controverted the claim on any ground whatever. This jurisdictional act did not declare that *anything therein should be construed to controvert* the claim of the Choctaws and Chickasaws, but left the act of March 3, 1891, standing exactly as it was left by the congress that passed it. It neither admitted, nor denied, the interest of the Choctaws and Chickasaws.

The legislative construction of the treaty of 1866, by the act of March 3, 1891, has precisely the same validity and force, to-day, which it had on the day of the passage of that act. The lands referred to, in section 15 of the act, were, like the lands involved in the pending controversy, a part of the leased district, ceded to the United States, in trust, by the treaty of 1866. If the Cheyenne and Arapahoe reservation was ceded in trust, the entire leased district was ceded in trust. That section placed upon the treaty of 1866 a construction, which is binding in this case, as follows:

> Said lands have been *ceded, in trust*, by article three of the treaty between the United States and the said Choctaw and Chickasaw nations of Indians, which was concluded April 28, 1866, and proclaimed on the tenth day of August, of the same year. 14 Stat. 769.

This exposition of the treaty is binding upon all courts, and in all cases except those in which rights became vested, *under the treaty, prior to the enactment of the statute.* In Postmaster General *v.* Early, 12 Wheat. 136, 148, the question related to the validity and effect of a legislative construction of existing law. The latter statute contained these words:

> The district court shall have cognizance, concurrent with * * the circuit courts of the United States, of all suits, &c.

The particular question was whether this clause placed the law in such a condition as to secure, to the *circuit* courts, the jurisdiction mentioned in the statute. Chief Justice Marshall, delivering the opinion of the court, said:

> It is true that the language of the section indicates the opinion that jurisdiction existed in the circuit courts, rather than an intention to give it; and a mistaken opinion of the legislature, concerning the law, does not make law. But if this mistake is manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act in future. This law expresses the sense of the legislature on the existing law, as plainly as a declaratory act, and expresses it in terms capable of conferring the jurisdiction.

In United States *v.* Freeman, 3 How. 556, 564, the court said:

> If it can be gathered, from a subsequent statute, *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.

In Stebbins *v.* Board of Commissioners, 2 McCrary 196, Mr. Justice Miller, of the supreme court, delivering the opinion of the circuit court for the district of Colorado, said:

> But, by a subsequent act, in 1872, congress, as the defendant alleges, undertook to construe that act, and, in their construction of it, they declare that it should be held to extend to the right to organize railroad companies. It is denied that congress has any right to give a construction to the statute, which will bind the court, and, therefore, it is said that the act of 1867 remains, and this railroad has no competent organization, which will enable it to take subscriptions to stock. But, in a case which came up, concerning taxation, under the internal revenue law, in the supreme court, a very similar statute, construing a former statute, is made the subject of consideration; and, in that case, the court held that, while it might not be true that rights, existing prior to the explanatory or declaratory statute, will be affected by that declaratory statute, yet, inasmuch as congress, or any legislative body, has a right to pass a law, for the future, that such a statute shall be held to mean so and so, while it may not affect past transactions, it is equivalent to the passage of a statute of that character for the future; and, while it is not necessary for us to decide, here, whether that declaratory statute would affect any contracts or transactions prior to its passage, it became a part of the law of 1867.

An act of congress, approved July 17, 1862, provides that the act approved August 6, 1861, "shall not be so construed, after the passage of this act, as to increase the emoluments of the commissioned officers of the army." This reversed the construction theretofore observed, in the war department. In United States *v.* Gilmore, 8 Wall. 330, the supreme court held that the act of 1862, not only fixed the construction of the provision in question, in the act of 1861, but also fixed the construction of a similar provision in a subsequent act, passed in 1864.

A statute of Indiana, enacted in 1825, conferred upon the probate courts authority to "hear and determine all

matters, in relation to the settlement of decedents' estates." In Dequinder et al. *v.* Williams, 31 Ind. 444, the question was whether this provision empowered the probate court to *appoint guardians*. Several subsequent acts had been passed, recognizing, by implication, the validity of such appointments. The court held that those later acts fixed the construction of the act of 1825. The court said:

> If a legislative construction be even plainly contrary to the terms of the act construed, it must, nevertheless, be taken as a new enactment, changing the old law.

Mr. Fox's libel act declared that, by the law of England, juries were judges of the law, in prosecutions for libel; it did not purport to introduce a new rule, but purported to declare a rule already and always in force. Yet before the passage of this act, the courts had repeatedly held that the jury, in these cases, were only to pass upon the fact of publication, and the truth of the innuendos; and that the question whether the publication was libellous, or not, was a question of law, which addressed itself exclusively to the court. It would appear, therefore, that the legislature declared the law to be what the courts had declared it was not. Cooley Const. Lim., 6 Ed., p. 111; Rex *v.* St. Asaph, 3 T. R. 428; Rex. *v.* Withers, 3 T. R. 428.

In State *v.* Trustees, &c., 37 Ohio St. 275, it was held that:

> A statute, declaratory of a former one, has the same effect upon such former act, in the absence of intervening rights, as if the declaratory act had been embodied in the original act, at the time of its passage.

In R.R. Co. *v.* Martin, 7 D. C. 120, 132, the court said:

> Now, although it is not within the competency of even the legislative power to deprive any person of a vested right, by means of a declaratory act, yet, where no right has been already secured, under the former act, the legislature may declare its meaning by a subsequent law, and this will be held to be the meaning of the first law, from the beginning, for no wrong is thereby inflicted, since no rights had become vested.

This declaratory act of 1891 is not only conclusive as a *legislative construction* of the treaty of 1866, but also con-

clusive as an express *acknowledgment of a trust by the trustee.* Let us assume that the statute of frauds is applicable to the case. The statute will be satisfied if the trust can be manifested, or proved, *by any subsequent acknowledgment by the trustee, as by an express declaration, or any memorandum to that effect,* or by a letter under his hand, or by his answer in chancery, or by his affidavit, or by a recital in a bond, or deed, or by a pamphlet written by the trustee, or by an entry in a bank deposit book.

The trust, upon which the leased district was ceded to the United States, is expressly acknowledged by the trustee, in the act of 1891. The acknowledgment is made by those departments of the government, which are invested with the exclusive power to make such acknowledgment. It takes the form of an act of congress, approved by the president of the United States. It is impossible to conceive of a stronger case of the proof of a trust, by the acknowledgment of the trustee. This acknowledgment was not revocable by any subsequent inconsistent action of congress. It permanently fastened upon the United States the character of trustee.

The jurisdictional act of March 2, 1895, contains the following words :

> That, as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, which claim is controverted by the United States, jurisdiction be, and is hereby, conferred upon the court of claims to hear and determine the said claim of the Choctaws and Chickasaws, &c. 28 St. 2.

The counsel for the appellants insisted that the meaning of the statement above quoted was that *congress* controverted the claim of the Choctaws and Chickasaws. But this theory is excluded by the last sentence of the same paragraph. Connecting this last sentence with the clause quoted above, we have the following legislative declaration :

That as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, which claim is controverted by the United States, jurisdiction be, and is hereby, conferred upon the court of claims to hear and determine the said claim of the Choctaws and Chickasaws: * *And provided further*, That nothing in this act shall be accepted or construed as a confession that the United States admit that the Choctaw and Chickasaw nations have any claim to or interest in said lands, or any part thereof.

Now the head of the department of justice controverts the claims prosecuted in the court of claims. In "common parlance," the United States controverts those claims. But this does not mean that congress controverts them. In the case at bar, a former secretary of the interior controverted the Choctaw and Chickasaw claim. Adopting "common parlance," congress said that the United States controverted their claim.

If we understand the meaning of the act to be that the head of the interior department controverted this claim, and that the act itself was not to be construed as an admission, *by congress*, of the validity of the claim, the provision is intelligible and sensible. The counsel for the appellants understand the provision to be, in effect, this: "Congress denies the validity of the claim, provided this denial of its validity shall not be construed as an admission of its validity." But I submit that the proviso conclusively shows that the words, "which claim is controverted by the United States," were not intended as a declaration that *congress* controverted the claim of the Choctaws and Chickasaws.

The counsel for the appellants contended that the Choctaw law of November 20, 1867, is evidence that the Choctaw legislature of 1867 understood the cession of 1866 to be, not a cession in trust, but an absolute cession. On the contrary, if it proves anything, it proves that the legislature of that year understood the cession to be, not an absolute cession, but a cession in trust,—in trust, not

for the settlement of negroes generally, but for the settlement of Choctaw and Chickasaw freedmen. That trust would be as fatal to the claim of an absolute cession, as would be a trust for the settlement of Indians.

It has been asserted that "no serious demand was ever set up, by the Choctaws and Chickasaws to an interest" in the leased district, until 1890. It will be difficult to suggest any occasion for making this claim before 1890. So long as the United States, in performance of the condition on which they held the leased district, devoted it to the settlement of friendly Indians, the Choctaws and Chickasaws had no right to claim any compensation for lands in that district. But when, in 1890, the pendency of the Cheyenne and Arapahoe treaty, which was ratified, by act of Congress, March 3, 1891, disclosed the purpose of the government to shake off the condition, and devote the lands to general settlement, the Choctaws and Chickasaws promptly notified the United States that, upon the consummation of that purpose, they should expect compensation for the lands.

VII.

The injustice and absurdities involved in the cession, if it was an absolute conveyance.

It being assumed that the rent, stipulated for the lease of 1855, was $400,000, if the price, stipulated for the cession of 1866, was $300,000, the entire consideration for the leased district, promised by the United States, was $700,000; if the sum of $300,000 was not the consideration for the cession of 1866, the entire consideration, paid by the United States for the leased district, was only $400,000. If, then, as the result of the pressure applied to the Choctaws and Chickasaws, in the Fort Smith

ouncil, the United States acquired the leased district, om their dependents,—their wards, for $700,000 or for 400,000, it would seem to be impossible for a court of quity to hold that these wards of the nation are, in good onscience, entitled to no further compensation for their nd. Such a transaction would be not only gross in-ustice, in itself, but also an indefensible discrimination favor of the Cherokees, Creeks and Seminoles, and gainst the Choctaws and Chickasaws.

Suppose it were true that the sum of $300,000, men-oned in the first clause of article 3 of the treaty of 1866, stead of being what, in fact, it was, the consideration fered for the grant of citizenship and 40 acres of land each of the Choctaw and Chickasaw freedmen, had en the consideration for the cession of 7,713,239 acres land; and suppose, also, that the sum of $800,000, ntioned in the treaty of 1855, instead of being the nsideration for the quit claim *and* the lease, had been plicable wholly, as rent, to the lease. The interest on s latter sum would amount to little more than a half t per acre. The total amount paid for the leased dis-t, in 1866, would then be $1,100,000. But at the gov-ment price, fixed by the act of May 20, 1862, this d would be worth, either $9,647,798, or $19,295,596. cording to the report of the senate committee its actual ue, in 1892, exceeded $40,000,000.

Whether the price, which the guardian paid the ward this land, was $300,000, or $400,000, or $700,000, or 00,000, the bargain was too unconscionable to be up-l by a court of equity.

ut the taking of the Wichita reservation, by the ted States, for general settlement, without compensa to the Choctaws and Chickasaws, would be an act of st discrimination against the Choctaw and Chickasaw

nations. As compensation for lands acquired, like the leased district, first for the settlement of friendly Indians, and afterwards for general settlement, the United States paid the Creeks $1.25, the Cherokees $1.42 and the Seminoles $1.25 per acre. Recognizing not only the essential justice of the Choctaw and Chickasaw title, but also the obligation of the government to do equal justice to these Indian tribes, the United States paid the Choctaws and Chickasaws $1.25, per acre, for the surplus lands of the Cheyenne and Arapahoe reservation. The obligation of the United States to compensate the claimants, for the surplus lands in the Wichita reservation, based on the intrinsic merits of their case, is strengthened by their obvious duty to deal with them as with the other tribes.

Second.

THE APPROPRIATION OF LAND EMBRACED IN THE CESSION OF 1866 TO GENERAL SETTLEMENT, UNDER THE LAWS OF THE UNITED STATES RELATING TO THE PUBLIC LANDS, IS A BREACH OF THE CONDITION OF THE CONVEYANCE.

The counsel for the government contended that if the cession of 1866 were a conditional conveyance, the condition would be duly performed, so far as the Wichita reservation is concerned, if each man, woman and child of the Wichita and affiliated bands of Indians should obtain an allotment of 160 acres of land, and the surplus lands should be opened to general settlement, provided the proceeds of the sales of such surplus lands should be paid to those Indians. He was of the opinion that a condition for the settlement of Indians, in the leased district, could be duly performed, by the settlement of Indians, on a small tract, and the settlement of whites on

a large tract therein, provided the Indians, settled on the small tract, should receive the money paid by the whites for the larger tract. I think that a condition, for the settlement of Indians, in the leased district, cannot be duly performed, by the settlement of Indians, on parts of the district, and of whites on other parts, whatever is done with the proceeds of the sales of the tracts, on which the whites are settled.

The Wichita agreement, of 1891, allots to each man, woman, and child of the Wichita and affiliated tribes, or bands, a farm of 160 acres, *selected out of a body of* 743,-610 *acres*, and this farm is made alienable, after the expiration of the time limited in the agreement. This arrangement can only be justified, on the assumed grounds, (1) that a farm of 160 acres, so selected, is not an unreasonably large farm, for the settlement of each of these men, women, and children; and (2) that the terms of the trust, under which the United States holds the lands, admit of the investment of the settlers with an alienable title thereto.

It would be fortunate for our country, if there were, within the limits of the United States, land, of half-decent quality, sufficient to make, for each one of our 70,000,000 people, a farm of 160 acres. Nevertheless, I will assume, for the purposes of the argument, that a settlement, on a selected farm, of 160 acres, is not an unreasonable settlement, even for a Wichita infant. I will also assume that the alienability of the land is admissible, under the treaty of 1866. Upon these assumptions, we now have the Wichitas and affiliated bands permanently and lawfully settled, on separate farms of 160 acres. Is not the power, conferred upon the United States, by the treaty of 1866, exhausted, by this settlement, so far as those Indians are concerned? Is not the trust, as to them, fully executed? Did the Choctaws and Chickasaws, by the treaty of 1866,

authorize the United States, not only to settle Indians on a part of the lands, in the leased district, but also to settle whites on a part of those lands, and to divert the proceeds of the sales to such white settlers, from the Choctaws and Chickasaws, to other Indians? If the moneys realized from these lands, can be paid to other Indians, why can they not be paid to whites, or blacks, or even paid into the treasury of the United States? Is there any such relation between the settlement, on the allotted tracts of 169,600 acres, and the proceeds of the sale of the surplus tracts of 574,010 acres, as to entitle the settlers on the former to the proceeds of the latter?

A condition to *settle Indians*, on a tract of land, is not a condition to *sell* that land, and pay the moneys, realized from the sale, to Indians, or to anybody else. A condition to settle Indians on lands, within prescribed exterior boundaries, is not a condidion to settle Indians on parcels of land, within the boundaries so defined, and to sell the rest to white settlers, for the benefit either of Indians, or of whites, or of blacks, or of the United States. I submit that the proceeds of the sales of these lands will be the equitable property of the Choctaws and Chickasaws, and cannot be diverted to the Wichita and affiliated bands. I submit that, if the United States shall give, to the Wichita and affiliated bands, any moneys on account of these lands, the gift must go out of the treasury of the United States, and not out of the proceeds of the sales of the lands.

Suppose it had been true that the government of the United States had, in some way, incurred an obligation to the Wichitas, which could only be discharged, by allotting to each individual 160 acres of the land, and distributing among them a sum of money equal to the proceeds of the sales of the residue of the reservation. That fact could

not impair, or affect the obligation of the United States to pay, to the Choctaws and Chickasaws, the value of land, in the leased district, devoted to general settlement. This supposed obligation to the Wichitas could not cancel the obligation to the Choctaws and Chickasaws. The United States can not rightfully use the property of the Choctaws and Chickasaws, to discharge an obligation to the Wichitas, and, thereby, extinguish the right of the Choctaws and Chickasaws to compensation for their property.

Third.

THE CHOCTAWS AND CHICKASAWS ARE ENTITLED TO DEMAND EITHER A RESTORATION OF THE LAND, OR JUST COMPENSATION THEREFOR.

The appellants contend that the United States can only be held responsible for injuries resulting to the claimants, from the opening of the land in controversy to general settlement; that no injury can result therefrom; and that the case is, therefore, one of *damnum absque injuria*. This contention is based on the assumption that the case of the Choctaws and Chickasaws rests on a breach of covenant, for which the covenant-breaker is only to respond in damages. This is a mistake. The legal title, which is transferred to the United States, by the treaty of 1866, is accompanied by, (1) a trust to settle friendly Indians on the land; (2) a power to select the friendly Indians to be so settled, which power of appointment, although not absolutely general and unrestricted, is broad enough, in scope, to include any friendly Indians in the United States; (3) a condition subsequent, which is the execution of the trust and power; and (4) a covenant to execute the trust.

The execution of the trust is imperative. It would be so, even if there were no covenant.

If this conveyance were a transaction between private persons, involving no trust, or condition, but only a covenant, the grantor would be entitled to demand either damages for a breach of the covenant, or a specific performance; but he would not be entitled to demand either the forfeiture of the estate, or the removal of a trustee. To an action for damages it would be competent for the defendant, if the plaintiff had suffered no injury, to interpose the defence, *damnum absque injuria*. But, inasmuch as the cession of 1866 was a conditional conveyance, a breach of the condition, whether injurious or beneficial, to the grantor, would work a forfeiture of the estate, and entitle him to a recovery of the land. The question of damages would be wholly foreign to that remedy. And since this cession is, at the same time, a conveyance in trust, a violation of the trust would entitle the grantor to demand that the trustee should be removed and deprived of the estate. If, therefore, the conveyance had been from one private person to another, the grantor would have been entitled to elect either one of four remedies.

But the appellees ask neither damages for breach of covenant, nor a specific performance of the contract, nor a removal of the trustee. They cannot obtain a restoration of the land, to which a plaintiff would, in a like case between private parties, be entitled, because the government of the United States, in the exercise of its paramount power of eminent domain, can override the forfeiture and take the land for public use, making due compensation therefor. What the appellees ask, therefore, is the value of the land. If they were citizens of the United States, demanding the enforcement of a forfeiture of the land in controversy, for a breach of the condition of the

conveyance, and the government of the United States, exercising its power of eminent domain, should take and hold the land for public use, the constitution would exact, as compensation, the just value of the land. That value exceeds $40,000,000. The only reason why the claimants can not demand that amount of compensation seems to be that the government of the United States, having sovereign power over the appellees, has, in the jurisdictional act, fixed the maximum compensation recoverable at a small fraction of the actual value of the land. Stuyvesant *v.* New York, 11 Paige, 414; Gray *v.* Blanchard, 8 Pick. (Mass.) 284; Woodruff *v.* Waterpower Co., 10 N. J. Eq. 489; Chapman *v.* Pingree, 67 Me. 198; 4 Kent Com. 123; Cowell *v.* Springs Co., 100 U. S. 55; Hale *v.* Finch, 104 U. S. 261; Hill *v.* Barclay, 18 Ves. 56; Rolfe *v.* Harris, 2 Price Exch. 207; Bracebridge *v.* Buckley, Id. 200; Bank *v.* Smith, 3 Gill & Johns, 265; Schermerhorn *v.* Negus, 1 Denio 450; Holden *v.* Joy, 17 Wall. 211; Schulenberg *v.* Harriman, 21 Wall. 44; Mead *v.* Ballard, 7 Wall. 290.

REPLY TO CONTENTIONS OF APPELLANTS IN OPPOSITION TO THE TITLE OF THE APPELLEES.

1. One of the positions of the Choctaws and Chickasaws in this case, is that, by the treaty of 1820, the United States ceded to the Choctaws territory which included the leased district, and also 8,000,000 acres of land west of the 100th meridian of west longitude; and that a large part of the sum of $800,000, paid to the Choctaws and Chickasaws, under the treaty of 1855, was applicable to the quitclaim of the land west of the 100th meridian. The counsel for the government contended, in the court below, that the Choctaws and Chickasaws

never owned any land west of the 100th meridian, and that, therefore, no part of the $800,000 was paid for the quitclaim. But he conceded that the Choctaws had owned the leased district, and contended that, therefore, the whole of the $800,000 must have been paid for the lease.

The position that the Choctaws never owned any land west of the 100th meridian cannot be maintained. On the 18th of October, 1820, Generals Andrew Jackson and Thomas Hinds, commissioners on the part of the United States, signed a treaty, by which the Choctaw nation ceded to the United States, certain lands, described by metes and bounds, east of the Mississippi river, and, in exchange therefor, the United States ceded to the Choctaw nation certain lands, described by metes and bounds, west of the Mississippi river. The following are the first and second articles of the treaty:

Article 1. To enable the president of the United States to carry into effect the above grand and humane objects, the Mingoes, head men and warriors of the Choctaw nation, in full council assembled, in behalf of themselves and the said nation, do, by these presents, cede to the United States of America all the land lying and being within the boundaries following, to wit: Beginning on the Choctaw boundary, east of Pearl river, at a point due south of the White Oak spring, on the old Indian path; thence north to said spring; thence northwardly to a black oak standing on the Natchez road, about forty poles eastwardly from Doake's fence, marked A. J. and blazed, with two large pines and a black oak standing near thereto and marked as pointers; thence a straight line to the head of Black creek or Bouge Loosa; thence down Black creek or Bouge Loosa to a small lake; thence a direct course so as to strike the Mississippi one mile below the mouth of the Arkansas river; thence down the Mississippi to our boundary; thence around and along the same to the beginning.

Article 2. For and in consideration of the foregoing cession on the part of the Choctaw nation and in part satisfaction for the same, the commissioners of the United States in behalf of said states do hereby cede to said nation a tract of country west of the Mississippi river situate between the Arkansas and Red river and bounded as follows: Beginning on the Arkansas river where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian fork, and up the same to its source; thence due south to the Red river; thence down Red river three miles below the mouth of Little river, which empties itself into Red river on the north side; thence a direct line to the beginning. Appendix, 10.

Here was an exchange of lands between the United States and the Choctaw nation. The consideration for which the Choctaws ceded to the United States certain lands east of the Mississippi *was not a part of the land* included within the metes and bounds of the western country ceded to them by the United States, *but was the whole of the land* included within those metes and bounds. If it had happened that a part of the land covered by this deed of the United States to the Choctaws was not in fact and in law owned by the United States on the 18th day of October, 1820, when the treaty was signed, the obligation of the United States would have been identical with the obligation incurred by an individual who, being a party to an exchange of farms, should prove not to be the owner of all the land covered by his deed.

In that event it would have become the duty of the United States to do one of four things: Either to acquire a complete title to all the land covered by their deed, and to convey the same to the Choctaws; or to restore to the Choctaws a part of their land east of the Mississippi river; or to rescind the treaty altogether and place the parties *in statu quo;* or, finally, to make just reimbursement in money for the land purchased and paid for by the Choctaws, but not delivered by the United States.

If it had been true that on the 18th day of October, 1820, the date of the exchange of lands between the United States and the Choctaw nation, the United States had owned no lands between the Red and Canadian rivers west of the one hundredth meridian of west longitude, then unless the United States had subsequently acquired and conveyed such lands, or restored to the Choctaws a part of their land east of the Mississippi river, or rescinded the treaty, the United States would have become bound to make just compensation to the Choctaws in money for

the lands deeded but not delivered to them. So it would have to come to pass that when the Choctaws, on the 22d day of June, 1855, relinquished their interest in the lands west of the one hundredth meridian, the interest so relinquished, as between the Choctaws and the United States, would have been precisely as valuable if the United States had not owned these lands on the 18th of October, 1820, as it would have been if the United States had owned the lands on that day. In one case it would have been the land itself which the Choctaws relinquished on the 22d day of June, 1855; in the other case it would have been an indisputable claim for the just value of the lands which the Choctaws relinquished.

But while the reimbursement, to which the Choctaws would have been entitled for the relinquishment of their interest in these lands west of the one hundredth meridian of longitude in 1855, would have been the same whether the lands did or did not belong to the United States on the 18th day of October, 1820, when the exchange was made, the fact is that on that day these lands did belong to the United States, having been acquired from France, by the treaty of April 30, 1803. The dissenting judge says (p. 79) that, in 1820, "the western boundary of the United States was the one hundredth degree west longitude." But the proofs show that he is mistaken.

On that day the United States owned, not only the country east of the one hundredth meridian, including the leased district and the land now occupied by the Choctaws and Chickasaws, but also all the land bounded by that meridian on the east, by the Canadian river on the north, by the Red river on the south, and on the west by a straight line drawn from the headwaters of the Canadian river to the headwaters of the Red river.

The title of France to the province of Louisiana, in-

cluding the land just described, was based upon the following grounds:

During the seventeenth and eighteenth centuries, all the European powers recognized, as rules of international law, the following principles.

(*a*) The sovereign, whose subjects first discovered a river, in the western hemisphere, acquired exclusive dominion over all territory lying between branches of that river, not previously discovered by subjects of other sovereigns.

(*b*) The sovereign, whose subjects first discovered a line of sea-coast, on the American continent, acquired dominion over all territory lying between all rivers entering the sea on that coast.

(*c*) In the case of discoveries by subjects of different sovereigns, at different points on the same coast, the most convenient line between such points, at proximately equal distances therefrom, became the common boundary of the territories of the respective sovereigns.

In 1673 Joliet and Marquette descended the Mississippi river to the Arkansas. In 1680 Henison descended the Mississippi to its mouth. In 1682 La Salle and Joutel descended that river to its mouth, with sixty men. These explorers were all French subjects. In 1685 La Salle built Fort Franc, on the Bay of St. Bernard, now Matagorda bay, and established, in that locality, a colony of 240 French immigrants. There was, at that time, no Spanish settlement, or discovery, nearer than Panuco, on the river of that name. The Rio Bravo del Norte, although somewhat nearer to Matagorda bay than to Panuco, afforded the most convenient midway boundary between the provinces of France and Spain. The sources of the Red and Canadian rivers were east of and near to the Rio Bravo del Norte.

The result of the application of the rules of international law, above stated, to the facts of the case was that, during the years 1680–1685, France became invested with the sovereignty of the province named (from her king) Louisiana, extending from the Mississippi river, on the east, to the Rio Bravo del Norte, and Rocky Mountains on the west, and from the Gulf of Mexico, northward, beyond the fortieth parallel of north latitude.

The adoption and observance by the European powers, of the above-mentioned rules relating to discoveries in America, and the facts relating to the discovery of Louisiana, are shown by proof which ought to be conclusive upon the government of the United States, because that government is itself the witness that furnishes most of the evidence. This evidence will be found in the following documents filed as claimants' evidence in chief.

(1) The letter of James Madison, secretary of state, to Mr. Livingston, minister to France, dated January 31, 1804. Am. St. Papers, For. Rel., v. 2, p. 574. Appendix 70

(2) Secretary Madison's letter of instructions to James Monroe and Charles Pinckney, ministers to Spain, dated April 15, 1804, and his further instructions to the same ministers, dated July 8, 1804. Id. p. 360. App. 71.

(3) Minister Monroe's letter to M. Talleyrand, minister of France, dated November 8, 1804. Id. 643. App. 72

(4) The letter of Ministers Monroe and Pinckney to the Spanish minister, dated April 20, 1805. Id. 663, 664.

(5) The letter of James Monroe, secretary of state, to the Spanish minister, dated June 10, 1816. Am. St. Papers, For. Rel., v. 4, p. 430. App. 77

(6) The letter of John Quincy Adams, secretary of state, to the Spanish minister, dated March 12, 1818. Id. 470 to 479. App. 78

(7) The letter of Secretary Adams to the Spanish minister, dated October 31, 1818. Id. 530. App. 84

(8) The letter of Secretary Adams to the Spanish minister, dated May 3, 1820, eight months after the Spanish treaty had expired by its own limitation. Id. 684. Rec. 67.

(9) The memoir of Luis de Onis, who signed the Spanish treaty on behalf of Spain, mentioned in the letter of Minister Forsyth, to Secretary Adams, dated September 21, 1820. Id. 693. Rec.

(10) De l'Isle's map, Paris, 1703. Rec. 78.

(11) Moll's map, London, 1711. Rec. 79.

(12) Moll's map, London, 1715. Rec. 80.

(13) De l'Isle's map, Amsterdam, 1718. Rec. 81.

(14) De l'Isle's map, Amsterdam, 1722. Rec 82.

(15) Popple's map, London, 1733. Rec 83

(16) Popple's map, London, 1735. Rec. 84.

(17) De l'Isle's map, Amsterdam, 1739. Rec. 84.

(18) Boehme's map, 1846. Rec. 85.

(19) American Maps, Vol. 1, Nos. 16, 17, 18. Rec. 86.

(20) American Maps, " 2, " 10. Rec. 88.

(21) De l'Isle's Atlas Nouveau, Vol. 1, No. 68. Rec. 86.

(22) De l'Isle's Atlas Nouveau, " 2, " 38, 39. Rec. 89.

(23) Bowen's Atlas of the World, No. 56.

This tract of land, bounded on the north by the Canadian river, on the east by the one hundredth meridian, on the south by the Red river, and on the west by a line drawn from the headwaters of the Canadian river to the headwaters of the Red river, which became a part of the province of Louisiana, upon the original acquisition of that province by France, continued to be a part of Louisiana until France ceded the province to Spain on the 3d of November, 1762. It continued to be a part of the province of Louisiana during the period of 38 years from the cession by France to Spain in 1762 to the retrocession by Spain to France in 1800. It remained a part of Louisiana from the retrocession by Spain to France in

1800 to the cession by France to the United States in 1803. And, finally, it continued to be a part of Louisiana from 1803 until the treaty of October 18, 1820, between the United States and the Choctaws, and was ceded by that treaty to the Choctaw nation. These facts are established by the proofs just cited.

Now it happened that there was an inconsistency between the *natural objects* and one of the *courses* specified in the conveyance made by the United States to the Choctaws in the treaty of October 18, 1820. It is a fact that a line drawn *due south* from the *source of the Canadian* will not touch the *Red river*, because the source of the Red river is one degree of longitude further eastward than the source of the Canadian.

But Mr. Justice Story, delivering the opinion of the supreme court in Preston's Heirs *v.* Bowman, 6 Wheat., 580, laid it down as "a universal rule that course and distance yield to natural and ascertained objects." And in Newsom *v.* Prior, 7 Wheat., 7, Chief Justice Marshall said:

> The courts of Tennessee, and all other courts by whom cases of this description have been decided, have adopted the same principle and adhered to it. It is that the most material and most certain calls shall control those which are less material and less certain. A call for a natural object, as a river, or a known stream, a spring, or even a marked tree, shall control both course and distance.

It is unnecessary to cite the numerous authorities, by which this principle has been recognized and approved.

Applying these rules of law to the case under consideration, we find that two of the calls of this conveyance to the Choctaw nation are for *natural objects*, namely; first, the *source* of the Canadian river; and, second, the *Red river;* that a third call is for a *course* connecting the Red river with the source of the Canadian; that this course, being due south from the source of the Canadian,

inconsistent with the other two calls, because the ource of the Canadian is further west than that of the ed river; and that this third call is therefore controlled y the other two calls of the description. The result is at the Red river and the source of the Canadian are to e connected by a straight line drawn from the source of e Canadian to the nearest point of the Red river, which earest point happens to be the source of the Red river. But on the map prepared in the Indian office, in 1895, d now on file in that office, the source of the Canadian ver is located west of 104° 30′ west longitude, and the ource of the Red river west of 103° 30′ west longitude. he map No. 39, appellees' evidence in chief, is an accu- te tracing from that map, the townships being deline- ed on the scale of those in the Chickasaw nation. This ap shows the area of the land owned by the Choctaws est of the one hundredth meridian, to be 8,225,280 res.

When the Choctaws relinquished their interest in this nd, on the 22d day of June, 1855, they were entitled to ceive, in compensation for that relinquishment, either e value which the land bore in 1820, which must have ceeded four cents per acre, amounting, with interest five per centum, to $888,329; or the value which it bore 1855. At the price of 10 cents per acre this land nounted in value, in 1855, to $822,528. But in the eaty of June 22, 1855, the sum of $800,000 was consti- ted the entire pecuniary consideration, not only for the linquishment by the Choctaws of their interest in the nd west of the one hundredth meridian, but also for the se by the Choctaws and Chickasaws to the United ates of the land between the ninety-eighth and one ndredth meridians. That sum was not, in fact, suf- ient to compensate the Choctaws for the relinquish-

ment of the land west of the one hundredth meridian. No part of it was *justly* applicable to the lease of the land between the ninety-eighth and one hundredth meridians, which amounted to 7,713,239 acres. Regarding the case in the light of strict justice, we must conclude that the United States held this land, from 1855 until 1892, without making any compensation therefor to the Choctaws and Chickasaws.

The considerations which reconciled the Choctaws and Chickasaws to this lease were the uses to which the lands were devoted. In the first place, by the express terms of the lease, the lands were to be used exclusively for the settlement of bands or tribes of friendly Indians; in the second place, they were to remain open to settlement by the Choctaws and Chickasaws themselves, who, while residing there, were, by articles 3, 7 and 9 of the treaty, placed under the jurisdiction of the Choctaw nation.

2. The counsel for the United States, I repeat, did not deny that the Choctaw treaty of 1820 conveyed the leased district to the Choctaws; but he contended that it conveyed no land west of that district. He insisted that inasmuch as the western boundary, defined in the Quapaw treaty of 1818, was the same as that defined in the Choctaw treaty of 1820, (viz., a line drawn south from the source of the Canadian to Big Red river) and it was *not* the *intention* of the parties to the Quapaw treaty that any land west of the 100th meridian should be conveyed by that treaty, therefore it could not have been the intention of the parties to the Choctaw treaty that any land west of the 100th meridian should be conveyed by that treaty.

His first proposition in maintenance of this contention was that the maps of Pike, Arrowsmith, Pinkerton, Melish, and Darby proved that the parties to the Quapaw treaty of 1818 must have intended to fix the western boundary

of the Quapaw cession on or near the 100th meridian. The source of the Canadian is located on the meridian of 97° 5′, by Arrowsmith; on that of 97° 15′, by Pinkerton; on that of 99° 45′, by Melish; on that of 100° 18′, by Pike; and on that of 99° 5′, by Darby. There is no proof that any party, to the Quapaw treaty of 1818, had ever seen, or heard of either of those maps, before the ratification of that treaty. But the counsel thought that the mere existence of the maps was evidence that their contents were known, not only to the president, secretaries of state and war, and senate, and to Messrs. Clark and Chouteau, who signed the Quapaw treaty, but also to the thirteen Quapaws who signed it. At the same time he insisted, as we shall see, that the presence of Major Long's first report in the war office, from November, 1820, to January 8, 1821, the date of the ratification of the Choctaw treaty, which report showed the source of the Canadian to be west of the 103d meridian, was no evidence that this report was known to any of the treaty-making authorities of the United States, before the latter date.

There is neither proof, nor probability, that, in the negotiation, or ratification, of the Quapaw treaty, either the Quapaws, or Commissioners Clark and Chouteau, or the president, secretary of state, secretary of war, or senate, ever gave a moment's thought to the question of the longitude of the source of the Canadian. It is certain that, if the parties to the Quapaw treaty had made the 100th meridian the western boundary of the cession, they would have taken, for that boundary, a meridian on which the source of the Canadian is not located, on any one of the thousands of maps now on file in the library of congress. The intention of the parties to the treaty was to make a line, drawn from the source of the Canadian, south, to the Red river, the western boundary of the cession, whatever might prove

to be the longitude of its source. In this transaction, not a word was spoken, on the subject of longitudes, by the president, the secretary of state, the secretary of war, or the senate. With them all it was, "up the Canadian Fork to its source, thence south to Big Red river," and nothing else.

But then, the United States were not the only parties to the Quapaw treaty. The Quapaws themselves were parties. They were the grantors. What was their belief respecting the longitude of the source of the Canadian? The counsel assumed that they must have been familiar with the maps of Arrowsmith, Pinkerton, Pike, Melish, and Darby, and must have considered the various longitudes of the source of the Canadian, indicated on those maps, and must have concluded arbitrarily to adopt one differing from them all, to wit, the 100th meridian.

The Quapaw chiefs and warriors neither spoke nor thought of longitude. When they assented to the line extending south, from the source of the Canadian, they had no more thought of the 100th meridian than of the 1000th meridian. When they assented to a boundary, fixed by concrete natural objects, it was not their purpose to assent to a boundary by abstractions. They were as ignorant of longitudes as of logarithms. But they knew what the source of a river was; and they perfectly understood what it signified, as an element of a boundary line. It was not a source of the Canadian at 100°, or at 100° 18′, or at 99° 45′, or at 97° 5′, or on any other meridian, that they had in mind, when they signed the treaty. What they had in mind was the *source of the Canadian*, wherever located.

The counsel, to use his own words, asserted that in 1818 the whole civilized world believed that the source of the Canadian was east of the 100th meridian. I think that in

1818 not one hundred men, in the civilized world, believed anything on the subject, and that not a single man, in the civilized world, had any ground for any belief as to the precise longitude of the source of that river. It is not probable that the president of the United States, now in office, or any of his cabinet ministers, or any ten senators or representatives, now in office, ever saw one of those five maps.

If it was the purpose of the makers of the Quapaw treaty to make a meridian of longitude, numbered by degrees, the western boundary of the cession, why did they not make such a meridian its western boundary? Why did they say: "Up the Canadian Fork to its source, thence south to Big Red river?" Why did they not say: "Up the Canadian Fork to the 100th degree of west longitude, thence south to Big Red river?" If it was their purpose to make the source of the Canadian a point, in the western boundary of the cession, and, at the same time, to define, or fix the longitude of that point, why did they deliberately thwart their own purpose? Why did they not say: "Up the Canadian Fork to its source, on the 100th meridian of west longitude, thence south to the Big Red river?"

But if the parties to the Quapaw treaty had, in 1818, entertained the belief that the source of the Canadian was on the 100th meridian, it would not follow that even they entertained the same belief, at the date of the Choctaw treaty, in 1820. The fact that the Quapaws entertained that belief, in 1818, would not prove that the Choctaws entertained it, either in 1820 or in 1818. The fact that Messrs. Clark and Chouteau entertained it, in 1818, would not prove that Generals Jackson and Hinds entertained it, either in 1820 or in 1818. Nor would the fact that the treaty-making authorities of the United States supposed, in 1818, that the source of the Canadian was at 97° 5′, 97°

15′, 99° 45′, or 100° 18′, or on any other particular meridian, prove that they supposed so at the date of the ratification of the Choctaw treaty; for, meantime, facts might have come to light, to change their belief on this point. But this illegitimate inference of counsel is rebutted by the facts soon to be considered.

3. The counsel for the United States contended that, if the treaty of 1820 did invest the Choctaws with a title to the land west of the 100th meridian, or to its value, that title was extinguished by the treaty of 1830. He based this contention upon three grounds as follows:

(1) The treaty of 1830 ceded the leased district to the Choctaws.

(2) It was stipulated, in the treaty of 1830, that if any provision of any prior treaty was inconsistent with any provision of the treaty of 1830, such prior treaty should, in its entirety, become null and void.

(3) If the cession of 1820 embraced land west of the 100th meridian, that cession was inconsistent with the cession of 1830, and the earlier treaty was, therefore, nullified by the later treaty.

But the treaty of 1830 neither contained, nor purported to contain, the cession of any land whatever to the Choctaws. There are no words in the treaty either expressing or implying such a cession. The provision is, not for a *cession* of land owned by the United States, but for a *formal patent* of land which had been ceded to the Choctaws, in 1820, and had been their unquestioned property for a period of ten years. A valid cession of the leased district, by the United States, to the Choctaws in 1830 was a legal impossibility; as certainly so as would have been a valid cession of the British islands, or of one of the provinces of the Chinese empire.

In part payment for the Choctaw lands in Mississippi,

the United States had sold and conveyed territory including the leased district, with the land west of it, to the Choctaws, in 1820; and it was not the purpose of the United States, in 1820, to obtain from the Choctaws their Mississippi lands, *by a void sale of the leased district.* The cession of 1820 absolutely divested the United States of title to the leased district, and, from 1820 until 1830, the United States made no pretense of ownership thereof. The assertion that the treaty of 1830 ceded the leased district to the Choctaws, is, therefore, erroneous.

There is no inconsistency between the cession of 1820 and the formal patent of 1830. The treaty of 1820 ceded land extending westward to the source of the Canadian. The treaty of 1830 ceded nothing, to the Choctaws, but provided for a formal deed of a *part of the land ceded in* 1820. It did not provide for a deed of that part of the cession of 1820, which was west of the 100th meridian, for the obvious reason that that land had, before 1830, become the property of Spain, and could not be made the subject of a deed by the president of the United States.

If it were true that an inconsistency between any provision of the treaty of 1830, and any provision of the treaty of 1820, rendered the treaty of 1820, "in its entirety, null and void," and were also true that such inconsistency actually existed, the Choctaws would now be the lawful owners of 5,169,788 acres of land in the state of Mississippi. In the first article of the treaty of 1820, the Choctaws ceded to the United States a tract of land *carved out of their Mississippi possessions, and described by metes and bounds,* containing 5,169,788 acres. In 1830 that land was, and for a period of ten years had been, the property of the United States. Not a vestige of title thereto remained in the Choctaws. But the Choctaws were still the owners of 7,796,000 acres of land in Mississippi, contig-

nous to the land ceded in 1820 to the United States. By the second article of the treaty of 1830 they ceded to the United States *all the land they then owned in Mississippi.* They ceded the tract of 7,796,000 acres. These are the words of the treaty:

Article 3. In consideration of the provisions, contained in the several articles of this treaty, the Choctaw nation of Indians consent and hereby cede to the United States, the entire country they own and possess, east of the Mississippi river.

The treaty of 1830, then, did not cede to the United States the land which was ceded by the treaty of 1820, but ceded land not embraced in the cession of 1820. The United States never acquired the tract of 5,169,788 acres otherwise than by the treaty of 1820. *It follows, of course, that if the treaty of* 1820 *was nullified, in its entirety, by the treaty of* 1830, *the cession of Mississippi lands, by the Choctaws, to the United States, made in the treaty of* 1820, *was nullified by the treaty of* 1830, *and those Mississippi lands are now the property of the Choctaws.*

It may be suggested that the title to the Mississippi lands, which were ceded to the United States by the treaty of 1820, was so vested in the United States, by that treaty, that it could not be divested by the treaty of 1830. But that is a blade that cuts both ways. If the title to those lands was so vested in the United States, by the treaty of 1820, that it could not be divested by the treaty of 1830, then, of course, for the same reason, the title of the Choctaws to the land west of the 100th meridian was so vested, by the treaty of 1820, that it could not be divested by the treaty of 1830. But then, suppose the title of the United States to the lands acquired under the treaty of 1820 was incapable of divestiture by the treaty of 1830. That would not affect the obligation of the United States to pay to the Choctaws the value of those lands, if the treaty of 1820 was, in fact, nullified, by the treaty of 1830.

4. The counsel for the government insisted that, inasmuch as the United States had previously stipulated, in an unratified treaty, to cede, to Spain, in exchange for Florida, all the land, between the Canadian and Red rivers, west of the 100th meridian, it could not have been the intention, of any of the parties to the Choctaw treaty of 1820, that the land ceded to the Choctaws should extend westward, beyond that meridian. The facts are these. The treaty was signed February 22, 1819. It was first approved by the senate, February 24, 1819. The king of Spain refused to ratify it, and it expired, by its own limitation, on the 22d of August, 1819. Although defunct it was ratified, by the king of Spain, on the 24th of October, 1820. But its resurrection was not an accomplished fact, until it was approved by the senate and ratified by the president on the 19th of February, 1821.

A treaty, which has been signed by the representatives of all the governments which are parties thereto, and has been ratified by one of them, is obligatory on the government which has ratified it, until the expiration of the period limited, by its terms, for the exchange of ratifications. If, at the expiration of that period, it has not been ratified by all the parties, it ceases to be obligatory on the government which has ratified it, and cannot be revived and made obligatory, without further action of that government.

The fact that on the 22d day of February, 1819, Secretary Adams signed the Spanish treaty, is certainly evidence that, on that day, he intended to cede to Spain all the land, between the Canadian and Red rivers, west of the 100th meridian. So is the fact that, on the 19th of February, 1821, the senate approved the Spanish treaty evidence that the senate then intended to approve the cession of that land to Spain. But neither those two

facts, nor any other known facts, are evidence that, on the 18th of October, 1820, when the Choctaw treaty was signed, or on the 21st of December, 1820, when it was approved by the senate, or on the 8th of January, 1821, when it was ratified by the president, there was any purpose, on the part of President Monroe, or Secretary Adams, or the senate, to make such a cession. For, in the first place, it was entirely competent for the United States, having ceded this land to the Choctaws, afterwards, in the exercise of the right of eminent domain, to cede the same land to Spain. And in the next place, the Spanish treaty which was signed on the 22d of February, 1819, expired on the 22d day of August, 1819, six months after it was signed, for want of ratification by the king of Spain. On the 18th of October, 1820, the 21st of December, 1820, and the 8th of January, 1821, it was still dead. This is shown by the messages and diplomatic correspondence of President Monroe, Secretary Adams, and Minister Forsyth.

On the 12th of August, 1819, ten days before the treaty of February 22, 1819, expired, Mr. Forsyth, our minister to Spain, in a letter to Señor Salmon, the acting secretary of state, served upon the Spanish government the following official notice:

On the 12th day of August His Majesty's government gives notice, by your note of the 10th—of its determination to ratify? no, sir, to send a person to Washington, possessing the confidence of the king, and having the necessary qualifications to terminate this affair. Can it have escaped the observation of this government that this affair must terminate in ten days? While a failure to resolve finishes the business, in a few days, this government thinks that a definite resolution cannot be taken, without first entering into various explanations with the United States, to some of which the government of the said United States has given occasion. * * The determination to send a messenger to the United States, for explanations, at this period, when his voyage, as it regards the convention, must be useless; and the only hope, which can be entertained from it, is that a new negotiation may be commenced,—a circumstance of especial weight, when it is recollected that this messenger might have been sent to Washington, the desired explanation might

have been asked and given, there, prior to the 22d of August, if the king, your master, had decided promptly, on this course. Or is it in the inexplicable and studious avoidance of the natural order of proceeding, in a case of this kind—an application to the minister of the United States near the court of his Majesty, for these necessary explanations, when they might have been possibly long since given, and still may be given before the period arrives, when the convention of the 22d February ceases to be obligatory upon the parties to it? Am. St. Papers, For. Rel., v. 4, pp. 656, 657. Appendix, 85.

That "period" arrived on the 22d of August, 1819, six months after the treaty was signed.

On the 21st of August, 1819, the day before the treaty expired, Mr. Forsyth served on the Spanish government the following notice:

He has the honor to announce that, after the 22d day of the present month, as the ratification of the convention of 22d February will not have been exchanged, all the claims and pretensions of the United States, which, with the spirit of moderation, the love of peace, and the delusive expectation that all causes of difference and dispute with Spain, would be thereby adjusted and settled, they consented to modify or waive, will stand in the same situation as if that convention had never been made; that the United States will hold themselves free to press and enforce them, in any and every mode, consistent with honor, that their interest may require. Am. St. Papers, Id. p. 661. Appx. 86.

In a communication sent to the Spanish minister, on the 8th of May, 1820, Mr. Forsyth says:

What then must have been the sentiments of the president, upon finding, by your note of the 14th ultimo, that instead of explanations, His Catholic Majesty has instructed you to demand the negotiation of another treaty, and to call upon the United States for stipulations derogatory to their honor and incompatible with their duties, as an independent nation? * * The ratification of that treaty can now no longer be accepted by this government, without the concurrence of a constitutional majority of the senate of the United States, to whom it must be again referred. Am. St. Papers, Id. p. 687. Appx. 87

On the 3d of May, 1820, Mr. Adams sent to the Spanish minister a letter, which concluded with the following paragraph:

But it is proper to apprise you that, if this offer be not accepted, the United States, besides being entitled to resume all the rights, claims and pretensions, which they had renounced by the treaty, can no longer consent to relinquish their claims of indemnity and those of their citizens from Spain for all the injuries which they have suffered and are suffering, by the delay of His Catholic Majesty to ratify the treaty. The amount of claims of citizens of the United States, which existed at the

time when the treaty was signed, far exceeded that which the United States consented to accept, as indemnity. The right of territory was and yet is to the Rio del Norte. I am instructed to declare that, if any further delay to the ratification, by His Catholic Majesty, of the treaty, should occur, the United States could not hereafter accept, either of $5,000,000 for the indemnities due to their citizens by Spain, nor of the Sabine for the boundary between the United States and the Spanish territories. Am. St. Papers, id. p. 684.

On the 9th of May, 1820, President Monroe sent identical messages to the two houses of congress, in which, after giving notice of the refusal of Spain to ratify the treaty of February 22, 1819, he said:

The result, therefore, is that the treaty is declared to have no obligation whatever; that its ratification is made to depend, not on the considerations, which led to its adoption, but on a new article, unconnected with it, respecting which a new negotiation must be opened of indefinite duration and doubtful issue. * * The attitude of the United States must now be assumed, on full consideration of what is now due to their rights, their interest and honour, without regard to the powers or incidents of the late mission. Am. St. Papers, id. pp. 676, 677.

On the 12th of July, 1820, Secretary Calhoun addressed the following letter to General Jackson:

DEPARTMENT OF WAR, *July* 12, 1820.

DEAR SIR: I have received your letter of the 19th ultimo, and am happy to find that you have consented to serve as a commissioner to hold a treaty with the Choctaw Indians, and I herewith enclose your commision and instructions.

I cannot designate particularly the lands which it would be desirable to give to the Choctaws, in exchange for theirs, not being sufficiently acquainted with the localities of the country, west of the Mississippi, belonging to the United States. In my general letter of instructions to the commissioners, you will observe that they may be located anywhere on the Quapaw purchase, and I should suppose the farther to the south and west the better.

I have the honor to be, &c.,

J. C. CALHOUN

General ANDREW JACKSON,
Nashville, Tennessee.

The first meeting of the commissioners and Choctaws, in council, occurred October 10, 1820. Only a few Choctaws were present. The minutes of the council, for that day, are printed on pages 235 to 237 of volume 2, American State Papers, Indian Affairs, commencing as follows:

OCTOBER 10, 1820.

In conformity with an appointment made by the commissioners, they met the chiefs, headmen and warriors of the Choctaw nation, in council, this day. They informed them that, although their runners had not returned, yet they had determined to deliver a talk to those now present. They also observed that the same talk would be given to those who were absent, as soon as they arrived. It was as follows: * * afpl. 148.

This "talk" contained no reference to the boundaries of the proposed cession.

The Choctaws next met the commissioners, in council, October 14, 1820. The minutes of the commissioners, for October 13, 1820, contain the following entry. Id. p. 238.

OCTOBER 13, 1820.

Puck-she-nub-bee, a principal chief of the nation, informed the commissioners that some of his headmen and warriors were disposed to go into council, and it was the wish of others to have a ball-play. He stated that he did not wish to mix his business, but to do one thing at a time. The commissioners replied that his view of the duty set was a correct one; that if his headmen and warriors were disposed to indulge themselves in amusement, it might be proper to gratify them, as they had no disposition to hurry them, in their determinations. This chief then remarked that they would proceed, on to-day, with the ball-play, and on to-morrow go into council. In the meantime he expressed a wish that the commissioners would furnish their definitive propositions; which were accordingly submitted to them, in manuscript, late this evening. The following is a copy:

CHOCTAW TREATY GROUND, *October* 13, 1820.

Friends and Brothers:

In order to carry into effect the grand and friendly object, which your father, the president of the United States, has in view, for securing the happiness and protection of all his Choctaw children, he proposes to give you a large country west of the Mississippi river. It will be laid off adjoining your Cherokee brothers, so that each can protect and befriend the other. THE LIMITS WILL EXTEND FROM THE ARKANSAS RIVER, WHERE THE CHEROKEE LINE BEGINS, SOUTH TO THE RED RIVER, AND WEST TO THE HEAD SOURCE OF THE ARKANSAS RIVER. Your father, the president, wishes to collect all his Choctaw children, who have already gone over the Mississippi, as well as those who are straggling about in every direction.

afpl. 143, 144.

This document proves that Generals Jackson and Hinds did not intend that the 100th meridian should be the western boundary of the Choctaw lands, unless they were both prevaricators of the worst stamp. But notwithstanding this explicit assurance, of Generals Jackson and

Hinds, that the cession was to extend to the headwaters of the Arkansas, west of the 103d meridian, the dissenting judge thinks it "safe to assume" (p. 79) that they intended that the 100th meridian should be the western boundary of the cession. There is not the slightest ground for imputing a want of candor to either of these commissioners. This document proves also that President Monroe, Secretary Adams and Secretary Calhoun entertained no such purpose; for, if they had, they would have communicated it to Generals Jackson and Hinds.

The minutes of the commissioners, for October 14, 1820, commence as follows:

OCTOBER 14, 1820.

The preceding talk was interpreted to the chiefs, headmen, and warriors of the Choctaw nation, this morning. The commissioners represented to them the importance of the subject, to which it related, and wished them all to hear it. It was a matter of deep concern, and they recommended them to listen and deliberate, with great attention. They observed that it was put in writing, in order that it might be read, in council, and that they might understand it well. * *

Immediately after hearing the above talk, the chiefs, headmen, and warriors went into council and were, for some time, engaged in discussing the propositions submitted to them as the basis of a treaty. The commissioners received no report from them as to the result. The chiefs, headmen and warriors, asked to be indulged with further time to deliberate, as it was a subject of uncommon magnitude to the nation. The commissioners replied that the course which they proposed was a prudent one, and that they would wait on them with patience; it was not their wish that they should be precipitate, but that their determination should be the result of mature reflection; then all the Choctaw nation would be satisfied, and their true and lasting interests successfully promoted.

The next meeting, in council, occurred October 17, 1820. The commissioners delivered another "talk;" but it contained no allusion to boundaries. The minutes of October 18, 1820, contain only the following entry:

OCTOBER 18, 1820.

Agreeably to appointment the commissioners met the chiefs, headmen, and warriors of the Choctaw nation, in council, this day; and, after having read and explained to them the different articles of the treaty, submitted it to them for signature.

The following letter from S. H. Long, major of topo-

graphical engineers, was received by the war department, in November, 1820:

BELLE POINT, *September* 14, 1820.

Sir: * *

I regret that, for want of a guide and a proper knowledge of the country, that the detachment accompanying me were led into a mistake, and explored the Canadian of the Arkansaw, instead of the Red river. On parting from Capt. B's detachment, we proceeded southwardly about 50 miles further, *in view of the mountains*, and came to a brook running in a southwestwardly direction, which, according to Pike's map and description of the country, our only guide, we took to be a branch of Red River. After pursuing it downward, more than 100 miles, we fell in with a party of Indians, of the nation of Bad Hearts, who confirmed us in this opinion, by repeatedly assuring us that the stream, on which we were traveling, was Red River. Having traversed it, by our courses, about 800 miles, by its meanderings, more than 1,000, we arrived at its confluence with the Arkansaw, and discovered our error, when it was too late to retrieve it.

* * S. H. LONG,
Maj. U. S. T. Engrs.

Hon. J. C. CALHOUN,
Sec. of War.

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This letter showed that the source of the Canadian was west of the 103d meridian. In Major Long's report of February 20, 1821, offered in evidence by the government, he says:

The Canadian rises at the base of the Rocky mountains, and, after a wandering course of about one thousand miles, enters the Arkansas, at a distance of about 550 miles from the mouth of the latter. This river has generally been represented, upon the maps of the country, as having a Easterly course; whereas its source is nearly in the same latitude at its confluence with the Arkansaw; consequently its general course is nearly East.

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In the presence of the facts that the Spanish treaty expired on the 22d of August, 1819; that it was in the power 14 months before the negotiation of the Choctaw treaty began, and remained there more than a month after the Choctaw treaty was ratified and proclaimed;—in view of the reiterated notifications of the death of the Spanish treaty, given to the senate, to the house of representatives, and to the Spanish government, by President Monroe, Secretary Adams, and Minister Forsyth;—

in the presence of these facts and official proceedings, the position, that the treaty-making authorities of the United States could not have intended to cede to the Choctaws any land west of the 100th meridian, because the Spanish treaty was pending, would seem to be wholly untenable.

Equally untenable is the position that the Choctaws, themselves, understood the cession to be limited by the 100th meridian, notwithstanding the assurance of Generals Jackson and Hinds that it was to extend to the "head source of the Arkansas." The assumption that the 103 Choctaws, who signed the treaty, had critically examined the maps of Arrowsmith, Pinkerton, Pike, Melish and Darby, is of course, absolutely unwarranted.

So also, is the assumption that Major Long's letter was not known, to the treaty-making authorities of the United States, before the Choctaw treaty was ratified.

This letter was dated September 14, 1820. It was received at the war office sometime in November, 1820. The exact day of its receipt is unknown. If it was received before November 8, it was in the possession of the government more than two months before the ratification of the Choctaw treaty, "by the president, by and with the advice and consent of the senate." If it was received, on the last day of November, it was in the possession of the government more than one month before the ratification of that treaty. This letter was accessible to John C. Calhoun, the secretary of war, to John Quincy Adams, the secretary of state, and to James Monroe, the president. It was the duty of these officials, not only to know the contents of the letter, themselves, but also to inform the senate of its contents, because, at that time, the Choctaw treaty had been signed by Generals Jackson and Hinds, and was awaiting the action of the president and senate.

And the presumption of the law is, not that this duty was neglected, but that it was duly performed.

I submit that the fact that Major Long's letter, of September 14, 1820, was in the possession of the government a month, or two months, before the Choctaw treaty was ratified, not only proves that the government had at hand the means of ascertaining that the source of the Canadian was west of the 103d meridian, but also affords presumptive circumstantial proof that the government did know that it was so located. I think that this circumstantial proof raises a presumption strong enough to cast upon the government the burden of proving that it had no such knowledge. I think that this burden is not shaken off, by the mere assertion that there is no evidence that the secretary of war communicated such information to the president, or senate. Indeed I go further than required by the exigency of the case, and contend that, even if it had been shown that the president and senate had no actual knowledge of this letter, the government should be held to a constructive knowledge of its contents.

There is not the slightest ground for supposing that the Choctaws, in the negotiation of the treaty of 1829, spoke or thought of longitudes. Not a word was spoken to them, by a government official, indicating a purpose to make the 100th meridian the western boundary of the Choctaw cession. There is no proof that the Choctaws had ever examined, or seen, or heard of one of the five maps, upon which the appellants relied, or that they supposed the source of the Canadian to be on, or near, the 100th meridian. On the contrary, Generals Jackson and Hinds had, four days before the treaty was signed, given the Choctaws their deliberate assurance, in writing, that their cession was to extend "to the head source of the Arkansas river," which was further west than the source of the Canadian.

They knew that the treaty, on its face, ceded to them a territory bounded, on the west, by a line drawn south, from the source of the Canadian, to the Red river. They did not know, or suspect, nor did they have any reason to know, or suspect, that, when the government fixed this line, as their western boundary, it intended to make, not this line, but the 100th meridian their western boundary. There is not the slightest basis for the assumption that the Choctaws understood the United States to cede, not what they did in express terms cede, but what they did not in terms cede. And the government understood that while the Choctaws, in 1820, neither knew, nor cared to know, or hear, anything about meridians of longitude, they well knew what the source of a river was, and could appreciate that, as an element of a boundary line.

The Choctaw treaty was made, in the state of Mississippi, 78 years ago. Since 1820 the Choctaws have made most creditable progress, in knowledge and in civilization. But seventy-eight years ago they had not passed the stage of semi-barbarism. Their "book-learning" was below zero. Their cartography was a minus quantity. They neither knew nor cared anything about longitudes or latitudes. They wanted their western country to extend to the *source of the Canadian*. Whether it extended 100 degrees, or 1,000 degrees west of Greenwich, was all the same to them. They were incapable of even considering the question of its longitude.

Even though the treaty-making authorities of the United States had believed the source of the Canadian to be near the 100th meridian, and had intended, in the Choctaw treaty of 1820, to make that meridian the western boundary of the Choctaw cession in disregard of the express terms of the treaty, that meridian would not have become its western boundary if the Choctaws had no such belief or

intention. If, in this exchange of lands, the United States had intended to make the 100th meridian the western boundary of the cession to the Choctaws notwithstanding the explicit language of the grant, but had failed to inform the Choctaws as to their purpose, the United States would, of course, have been bound by the language of the treaty.

The Choctaws could not be held, by a secret purpose of the United States to fix a boundary, different from that expressly defined in the treaty. The United States could not, after the assurance, which their commissioners, Jackson and Hinds, gave to the Choctaws, that their land would extend to the head source of the Arkansas river, substitute, for the boundary prescribed in the treaty, a boundary not therein prescribed, without previous notice to the Choctaws of such intended substitution, and acquiescence therein on the part of the Choctaws. In this case, there is no proof, or possibility of proof, that the United States notified the Choctaws that they proposed to substitute the 100th meridian, for the western boundary defined in the treaty.

I submit that the United States are to be held to that sense of the treaty, in which they permitted the Choctaws to understand it. *A fortiori* are they to be held to that sense, in which, through their agents, Generals Jackson and Hinds, they solemnly assured the Choctaws it was to be executed.

But then, if the parties to the Choctaw treaty had supposed the source of the Canadian to be, either on the meridian of 97° 5′, or on the meridian of 99° 45′, it would not have followed that they did not intend to stand by the words of the treaty extending the cession to the source of the Canadian, whatever might prove to be the location of its source, but intended to make the arbitrarily selected

meridian of 100° the western boundary of the cession, instead of a line drawn from the source of the Canadian to the Red river.

5. The counsel insisted that, although the senate, on the 19th of February, 1821, did "consent to and advise" the president to ratify the Spanish treaty for the second time, the president did not ask the senate to do anything of the kind, because further action, on the part of the senate, was not essential to the validity of the treaty. But if further action, on the part of the senate, had not been, in the judgment of the president, essential to the validity of the treaty, he certainly would not have sent the treaty to the senate, on the 14th of February; he would have exchanged ratifications with the Spanish minister, upon receipt of the notice, which the Spanish minister gave, on the 12th of February, of his readiness for an exchange of ratifications; he would thereupon have made proclamation of the treaty, without sending it to the senate at all. It is evident, not only that further action, on the part of the senate, was essential to the resurrection and validity of the treaty, but also that the president and senate understood such further action to be necessary, and acted accordingly. The senate resolution of February 19, 1821, approving the second ratification of the treaty, as originally reported by the committee, was framed as follows:

Resolved, (two-thirds of the senators present concurring therein) That the senate do advise and consent to the ratification of the treaty of amity, settlement, and limits, made and concluded at Washington, on the 22d day of February, in the year of our Lord 1819, between the United States of America and his Catholic Majesty.

As adopted by the senate, the resolution took the following form:

Resolved, (two-thirds of the senators present concurring therein) That the senate, having examined the treaty of amity, settlement, and limits, between the United States of America and his Catholic Majesty, made

and concluded on the 22d of February, 1819, and seen and considered the ratification thereof, made by his said Catholic Majesty, on the 24th day of October, 1820, do consent to and advise the president of the United States to ratify the same.

There may possibly be room for doubt whether the resolution, in its original form, required a *subsequent* ratification by the president. The words were: "Resolved, That the senate do advise and consent to the ratification of the treaty." There is, however, no room for doubt as to the import of the resolution actually adopted. The senate obviously consented to and advised a *subsequent* ratification. The words of the resolution are: "Resolved, That the senate do consent to and advise the president of the United States to ratify the same."

Now, it is not the ratification of a treaty, by one or both of the parties, that carries the obligation of the parties, by relation, back to the date of the signing of the treaty. It is the *exchange* of ratifications that has that effect. The exchange of ratifications is an international act. But the ratification, itself, is a domestic act. It does not acquire any international character until the exchange of ratifications takes place. Until then it is wholly within the cognizance and control of the party whose act it is. It may be withheld or rescinded. Inasmuch, then, as the ratification of 1819 could have acquired no international character, until the exchange of ratifications, in 1821, the ratification of 1819, if it had been delivered in 1821, to the Spanish minister, in exchange for the Spanish ratification of October, 1820, would have become operative, as an international act, only when the exchange of ratifications occurred. If its date had not been changed by the pen, it would necessarily have been changed by the fact. It would have been a ratification subsequent to the adoption of the senate resolution of February 19, 1821. Whether the president signed a new instrument,

or used the old paper, with or without a change in its date, we are not informed. Nor is information on this point material to the case. If the president had not, in one way or another, ratified the treaty *after* the adoption of the senate resolution, his act would have been unconstitutional, because not performed with the consent and by the advice of the senate.

6. The counsel for the government claimed that the United States ceded nothing to Spain, by the treaty which was ratified February 19, 1821. This was a mistake. On the 15th of April, 1804, James Madison, the secretary of state, instructed our ministers to Spain as follows:

> No final cession is to be made to Spain of any part of the territory on *this side of the Rio Bravo*, but in the event of a cession to the United States of the territory east of the Perdido.

On the 8th of July, 1804, Secretary Madison instructed the same ministers as follows:

> It is to be understood that a perpetual relinquishment of the territory *between the Rio Bravo and Colorado* is not to be made, nor the sum of ——— dollars paid, without the entire cession of the Floridas.

On the 12th of March, 1818, Mr. Adams, then secretary of state, in an official letter to the Spanish minister, said:

> Well might Messrs. Pinckney and Monroe write to Mr. Cevallos, in 1805, that the claim of the United States to the boundary of the Rio Bravo was as clear as their right to the island of New Orleans.

President Monroe held, October 31, 1818, that the claim of the United States to the boundary of the Rio Bravo was too clear to admit of question; and he directed his secretary of state, Mr. John Quincy Adams, to forbear discussing their title with the Spanish minister. De Onis, the Spanish negotiator, in his memoir, said that, by the treaty, Florida was exchanged for Texas. Every president and secretary of state, from 1804 to 1820, decided officially that the territory of the United States, acquired

from France in 1803, extended westward to the Rio Bravo and the Rocky mountains.

The Spanish treaty embraced a cession to Spain, of all the territory west of the line agreed upon as the future boundary, between the United States and the Spanish possessions. Duplicates of this treaty were signed by the negotiators, one in the Spanish and the other in the English language. The corresponding paragraphs differ from each other, in the Spanish and English versions of the treaty, not only in the order of the ceding clauses, but also in the words of the clause setting forth the action of Spain. In both versions the cession, by the United States, takes the same form as follows:

> The United States hereby cede to his Catholic Majesty, and renounce forever all their rights, claims, and pretensions to, the territories lying west and south of the above-described line.

The counsel for the government was of the opinion that while, by the terms of the treaty, the *rights* of the United States to this land were ceded, the land itself was not ceded. I think the land was ceded, and the rights, claims, and pretensions renounced. I think the clause, if expanded, would take this form:

> The United States hereby cede to his Catholic Majesty the territories lying west and south of the above-described line, and renounce all their rights, claims, and pretensions to those lands.

But if the United States then actually owned the land, a cession of all their rights therein would obviously have been exactly tantamount to a cession of the land itself.

The action of Spain, as set forth in the Spanish version, which version, as decided in Arredondo's case, fixed the obligation of Spain, is different. It is this:

> His Catholic Majesty renounces and cedes forever, for himself and his heirs and successors, all the rights which he holds to the territories east and north of said line.

He cedes rights; he does not in terms cede lands. If

he had owned lands east, or north, of the line, this language would, of course, have transferred them. But he owned no lands so situated.

7. In maintenance of his position that, although the parties to the Choctaw treaty, in express terms, extended the cession westward to the source of the Canadian, they intended to extend it only to the 100th meridian, the counsel for the United States said:

> When a deed names a boundary line, which is supposed, by the parties, to have a certain location, but which is really located elsewhere, it has repeatedly been held that the intention must control the meaning of the words of the deed.

This was an inaccurate statement of a familiar principle of law. The counsel seemed not only to misunderstand the rule, but also to fail to perceive that the authorities cited by himself were fatal to his contention. The rule is this: Where a deed names an object, whether natural or artificial, as one of the calls, and the evidence shows that there are, in the locality, two or more objects to which the name or designation is applicable, a latent ambiguity, in the call, is disclosed, and evidence will be admissible to cure the ambiguity and show the intention of the parties. As for example, when one of the calls is for the "Lunenburg line," or the "Shirley line," or the "Derry old line," if it be shown that there are two or more different lines, in the locality, to which the designation is applicable, the latent ambiguity, thus disclosed by evidence, may be explained and removed by evidence. This rule is recognized in each of the four cased cited by the counsel. But it has no applicability to the case at bar.

Another principle is, that where there is, in the locality, only one object bearing the designation used in a call, a mistake, respecting the *location* of that object, does not present a latent ambiguity in the call, and any inconsist-

ency in the calls must be corrected, not by evidence *aliunde*, but by giving to the calls for natural objects control of the calls for courses and distances.

The counsel cited four authorities. In Croghan *v.* Nelson, 3 How. 187, the first case cited, the question was whether, in a locator's entry in the Kentucky land office, calls for *quantity* controlled calls for *course*. The calls included a call for quantity (1,000 acres) and four calls for boundary lines, the first and fourth being for natural objects,—a bayou and a creek connected together, and the second and third for movable artificial lines connected with each other, and, together, connecting extremities of the first and second lines. The court held that, under the Kentucky laws, the call for 1,000 acres controlled the calls for the courses of the movable lines and said:

> The great and leading object of every entry is to obtain the *quantity* of land specified in it; every other call, therefore, must be regarded as intended to effect this principal object, and as subordinate thereto. The call to run a line parallel with the first, or base line, is, therefore, repugnant to the call to include the quantity, and must be rejected.

In the case at bar, the "great and leading object" was not to obtain a specified quantity of land. There was no specification of quantity, or call for quantity, in the treaty. There were calls for two natural objects, the source of the Canadian and the Red river, and for a course connecting those natural objects. It is not material to inquire whether the rule is the same, at common law, or under international law, as under the Kentucky statute; for no question arises, in the case at bar, bearing the remotest analogy to the question decided in Croghan *v.* Nelson. In that case the question was whether, in a Kentucky land office entry, a call for quantity controlled a call for course. In the case at bar, the question is whether, in the case of a call naming, as a corner in a boundary, a natural object, to which alone the designation is applicable, it is compe-

tent to show, by evidence *aliunde*, that the parties did not intend to make such natural object a corner, but intended to locate that corner at a distance of 200 miles from the natural object expressly designated in the treaty.

If the "Canadian river" had two branches, approximately equal in length and volume, both of greater length and volume than any others, the river would have two sources. In that case, a call for the "source of the Canadian river" would be ambiguous, and evidence to show which source was intended would be competent. But the Canadian has only one stream, to whose head the term "source of the Canadian river" can be, or ever has been, applied. There is but one "source of the Canadian river." There was, therefore, no ambiguity in the term "source of the Canadian river." Evidence showing that the parties supposed the longitude of that source to be four degrees farther east than it was, would disclose a mistake, but would disclose no ambiguity in the call. Proof of a mistake, respecting the location of a natural object, which is not, at the same time, a mistake as to its identity, discloses no ambiguity in its designation, and affords no ground for the admission of evidence, to show that the parties to the deed did not mean what they expressly said.

In Cook *v.* Babcock, 7 Cush., Mass. 526, which is the second case cited by the counsel, the question was whether, in the absence of proof that there were two "lines of Blandford," one the true line, and the other a reputed line, it was competent to show, by evidence, that the parties intended to make a line different from the true line one of the boundaries of the land. One of the calls was for a course, "north on the line of Blandford." Before the date of the plaintiff's deed, that line had been established, by an act of the legislature. The plaintiff

ed evidence to show that, before the legislature fixed line, it had been "understood and reputed to run ier north," than the line so established; and he con-ed that his land extended to this "understood and ted" line. Chief Justice Shaw, delivering the unani-s opinion of the court, said:

en the description, in a deed or devise, is clear and explicit, and with-ubiguity, there is no room for construction, or for the admission of evidence, to prove that the parties intended something different. veyance of land, like a devise of land, is required, by law, to be in g, and registration is provided for, for the information of all s. It is the intention of the parties, thus expressed and recorded, ot an intent to be proved aliunde and not expressed, which must n. When, indeed, upon application of the description to the land, loubtful what was intended, this is a latent ambiguity, and thus ice aliunde may be given; as when the description gives the line ning to a maple tree, marked, and two maple trees are found, of which would answer the description. So, here, if the words had the "reputed" line, or the "supposed" line, or words of that ption. But the deed from Herrick to Clark, on which the question was made after the dividing line between Blandford and Chester een established by law, and must be presumed to have been known parties, from the use they have made of it in the deed as a monu-* * Nor is it enough to prove a mistake in the deed, by show-om the conveyancer or any other evidence, that the grantor in-l to convey by a supposed old line, not then the true town line.

Putnam *v.* Bond, 100 Mass. 58, the third case cited, vidence showed that there were two "Lunenburg ," one "*considered by everybody, including the parties e deed*," to be the real line, the other being the true d line. The question was whether evidence was ad-ible to explain and cure this ambiguity in the call. e Gray held that this evidence disclosed a latent guity in the description, and, that the Lunenburg *which was considered by everybody, including the ies to the deed, to be the real Lunenburg line*, was to be as the line referred to, in the ambiguous convey-

in the case at bar, one of the calls had named a line h was not a natural object, and the evidence had dis-d that there were two lines of the same name, one the

lawfully established line, and the other considered the true line, *by everybody, including the parties to the treaty*, there would have been disclosed a latent ambiguity in the description, and the case of Cook *v.* Babcock would have been available, as an authority for accepting the latter, as the boundary referred to in the treaty.

In Hall *v.* Davis, 36 N. H. 569, the fourth case cited, one of the calls of the deed was for "Derry old line," and one of the questions, in the court below, was whether, in the absence of proof that there were two "Derry old lines," this call could be controlled by parol proof. The supreme court said:

> To the second ruling of the court below, rightly understood, we can discover no valid objection, although it was apparently unnecessary, save to meet an assumption of the plaintiffs. The located line would seem very clearly to have been the true original line of Londonderry; and, if it were so, whether the parties understood the deed to refer to "Derry old line," as a located line, or not, was wholly immaterial, unless the language of the deed contained a latent ambiguity; for that language having named "Derry old line," as the boundary of the lot, when "Derry old line" was shown to be an actually located line, that located line must be the boundary of the parties, whatever their understanding or intention might have been.

The court proceeds to say that, if the evidence had shown that there was a second line, called "Derry old line," it would have disclosed a latent ambiguity, and it would then have been competent for the parties to show in what sense the expression was used.

The reason for excluding proof of the intention of the parties, is, if possible, still stronger, in the case at bar, than it was in the case of Hall *v.* Davis; for in that case the call in question was a call for an artificial line, but in the case at bar, the call in question is for a natural object.

8. Another ground, on which the counsel for the government contended that the parties to the Choctaw treaty of 1820 intended to make the 100th meridian the western boundary of the Choctaw cession, was that, whereas a

ine drawn due south, from the true source of the Cana-
lian, which is west of the meridian of 104° 30′, would
ot touch the Red river, but would pass to the west of its
ource, a line drawn due south from the Canadian, on the
00th meridian, would strike the Red river, and, there-
ore, the parties must have intended to make the 100th
eridian the western boundary of the cession.

Precisely the same reasoning would prove that the
arties intended to make any and every one of more than
0,000 different meridians, between 100° and 103° 30′, the
estern boundary of the land. For a line drawn due
outh, on the meridian of any second, or fraction of a
econd, of longitude, between 100° and 103° 30′, will in-
rsect the Red river, the source of which is west of the
eridian of 103° 30′.

9. In maintenance of his contention that the Choctaw
eaty of 1820 invested the Choctaws with no title to any
nd west of the 100th meridian, the counsel for the
nited States invoked the familiar rule that, by the ex-
hange of ratifications of a treaty, the obligations of the
arties to each other, therein assumed, are made to date
om the time when the treaty was signed. If a treaty,
tween two independent sovereign powers, A and B,
all be signed, on the 1st of February, 1898, and the
tifications exchanged on the 1st day of July, 1898, the
bligations of the two parties *to each other*, therein as-
med, will date back to the time when the treaty was
gned. If a treaty, between A and a third party, C,
all be signed on the first day of March, 1898, and the
tifications exchanged on the 1st day of June, 1898, the
rms of the treaty between A and B and the date of
gning being known to C, it will not be competent for C,
der the law of nations, to acquire from A, by the sec-
d treaty, any rights in prejudice of the rights secured
B, by the first treaty.

But if the treaty, between A and B, shall be a secret treaty, and its terms and the fact and date of signing shall be unknown to C, then the second treaty, having been first in exchange of ratifications, will prevail over the other; and if the first treaty shall embrace a cession of land, from A to B, and the second a cession of the same land from A to C, all the parties to both treaties being independent sovereign powers, the title of C to the ceded lands will, under the law of nations, be good, as against both A and B. B will be compelled to look to A for redress of grievances. If, in the case at bar, the Choctaw nation had been an independent sovereign power, the Choctaw title to land west of the 100th meridian would have been valid from January 8, 1821, the date of the proclamation of the Choctaw treaty, notwithstanding the final ratification of the Spanish treaty, on the 19th day of February, 1821. If England had been in the place of the Choctaw nation, England, and not Spain, would have become the owner of the land. But inasmuch as the Choctaw nation, instead of being an independent sovereignty, was a dependent state, subject to the paramount power of eminent domain vested in the government of the United States, the final ratification of the Spanish treaty was effective to transfer to the king of Spain the land of the Choctaws west of the 100th meridian.

There is another rule of international law, intimately connected with the foregoing rule. It is this: If either party to a treaty shall refuse, or neglect, to ratify it, within the period of time limited, by its terms, for the exchange of ratifications, the party in default will be powerless, by a subsequent ratification, to effectuate a resurrection of the treaty, without further action by the party not in default. It will be for the party not in default to determine whether the treaty shall or shall not be restored to life.

If the party not in default shall again ratify the treaty and ratifications shall be exchanged, then, *as between the parties to the treaty*, the obligations therein assumed will date back to the day when the treaty was signed. But if, before the exchange of ratifications, a treaty between the party not in default and a third sovereignty, C, shall be concluded and ratified, without notice to C of previous negotiations between A and B, a cession of land in the treaty between A and C, will prevail over a cession of the same land in a treaty between A and B. In the case now before the court, the cession to the Choctaws would prevail over the cession to Spain, if the Choctaw nation had been an independent sovereign state, like England, instead of being subject, as it was, to the superior sovereignty and paramount power of eminent domain of the United States. If the treaty which was made with the Choctaws, in 1820, had been made with England, Spain would have acquired no title to the land in controversy, by the treaty which was finally ratified on the 19th of February, 1821. England would have held the land.

It was contended that in the case of the United States v. Arredondo, 6 Peters 691, the supreme court held that no person, not a citizen, could, between the date of signing a treaty and the date of the exchange of ratifications, acquire any rights in conflict with those conferred by the treaty. The doctrine of the Arredono case was evidently misunderstood. The treaty, by which Spain ceded Florida to the United States, was signed, as already stated, on the 22d of February, 1819, and ratifications were exchanged on, or soon after, February 19, 1821. Before February 22, 1819, the king of Spain had granted certain lands in Florida to Arredondo, upon condition that he should establish 200 Spanish families on the lands within three years from the date of the grant. A general pro-

vision, of article 8 of the Spanish treaty, permitted Arredondo to establish these families on the land, within three years "from the *date* of this treaty." But he did not establish the 200 families on the land before the expiration of three years from the date of the *signing* of the treaty. And one of the questions, in the case, was whether, so far as his rights were concerned, the *date* of the treaty was the date of signing, or the date of the ratification. The court said:

It is lastly objected that the extension of time, by the intendant, in December, 1820, was without authority, being subsequent to the ratification of the treaty by the king of Spain. But the ratification by the United States was in February following; and the treaty did not take effect till its ratification by both parties operated, like the delivery of a deed, to make it the binding act of both. That it may and does relate to its date, as between the two governments, so far as respects the rights of either under it, may be undoubted; but as respects individual rights, in any way affected by it, a very different rule ought to prevail. If the question was new, in this court, we should have no hesitation in saying that as to the grant of land subject to the condition of settlement, the *ratification* of the treaty must be taken as its *date*. But the question is not a new one.

The court then cite as authorities 4 Cranch 1, 65; 4 Dall. 199.

In Haver *v.* Yaker, 9 Wall. 32, 34, the court said:

It is undoubtedly true, as a principle of international law, that as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard, the exchange of ratifications has a retroactive effect, confirming the treaty from its date. But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them it is not considered as concluded, until there is an exchange of ratifications; and this we understand to have been decided by this court, in Arredondo's case, reported in 6th Peters. The reason of the rule is apparent. In this country a treaty is something more than a contract, for the federal constitution declares it to be the law of the land. If so, before it can become a law the senate, in whom rests the authority to ratify it, must agree to it. But the senate are not required to adopt or reject it as a whole, but may modify or amend it, as was done with the treaty under consideration. As the individual citizen, on whose rights of property it operates, has no means of knowing anything of it while before the senate, it would be wrong in principle, to hold him bound by it as the law of the land, until it was ratified and proclaimed. And to construe the law so as to make the ratification of the treaty date back to its signing, thereby divesting a title already vested, would be manifestly unjust, and cannot be sanctioned.

In this case of Haver *v.* Yaker, the question was whether rights, acquired before the exchange of ratifications, by an individual not a party to the treaty, were affected by the treaty. In the case at bar, the question is whether rights, acquired by an Indian nation, prior to the exchange of ratification, are affected by the treaty. In both cases the rule and the reason for the rule are obviously the same. And, but for the fact that the United States were invested with the paramount power of eminent domain over the land west of the 100th meridian, the title of the Choctaws to that land would not have been extinguished by the treaty with Spain.

10. The counsel for the Wichitas contended that the treaty of 1820 did not convey to the Choctaws, either the leased district, or the land west of the leased district, (1) because the Quapaws held no right of occupancy therein, and, therefore, conveyed no title thereto by the treaty of 1818, and (2) because the Wichitas themselves held the right of aboriginal occupancy in the entire leased district and other lands.

But even if the aboriginal title to these lands had been held, not by the Quapaws, but wholly by the Wichitas, this position of counsel would not be tenable. In British America the ultimate fee of all lands encumbered with the right of Indian occupancy, was in the British crown, previous to the revolution, and in the states afterwards. It was encumbered by the Indian right of occupancy, but was subject to grant. Clark *v.* Smith, 13 Peters, 195. See, also, Fletcher *v.* Peck, 6 Cranch, 87; United States *v.* Clark, 9 Peters, 168. The Cherokee Nation *v.* Georgia, 5 Pet. 1; Johnson *v.* McIntosh, 8 Wheat. 543; United States *v.* Cook, 19 Wall. 591; Veeder *v.* Greppy, 3 Wis. 502; Jackson *v.* Hudson, 3 Johns. (N. Y.) 375; Beecher *v.* Wetherby, 95 U. S. 517.

In the province of Louisiana the fee of the land was in the crowns of France and Spain, from 1685 to 1803, and, since 1803, has been in the government of the United States, subject to the Indian right of occupancy. Since the acquisition of Louisiana, by the United States, in 1803, it has not been possible for any Indian tribe to acquire such a right of occupancy, in that province, as could constitute an incumbrance on the fee-simple title of the United States.

An Indian right of occupancy could not prevent a conveyance, by the United States, of a fee-simple title clear of the Indian incumbrance. It could only impose upon the United States the obligation to make due compensation for the loss of occupancy of the land. For this nation, like every other sovereignty, is invested with the power of eminent domain,—the power to take private property for public use. This is an inherent, indispensable, and inalienable power of sovereignty. It extends to every acre of land within the exterior limits of the republic. It is recognized alike by the public law of nations, and by our written constitution, which makes the payment of just compensation for the property a condition of the exercise of the power. Whenever a treaty becomes essential to the public welfare, and the cession of private property real or personal becomes essential to the consummation of the treaty, the taking of the property, for that purpose, is a taking for public use; and the treaty, *proprio vigore*, takes the private property, converts it into public property, and effectuates the transfer.

All this was true in the case of the Choctaw treaty of 1820. In order to secure the removal of the Choctaws from the State of Mississippi, and to consummate the purchase of 5,169,788 acres of their Mississippi lands, it became necessary for the United States to cede to the

Choctaws the western lands described, by metes and bounds, in the second article of the treaty of 1820. If any part of the land embraced within those boundaries was the property of the Wichitas, the United States, by that treaty, took the land for public use, transformed it into public property, and ceded it to the Choctaws. If the Wichitas were not the owners of any part of the ceded land, they can claim no compensation for its loss. If they were its owners, they have a claim for compensation against the United States. But it is a caim absolutely dissevered from the land. They have no vendor's lien, or other lien upon it, no equitable or reversionary interest therein, no conditional interest of any kind atttached to or running with the land, any more than they would have, if the land had been ceded to the king of England.

Suppose that, when the Choctaw treaty of 1820 was made, General Jackson had notified the Choctaws that the Wichitas held a right of occupancy in the leased district. I submit that the Choctaws would not have exchanged their Mississippi country for an estate in the land between the Red and Canadian rivers, encumbered by a right of occupancy held by other tribes.

11. It was claimed that the phraseology of article 10 of the treaty of June 22, 1855, tended to establish the position that the stipulated payment of $800,000 must have been applicable to the lease of the district between the 98th and 100th meridians. The following is the text of this article:

Article 10. In consideration of the foregoing relinquishment and lease, and as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct.

It was asserted that the Chickasaws had no rights connected with the land west of the 100th meridian, and

therefore the provision that, one-fourth of the sum of $800,000 should be paid to them, implied that the payment of $800,000 was exclusively applicable to the lease. But in the first place, the Chickasaws did, in fact, then hold rights connected with the lands, between the Red and Canadian rivers, west of the 100th meridian. Their interest therein was, in character, identical with the corresponding interest of the Choctaws. It was inferior in extent, because the Chickasaws were inferior in numbers to the Choctaws. The Choctaws were entitled to three-fourths and the Chickasaws to one-fourth of the compensation for the relinquishment of title to this land. The Choctaws conveyed this interest to the Chickasaws by a provision in article 1 of the convention of January 17, 1837, as follows:

> Article 1. It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country, to be held on the same terms that the Choctaws now hold it, except the right of disposing of it, which is held in common with the Choctaws and Chickasaws, to be called the Chickasaw district of the Choctaw nation, to have an equal representation in their general council, and to be placed on an equal footing, in every other respect, with any of the other districts of said nation, except a voice in the management of the consideration which is given for these rights and privileges: and the Chickasaw people to be entitled to all the rights and privileges of Choctaws, with the exception of participating in the Choctaw annuities, and the consideration to be paid for these rights and privileges, and to be subject to the same laws to which the Choctaws are: but the Chickasaws reserve to themselves the sole right and privilege of controlling and managing the residue of their funds, as far as is consistent with the late treaty between the said people and the government of the United States, and of making such regulations and electing such officers, for that purpose, as they may think proper.

In all the rights and privileges of the Choctaws except the right to the Choctaw annuities, and to the money paid by the Chickasaws to the Choctaws, the Chickasaws became participants, such rights and privileges being held in common, three-fourths by the Choctaws, and one-fourth by the Chickasaws. The rights, so acquired by the Chickasaws, included the right to one-fourth of the

compensation for the land west of the 100th meridian, which the United States had sold to the Choctaws, and had subsequently sold and conveyed to the king of Spain.

But then, in the next place, if the Chickasaws had not been holders in common of this right of reclamation, as against the United States, the question, whether a part of the $800,000, should be paid to the Chickasaws, was a question between the Choctaws and Chickasaws. If, in view of the intimate political and proprietary relations, which had been established between the two nations by the convention of 1837, and had continued for eighteen years, the Choctaws had seen fit to permit the Chickasaws to receive one-fourth of the $800,000, that arrangement would have concerned the Choctaws and Chickasaws only.

12. The counsel for the United States contended that the fact that, in the treaty of June 22, 1855, the Chickasaws did not join in the quitclaim of the land west of the 100th meridian, was proof that all of the payment of $800,000, was applicable to the leased district. This was a mistake. In 1837 the Choctaws held no interest in any *land* west of that meridian. By the Spanish treaty, their interest in that land had been extinguished, and all that remained to them was an interest in its money value. One-fourth of that money interest was all that was secured to the Chickasaws by the treaty of 1837. But in 1854, the land being again within the limits of the United States, the Choctaws insisted that they were still its owners, and importunately demanded to be "repossessed" of it. It was in response to this demand that the United States inserted in the treaty of 1855 a relinquishment of the land. Provision was made in the treaty, *not for a relinquishment of any title to the money value of the land, but for a relinquishment* of all right, title, and interest in and to the *land itself*. The treaty of 1855 contains the following clauses:

And whereas the United States desire that the Choctaw Indians shall relinquish all claim to any *territory* west of the 100th degree of west longitude. * *

The Choctaw Indians do hereby absolutely and forever quitclaim and relinquish to the United States all their right, title and interest, in and to any and all *lands*, west of the 100th degree of west longitude.

If the title to the money had been relinquished, the Chickasaws could have properly joined in such relinquishment. But they could not quitclaim any title to the land, because they had never either held or claimed any title thereto. On the other hand, they were entitled to one-fourth of the money value of the land, and were, therefore, properly made the payees of one-fourth of the money, to be paid for the quitclaim.

In the treaty of 1855 the parties said they agreed that the sum of $800,000 should be paid to the Choctaws and Chickasaws, for the quitclaim of the land west of the 100th meridian *and* the lease of the land between the 98th and 100th meridians. This is what they said: "In consideration of the foregoing *relinquishment and lease*, and as soon as practicable after the ratification of this convention the United States will pay, &c." The counsel for the appellants asserted that the parties to the treaty were mistaken when they said this. They asserted that the parties to the treaty did not agree to pay the sum of $800,000 for the relinquishment *and* lease,—but did agree to pay every dollar of the sum of $800,000 for the lease alone, and the dissenting judge is of the same opinion (p. 80). On the contrary, I submit that inasmuch as the 8,000,000 acres of land quitclaimed amounted, in value, to many times $800,000, it is incredible that when the parties said they agreed that the sum of $800,000 should be paid for the quitclaim *and* lease, they did not mean what they said, but meant that it should all be paid for the lease alone.

13. It was contended that ten cents per acre would have

been an excessive price for the 8,000,000 acres west of the 100th meridian, in 1855, because Bonaparte ceded the whole of Louisiana to the United States for 80,000,000 francs, in 1803. But there had been great changes, in this region, between the years 1803 and 1855. During that interval of time four new states and five new territories had made their appearance in this province, which was practically a wilderness in 1803. And there were other reasons for the small price accepted by Bonaparte for Louisiana. President Jefferson did not ask of France or desire anything more, in Louisiana, than the city of New Orleans, which is situated, not on the right bank, but on the left bank of the Mississippi river. Bonaparte, through his minister M. Talleyrand, first proposed the sale of the entire province of Louisiana to the United States. The reason he did so was twofold. (1) He was about to engage in a war with England; and he well knew that before it ended England would wrest Louisiana from France; and (2) he needed money for the war in which he was about to engage. The question, with him, was whether a friendly power should acquire the province, by treaty, for 80,000,000 francs, or the hereditary enemy of France should acquire it, by force, for nothing. And President Jefferson accepted a proffered cession which he had not solicited.

To substantiate this statement I cite from the second volume of American State Papers, page 547, a paragraph in a dispatch from Minister Livingston to President Jefferson, dated March 12, 1803, as follows:

> I broke off this part of my letter to attend Madame Bonaparte's drawing-room, where a circumstance happened of sufficient importance to merit your attention. * * After the First Consul had gone the circuit of one room, he turned to me and made some of the common inquiries usual on these occasions. He afterwards returned and entered into a further conversation. When he quitted me, he passed most of the other ministers merely with a bow, went up to Lord Whitworth, and, after the

first civilities, said: "I find, my lord, your nation want war again." L. W.: "No, sir, we are very desirous of peace." First Consul: "You have just finished a war of fifteen years." L. W.: "It is true, sir, and that war was fifteen years too long." Consul: "But you want another war of fifteen years." L. W.: "Pardon me, sir, we are very desirous of peace." Consul: "*I must either have Malta or war.*" L. W.: "I am not prepared, sir, to speak on that subject, and I can only assure you, Citizen First Consul, that we wish for peace." The prefect of the palace then came up to the Consul, and informed him that there were ladies in the next room, and asked him to go in. He made no reply, but bowing hastily to the company, retired immediately to his cabinet, without entering the other room.

Five days later Minister King sent to Secretary Madison the following dispatch:

LONDON, *March* 17, 1803.

SIR: War seems more and more probable; indeed it appears to me inevitable. Holland will be involved, and Spain and Portugal must obey the commands of France. The day after the King's message to parliament was communicated to the French government, Bonaparte delivered to Lord Whitworth a paper (a copy of which I have seen) stating:

1. That the expedition preparing in the Dutch ports was, as all the world knew, destined for America; but, in consequence of the message it had been recalled and would not proceed.

2. That if the armament, announced in the message, be not satisfactorily explained, or, if it take place, France would march twenty thousand men into Holland.

3. That the forces debarked in the ports of Holland would be reinforced and assembled on the coast of Flanders.

4. That the French army would be immediately put on a war establishment.

5. That camps would be formed on the coast between Dunkirk and Boulogne.

6. That an army would enter Switzerland.

7. That an army would march into Italy, and occupy Tarento, and,

8. That England must not expect, under cover of an armament, to avoid the execution of the treaty of Amiens.

The greatest activity continues to prevail in the military and naval departments. It is understood that the squadrons in the East and West Indies, and in the Mediterranean, will not immediately require reinforcement; and that a respectable fleet will soon appear in the channel and on the coast of Ireland. The regular army, on foot in Great Britain (exclusive of the forces in Ireland, Egypt, Malta, Gibraltar and the colonies), consists of twenty-seven thousand infantry and twelve thousand cavalry, and will be reinforced immediately by thirty-seven thousand of the militia, which have been called out.

In Mr. King's dispatch to Secretary Madison, dated London, April 2, 1803, printed on page 551 of the same volume, he said: "In a late conversation with Mr. Addington he observed to me, if the war happen, it would perhaps be one of their first steps to occupy New Orleans."

In Minister Livingston's dispatch, of April 11, 1803, to ecretary Madison, he said (same volume, page 552):

M. Talleyrand asked me, this day, when pressing the subject, whether e wished to have the whole of Louisiana. I told him no: that our shes extended only to New Orleans and the Floridas; that the policy France, however, should dictate (as I had shown in an official note) give us the country above the river Arkansas, in order to place a rrier between them and Canada. He said that, if they gave New leans, the rest would be of little value, and that he would wish to ow "what we would give for the whole."

The treaty was signed April 30, 1803. The king of ngland eighteen days afterwards declared war against rance. And if Bonaparte had not sold Louisiana to the nited States, "for a song," he would have incurred the miliation of seeing that province pass under the British g; and British provinces and British ships would now rround what little would remain of the United States. 14. The counsel for the appellants contended that the octaws and Chickasaws could not have placed a high imate upon the leased district, because they leased it the Confederate States for nothing, in 1861. But the octaws and Chickasaws, in the treaty of 1861, merely ewed, in favor of the Confederate States, the lease ich they had given to the United States, in the treaty 1855. One government was substituted for the other. e Confederate States took the lease as it stood in the nds of the United States. The condition to settle In- ns on the land was expressly continued. If any money sideration had been paid, for the lease, by the United tes, it enured to the benefit of the Confederate States. e following is the language of the Confederate treaty of 1:

rt. II. The lease made to the United States, by the treaty of 22d day une, 1855, by the Choctaw and Chickasaw nations, of all that portion eir common territory which lies west of the ninety-eighth parallel est longitude, is hereby renewed to the Confederate States, but for term of ninety-nine years only from the date of this treaty.

The Choctaws and Chickasaws had expected no further

compensation for the lease, from the United States, provided the land should be devoted to Indian settlement. By the terms of the Confederate lease, it was expressly devoted to Indian settlement. But, in articles 53 to 57, inclusive, the Confederate government agreed to pay the Choctaws and Chickasaws moneys amounting, in the aggregate, to $3,124,947.98. The consideration for this payment is not expressly indicated in the treaty. That the lease entered into that consideration would seem to be very clear. I submit to the court an official publication containing this treaty, and respectfully request the court to examine articles 11, 53, 54, 55, 56, and 57.

The claims of the Wichita and affiliated bands of Indians.

The following extracts from the brief filed by the Wichita and affiliated bands in the court below, show the basis, nature, and scope of their claims:

The Wichita tribe has occupied the country immediately west of the Cross Timbers from a time when "the memory of man runneth not to the contrary," and the traditions of the Indian tribes as well. Page 14.

The Wichita tribe have occupied the country west of the Cross Timbers from time immemorial. Page 19.

So far as we have established the confines of the territory occupied by the Wichitas and their close affiliates, so far do we claim title by the right of occupancy. Those confines we claim are established and admitted by the treaty of 1835 to be: "The Great Prairie west of the Cross Timbers to the western limits of the United States." Page 37.

On the same points we claim as follows: (1) That by a residence from time immemorial the Wichitas acquired a title by occupancy of the Great Prairie west of the Cross Timbers. Page 132.

Answering the summary contained on page 102 of the Chickasaw brief, we again disclaim any attempt to fix the Wichita habitat in the leased district. This is a creature of the Chickasaw fancy, fathered by a wish to restrict the Wichitas, originally, to so limited an area. Page 149.

Continual occupancy of the country west of the Cross Timbers, of which the leased district forms a part, is conclusively shown by all history and the traditions of all neighboring Indian tribes. Page 153.

This title is easily established by history, as it requires no tradition to fill in the gaps. But first let us again reiterate our statement that our claim is not as to the leased district, but as to the Great Prairie west of the Cross Timbers. Page 185.

The following table exhibits the area of land embraced in each of these different claims.

Wichita Reservation	743,610	acres.
1,060 Wichitas and affiliated Indians, each 160 acres. Aggregate	169,600	"
Surplus after allotment	574,010	"
Leased District	7,713,239	"
Each Wichita	44,075	"
Each member of the Wichita and Affiliated Bands	7,276	"
Land west of Cross Timbers, between Red and Canadian rivers, to U. S. boundary	18,114,519	"
Each Wichita	103,510	"
Each member of the Wichita and Affiliated Bands	17,088	"
Land north of Red river and west of Cross Timbers, to 100th meridian	16,128,000	"
Each Wichita	92,160	"
Each member of the Wichita and Affiliated Bands	15,215	"
Land north of Red river and west of Cross Timbers, to U. S. boundary	34,560,000	"
Each Wichita	197,485	"
Each member of the Wichita and Affiliated Bands	32,604	"
Lands west of Cross Timbers north and south of Red river, to 100th meridian	26,880,000	"
Each Wichita	153,600	"
Each member of the Wichita and Affiliated Bands	25,538	"

Land west of Cross Timbers north and south of Red river, to U. S. boundary,	57,600,000 acres.
Each Wichita.....	329,148 "
Each member of the Wichita and Affiliated Bands.....	54,339 "

It will appear that the names Wichita, Witchita, Towiache, Toweash, Toyash, Towish, Taoviase, Taouayache, Tahawayase, Ouichita, Ouachita, Ouasita, Ousita, Wachita, Washetaw, and Panis Piques, have all been applied to the same tribe or band.

The grounds, on which the counsel for the Wichita and affiliated bands base their claim of title, not only to the Wichita reservation, but also to the entire leased district, and the whole of the Great Prairie west of the Cross Timbers, stated in their own words, are:

(1) That by a residence, from time immemorial, the Wichitas acquired a title, by occupancy, to the Great Prairie, west of the Cross Timbers;
(2) That the treaty of 1835 admitted that occupancy, and we claim that that occupancy was such as to support the usual Indian title:
(3) That, by the agreement of Fort Arbuckle, the Wichitas admitted the affiliated bands, to an interest in their title, with the approval of the United States.

The Wichitas' "title, by occupancy," to the entire leased district, and to the whole of the Great Prairie west of the Cross Timbers and north of Red river, is identical, in character, with their title, by occupancy, to the Wichita reservation. The Wichitas, including men, women and children, number 175. If they hold an aboriginal title, by occupancy, to the Wichita reservation, each man, woman and child is invested with a title, by occupancy, to an equal undivided share, not only in that reservation, but also in the leased district, and in the Great Prairie. Each share in the Wichita reservation will amount to 4,240 acres; each share in the leased district to 44,053

acres; and each share in the Great Prairie to 197,485 acres.

It becomes important to ascertain the nature of this Indian title, by occupancy, to lands in the United States. Its nature has been fixed by the concurrent action of the European powers, approved and ratified by the United States. In 1685 France, by the right of discovery, became the owner, in fee simple, of the province of Louisiana, extending from the Mississippi river, westward, to the Rio Bravo del Norte and the Rocky mountains, and from the Gulf of Mexico, northward, beyond the 40th parallel of north latitude. The title of France was subject to such Indian rights of occupancy as then existed. In 1762 France ceded the province to Spain and in 1800 Spain retroceded it to France. While it was held by France and Spain small parts of the province were granted to private persons. With the exception of those grants, every acre of Louisiana became the estate, in fee simple, of the United States, when Bonaparte ceded the province to the United States, in 1803. But the title of the United States, so acquired, was subject to such Indian rights of occupancy as then existed.

These rights of occupancy did not enter into the texture of the title, but only hung as incumbrances upon it. They were extinguishable either by cessions from the Indians, or by their removal from the land, or by the exercise of the right of eminent domain by the United States. If any part of Louisiana was unoccupied in 1803, the fee-simple title acquired by the United States to that part of the province was not encumbered by any Indian right of occupancy. And it is evident that it was not competent for any Indian tribe, by entry upon land in the province, after its cession to the United States, to acquire a title by occupancy thereto, which would in any way encumber the

title of the United States. It is evident that no Indian right of occupancy, subsequent in origin, to 1803, could impair the absolute ownership of the United States. It is also evident that, in order to constitute an aboriginal title, the Indian occupancy must have been practically continuous. A tribe could not, by pitching their wigwams *temporarily*, in different localities, acquire an occupancy, in all or any such localities.

The Wichitas never held any title by occupancy to the Great Prairie, or to the leased district, or to the so-called Wichita reservation. There is no evidence that the Wichitas were ever located, even temporarily, either on the Wichita reservation, or in the leased district, or on the Great Prairie, prior to 1820. An alleged Indian tradition that, in their wanderings, they once made a short halt in the leased district will be hereafter considered. The appellees' proofs show that they were located in Texas, sometimes on the Brazos, sometimes on the Colorado, sometimes on the Red river, and sometimes on the Wichita river, in 1682, 1759, 1788, 1800, 1802, 1805, 1806, 1810, 1818, 1830, 1836, 1837, 1839, 1841, 1846, 1847, 1848, 1849, 1850, 1856, 1857 and 1858; and that they were located in Louisiana in 1688, 1690, 1699, 1703, 1715, 1720, 1722, 1761 and 1802. The appellees' proofs also locate, in different years from 1700 to 1815, twenty-two other tribes of Indians, but no Wichitas, between the Red and Arkansas rivers, on the lands to which the Wichitas claim a title by occupancy.

I submit that the evidence, which we have presented, has completely demolished the "aboriginal title," claimed by the Wichita and affiliated bands. I submit that it has overwhelmed both their proofs and their arguments. The most diligent and careful scrutiny of those proofs and arguments will disclose no basis, for their claim of

"aboriginal title," beyond the evidence referred to, in their sixth request for findings of fact, which takes the following form:

6. In 1818, and prior thereto, the Wichita tribe of Indians occupied the country north of Red river, and around the Wichita mountains. Prior to 1810, they occupied two villages, one on each side of Red river, just west of Cross Timbers.

To establish these alleged facts, the counsel cite six different documents, as follows: Parilla Expedition, 1759; Mesieres Expedition, 1778; Fragoso Expedition, 1788; Report of Dr. Sibley, 1805; Robin's work, Paris, 1807; Indian Statements, 1883. These documents, which constitute the only evidence presented in proof of the facts so alleged, actually and completely disprove those alleged facts. In August, 1759, Parilla, a Spanish officer, marched, with a force of Spaniards and Apaches, from Bexar, in the southwest part of Texas, on a military expedition towards the Red river. He invaded territory, which was then the property of France, but was, three years afterwards, ceded by France to Spain. Having marched 150 leagues, in a northeasterly direction, he surprised a ranch, killed 55 persons and took many captives. The Spaniards and Apaches then advanced towards the Wichita villages. But, in the region of San Teodoro, subsequently so called, they encountered 6,000 Indians, of different tribes, under a French flag, in a strongly fortified position. Not waiting to be attacked, the Indians sallied forth and routed Parilla's troops, who fled in a panic.

That defeat ended the expedition. Parilla did not reach any Wichita village. He does not say that the army, which put him to flight, contained any Wichitas. The counsel for the Wichitas aver that

Parilla had no personal knowledge of the towns, and nothing, in the record of his trip, shows that the Wichitas were differently situated than when they were visited, by Mesieres, nineteen years later.

And certainly it is possible that the Wichitas had returned in 1778 to the locality where they were in 1759. For Parilla's defeat is said to have occurred "in the region of what was subsequently called San Teodoro;" and Mesieres states that, in 1778, he named a Wichita village "San Teodoro." But if this conjecture of the Wichita counsel, respecting the locality of Parilla' defeat, is well founded, the Wichitas were located, in 1759, more than 45 miles east of the 98th meridian, which constituted the eastern boundary of the leased district. Parilla's narrative, then, actually proves that the Wichitas were not in the leased district, or within 75 miles of the Wichita reservation at that time; and it tends also to prove that they were then more than 45 miles east of the meridian, which constituted the eastern boundary of that district, and, therefore, would not have been in the leased district, even if they had been north of Red river.

The statement, respecting Parilla's expedition, is taken from volume 5 of Hubert H. Bancroft's work, quoted on page 733 of the record, in United States *v.* Texas, as follows:

> A conference of officers, at Bexar, in January, 1759, made plans for the campaign. * The army of five hundred soldiers and volunteers, with a large force of Apache auxiliaries, in the best of spirits, started in August, under the command of Parilla. After marching some hundred and fifty leagues they surprised a rancheria, killing fifty-five of the foe and making many captives. They then advanced against the towns of the *Taovaiases*, and, in the region of what was later called San Teodoro, found six thousand Indians of different tribes, in a strongly fortified position, many of them armed with muskets, and displaying a French flag. * The savages did not wait to be attacked, but made a sortie in force and the Spaniards fled in a panic. [illegible] 5.

The report of the Spanish Lieutenant-Colonel de Mesieres, dated April 18, 1778, printed on pages 890, 891, of the record in United States *v.* Texas, shows the following facts:

This officer, having started from Bexar, reached Bu-

carely, on the Trinity river, March 9, 1778. He started from Bucarely March 18, 1778, and reached the Tuacane settlement, on the Brazos river, April 5, 1778. He left that settlement April 8, and reached the *Taovíase* village, on the Red river, April 15. He proceeded no further, but returned from the *Taovíase* village to Bucarely, where he was on the 2d of May, 1778. He made no excursion north of the Red river. He does not state, or imply, that the *Taovíases* occupied a mile of land north of the river or within the leased district. He says:

From the Brazos river, on which the Tuacanas dwell, to the stream that waters the *Taovíase* village, there is seen, on the right, a forest justly called by the natives the "Big Forest" (Cross Timbers). It is very thick, although not very wide. The *Taovíase* nation is divided into two villages, one situated *north* of the Rio Bermejo (Red river) or River of Natchitoches, and the other opposite. * The *former* village is composed of *thirty-seven* houses and the *latter* of *one hundred and twenty-three* houses. They have fuel at hand in that big forest above mentioned, extending eighty leagues in length, and one, two, or more leagues, in width, where bear and wild hogs are found. The Rio Bermejo runs from the mountains of New Mexico, at about four days' travel from the *Taovíase*, and forms three forks which unite near the village. Doc. 203.

This statement shows that, in 1778, the Wichita village was divided by the Red river, more than three-fourths of the wigwams being on the south bank of the river. It also shows that this double village was located at the point, where the Cross Timbers, extending from the Brazos to the Red river, strike the latter river, and was therefore east of the ninety-eighth meridian, which constitutes the eastern boundary of the leased district. For the Cross Timbers reach the Red river near the point at which the 97th meridian crosses that river, as shown by the maps of Austin, 1830; Hunt and Randel, 1839; Kennedy, 1841; and Tanner, 1846. The proofs relating to the Parilla and De Mesieres expeditions, therefore, locate the Wichitas, prior to 1818, not on the Wichita reservation, nor even in the leased district, but about 45 or 50 miles east of the

98th meridian, which meridian bounds the leased district on the east.

Fragoso started eastward, from Santa Fe, on the 24th of June, 1788. According to his itinerary, he left the *Wichita* villages, July 26, and travelled that day 7 leagues. On the 27th he started at 6 o'clock A. M. and went into camp at 6 P. M. He probably travelled 10 or 11 hours; but he does not state the distance made. On the 28th, after travelling 4 leagues, he reached the *Cross Timbers*. The average hourly distance made during the 22 days prior to his arrival at the *Wichita* village, for which the distances are stated, was four-fifths of a mile. The distance from the *Wichita* village to the *Cross Timbers* was, therefore, about 14 leagues, or 42 miles.

Fragoso traversed the Cross Timbers at their intersection with the Trinity river. The shortest distance between that point and the intersection of the 98th meridian with Red river is more than 60 miles. The narrative of Fragoso, therefore, locates the Wichita villages east of the 98th meridian.

Dr. John Sibley's report to the secretary of war, dated April 5, 1805, and printed in the American State Papers, volume 1, Indian Affairs, pages 72 et seq., contains the following paragraphs:

PANIS OR TOWIACHES. The French call them *Panis*, and the Spaniards *Towiaches;* the latter is the proper Indian name. They live *on the south bank of the Red river*, by the course of the river upwards of eight hundred miles above Natchitoches, and by land, by the nearest path, is estimated at about three hundred and forty. They have two towns near together. The lower town where the chief lives, is called *Witcheta*, and the other is called *Towa-a-hach*.

From the mouth of this river (False Wachita), through the Prairie, to the main branch (Canadian) of the Arkensa, is three days' journey; perhaps sixty or seventy miles in a straight line. From this (mouth of the False Wachita) to the Panis or Towiache towns, by land, is about thirty miles, and by water double that distance. The river is nearly a mile wide. * * Appendix, 102.

This report shows that in 1805 the Wichitas lived not

h of the Red river but also not more than thirty land from the mouth of the False Wachita. The the False Wachita is about four miles west of lian of 96° 30′ as shown by the land office maps nd 1897 and by the Indian office map of 1896. g to Dr. Sibley, therefore, the Wichitas, or Towi- ere, not only south of the Red river, in 1805, but r 50 miles east of the 98th meridian.

ith of the authorities, on which the counsel rely, rk of Robin. He says, vol. 3, p. 3:

e *Natchitoches* to *Yatasses* the distance, reckoned by water, is leagues; from this savage village to that of the *Little Cadeaux*, d from there to the *Grand Cadeaux, fifty;* from the *Grand* the *Taouayaches*, who are located on the west bank of said he *Ouitcitas* on the east, the two villages being opposite each y (*quartre vingts*) leagues. Ascending the same river, we find, e of fifty leagues from these two villages, a rock of calcined serves to supply the natives of this region, who make com- t among themselves. This, with many other salt streams, waters of the Red river very brackish when it is low. Higher r continues large, but flat and fordable. Rec. 99.

ling to this statement, the distance from the ches (located near the present site of the city of e) to the villages of the Taouayaches and Ouitcitas vater, 185 leagues,—about 555 miles. The dis- om Natchitoches, to the sharp bend of the Red the state of Arkansas, is, in a straight line, 132 The distance, in a right line, from that bend to meridian, is 181 miles. If the distance, by this oked river, from the Natchitoches to the sharp the Red river, and from that bend to the 97th was three-fourths greater than the distance, by lines connecting those three points, the whole by water, from the Natchitoches to the 97th was about 548 miles, that is to say, only a few than Robin's estimated distance from the Nat- to the villages of the Taouyaches and Ouitcitas.

Dr. Sibley and M. Robin, therefore, agree very closely in the location of these villages many miles east of the 98th meridian.

The sixth and last item of proofs, on which the counsel rely, to establish their claim that the Wichitas occupied the Wichita reservation, prior to 1810 or 1818, embraces "Indian Statements, 1883." These statements were made by Es-quetch-chee, Niastor and Uts-tuts-kins. On page 32 of Senate Executive Document, No. 13, 48th Congress, 1st Session, appears the following:

ES-QUETCH-CHEE, Witchita (Old Man), says:

He is about 85 years of age; was born on Red river not far from the mouth of the Big Wichita. When I was a boy the chief of the Wichitas was killed, and after that my people moved into the Wichita mountains, and had many villages. When I became a man I moved with some of my people to Rush springs, east of where Fort Sill is now, where we made farms and had everything plenty; never wanted for anything. We lived there a great many years, quiet and peaceable, until soldiers came there in search of Comanches who were camped near our village, buying corn and watermelons from us, and who had before coming to our village committed depredations on the frontier of Texas. (x [illegible], 125.)

He states further, that when the Wichitas left Rush creek, they moved to Caddo creek (which was not in the leased district) and thence to Arbuckle (which was not in the leased districts). If his statement is to be admitted in evidence, and is correct, the Wichitas resided in Texas until after their chief was killed, and at some time (not specified) after his death, moved to the Wichita mountains; when Esquetchee became a man they moved to Rush Springs, which was not in the leased district. They may have remained in the Wichita mountains five or six years. They remained at Rush Springs many years, and then moved to Fort Arbuckle, which was not in the leased district. If this proved, as it does not, that the Wichitas went to the Wichita mountains, before 1818, it would also prove that they remained there only a few years.

The next witness presented by the Wichitas is Uts-tuts-kins. They say that they had horses in the 17th century.

and that Uts-tuts-kins testified that they had resided in the leased district ever since they had horses. And yet the fact is that the deposition of Uts-tuts-kins, which is printed on page 36 of Senate Executive Document, No. 13, 48th congress, 1st session, is flatly contradictory to this assertion. Uts-tuts-kins says that the Wichitas, long ago, came from a far-off country; that they came south, and met the Comanches, who had horses; that then, for the first time, the Wichitas obtained horses; that they moved to Neosho, in Kansas; that they moved thence to the Salt Fork (which was north of the leased district); that they moved thence to the Red Hills (which were north of the leased district); that they went from the Red Hills to the mouth of Otter creek, and separated into three parties, one locating at the mouth of the Wichita (which was in Texas), another locating on the Clear Fork of the Brazos (which was in Texas), and the third locating at the mouth of Otter creek, which was in the southern part of the leased district; that the chief of the Otter creek party having died, that party moved to the mouth of the Wichita (in Texas), and joined the party located there; that the chief of the Brazos party having died, that party joined the other two, at the mouth of the Wichita (in Texas), and all were together again, and lived there a long time; that they moved thence to the mouth of Cache creek; thence to the mouth of Otter creek, where Col. Dodge visited them in 1834; thence to Fort Sill; thence to Rush Springs, which was not in the leased district; thence, in 1858, to Caddo creek, which was near Fort Arbuckle, and was not in the leased district.

The last of these three witnesses is Niastor, whose statements will be found on pages 30, 31, 51, 52, of the same executive document. The counsel for the Wichitas aver, on page 24 of their answer to our petition, that the

Towaconies, and certain other tribes, "have, from time immemorial, resided in Texas, north and east of the Brazos river." In support of their contention, that the Wichitas have, from time immemorial, resided in the leased district, they produced a statement alleged to have been made by Niastor, a chief of the Towaconies. I copy from pages 30, 51, 52, of Senate Executive Document, No. 13, 48th Congress, 1st Session, as follows:

Niastor, chief of the Towaconies, says:

He remembers well, when he was a boy living with his people, on the Brazos river, in Texas, that Major Nabors convened a council of Indians there, and told them that they were to possess that country for a home; that it would not be taken away from them. * * It was not long after this, when Major Nabors told us, if we would consent to give up our homes, on the Brazos, that we should be given a larger country on the north side of Red river. * *

Our people, after crossing Red river, traveled north, until they met their friends, the Wichitas, on the south side of the Wichita river, near where the commissary building now stands; the Wichitas having come up from near Arbuckle. After arriving here, we were shown the country we were to have for our homes, and were told that, with the Wichitas, we should possess it forever. Page 30.

Niastor. My mother told me that her father said she was born in this country, and that he was born on the Arkansas river, below where the town of Wichita now is. * * My great-grandfather told my mother, that, when the Wichitas lived on the Arkansas river, the Indians, from the north and east, crowded them, and fought them, and drove them this way. That, at that time, To-de-kits-a-die (meaning Boy Chief) was the chief the Wichitas. He told my mother that our people had always lived there; but, after the Indians fought them, our people held a council and concluded to move away from there. Some of our people were selected, to go and look out a country; and they went southwest until they saw the mountains, (now called Wichita mountains) and liked the country very much; they returned to the village; and then our chief men called a council, and heard what the returned party said about the land they had seen; that it pleased them, and that they wanted all of our people to go there. At that time there were a great many Wichitas, and *our* people had never seen any horses, there being none in the country, and when our people left the village, on the Arkansas river, to go south, they all had to walk. When they arrived at the North Canadian, they traveled up that river, till they came to the red sand hills, in the bend of the river, where they made villages and raised corn. * * Our people, after living there some time, raising corn, got tired and the boy chief To-de-kits-a die told them that they would all go to the Wichita mountains, which was a better country for raising corn than the red hills. Pages 51, 52. Appendix, 134.

Niastor says that his mother told him, that her father told her, that he (her father) was born on the Arkansas

river, in Kansas, below the site of the town of Wichita; that his mother also told him, that his great-grandfather told her, that the Wichitas (whom he mixes up with the Towaconies) had always lived there, that they moved thence to the Sand Hills, which were north of the leased district, and, after some years, moved to the Wichita mountains. It is obvious that Niastor, who was born in 1835, and lived on the Brazos river, in Texas, until 1859, with his tribe the Towaconies, (who, according to the Wichita answer, p. 94, had resided in Texas from time immemorial) could not have acquired, otherwise than by hearsay, any knowledge of the early movements of the Wichitas.

In order to establish an aboriginal title, to the Wichita reservation, so called, or to the leased district, of substance and consistency sufficient, either to overcome the title acquired by the Choctaws and Chickasaws, under the treaty of 1820, or to entitle the Wichitas to any compensation for the land, the Wichitas must show an occupancy of that reservation prior, not only to 1820, but also to 1803. But they have not produced even a shred of evidence, to prove that a single Wichita, or a single member of either of the "Affiliated Bands," ever set foot within the Wichita reservation, prior to 1820, except the story of Niastor, the Towacony, that his mother told him, that his great-grandfather told her, that the Wichitas, on their way, from Kansas to the red Sand Hills, which were not in the Wichita reservation, and thence to the Wichita mountains, which were not in the Wichita reservation, stopped, for a short time, on Sugar Creek, which was in that reservation.

But if this story of Niastor's mother were absolutely true and were competent evidence, it would not establish, for the Wichitas, any aboriginal title to the reservation. On the contrary, it would absolutely destroy the title which

they claim. For the story of Niastor's mother shows that the Wichitas had not lived at Sugar Creek from time immemorial,—that they had always lived in Kansas, but had tarried, for a time, at Sugar Creek, in their wanderings from Neosho.

The version given to this tradition, by Uts-tuts-kins has already been set forth. Es-quetch-ee does not allude to it. Nothing was said by Es-quetch-ee, or Uts-tuts-kins, even tending to show that a Wichita was ever on the Wichita reservation, prior to 1859. Not one of the other five items of proof, upon which the counsel rely, proves, or tends to prove, that a Wichita ever saw the Wichita reservation, or even the leased district, prior to 1820. On the contrary, they all locate the Wichitas in Texas. The narrative of De Mesieres' expedition does, indeed, locate a few (37) of the Wichita wigwams, on the north bank of the Red river; but it locates them at the Cross Timbers, many miles east of the 98th meridian. No proof has been produced to show that any Wichitas ever occupied any part of the leased district, *prior to* 1859, otherwise than as a temporary stopping place, in their ceaseless wanderings.

The appellants lean heavily on Albert Pike. In his letter to the secretary of the interior, dated July 12, 1882, and printed on pages 29 and 30 of Senate Executive Document No. 13, 48th Congress, 1st Session, General Pike says:

> In 1861, as commissioner of the Confederate States, I made a treaty with the reserve Comanches (of the Peneteka band of the Ni-um) and the other small tribes, then settled in the vicinity of the Wichita agency and Fort Cobb. Among these were the Wichitas. * * The Wichitas, or Ta-wai-hash, preferred a claim to me, for compensation for the country south of the Wichita mountains, on Cache and Clear Creeks, which they had for so many years possessed and occupied, without conflicting claims on the part of any other tribe. No memory of man reached back to the time when they had not occupied it. * * and the treaty agreed that their claim, for compensation, should be considered and examined, and that, what might be found just and right, should be paid them.

According to this statement of General Pike, the Wichitas, in 1861, claimed "*compensation for the country south of the Wichita Mountains on Cache and Clear Creeks;*" and, as commissioner of the Confederate States, he agreed that this claim should be "considered and examined, and that, what might be found just and right, should be paid them." This "country" is a small tract, not in the Wichita reservation, but in the southern part of the Kiowa and Comanche reservation. The Wichita claim has both grown and changed since it started on its travels. In 1861 it covered only a small tract, in the southern part of the Comanche reservation. In 1882 it expressly excluded compensation for any part of the Kiowa and Comanche reservation, but included compensation for the residue of the leased district. The claim *now* covers, not only the Kiowa and Comanche reservation, but also the entire leased district, and, in addition, many millions of acres bordering on that district.

The official communication of Commissioner Price, to the secretary of the interior, dated October 9, 1883, and printed on pages 2 to 12 of the "executive document" above mentioned, contains the following paragraphs:

In a communication, dated July 12, 1882, Joseph Leonard asked, as a reserve for the Wichitas and affiliated bands, all that part of the Indian Territory west of the 98th degree of west longitude and south of the Canadian river, *except the Kiowa and Comanche reservation.* * *

Luther H. Pike, *as counsel for Joseph Leonard*, alleged delegate, submitted a printed brief of thirty-one pages, in which the history and claims of this tribe are fully set forth.

It may be remarked that *Joseph Leonard has failed to furnish any evidence that he is authorized to represent these Indians, although repeatedly requested to do so.* Ex. Doc. 115.

General Pike commanded the Confederate military department, which included the Indian Territory. He was the Confederate commissioner, who negotiated the treaty of July 12, 1861, with the Choctaws and Chickasaws, and thereby secured for the Confederate army, those Choctaw

and Chickasaw recruits, whom the counsel for the appellants have so vigorously assailed. He was also the father of Luther H. Pike, the attorney of the unauthorized agent Leonard, and his (General Pike's) communication of July 12, 1882, cited above, was actually enclosed in Leonard's petition of that date. He had, of course, no personal knowledge of the alleged ancient occupancy of the Wichitas. Nor did he assert that the Wichitas occupied any part of the leased district, except the "country south of the Wichita mountains on Cache and Clear Creeks," in the Kiowa and Comanche reservation, which Leonard expressly excluded from the reserve which he asked for the Wichitas. Finally, the circumstances do not show that General Pike was a disinterested witness.

The claim of 175 Wichita men, women and children, to the aboriginal ownership of 7,713,239 acres of land, worth 40,000,000 of dollars, within the leased district, and of untold millions of acres contiguous to that district, is manifestly absurd. In order to improve its appearance by expanding the Wichita population, the counsel undertook to prove, by a picture "*after Catlin*," produced in evidence, and by a statement in "Catlin's Manners and Customs," that there were 600 Wichita wigwams, containing according to their estimate, (p. 45) about 6,000 Wichitas, at the mouth of Otter Creek, in 1834. But the fact is that Mr. Catlin never saw one of these wigwams or witnessed a single fact relating thereto. He never was at, or near, the mouth of Otter Creek. He became seriously ill before Colonel Dodge's expedition reached the mouth of Otter Creek, and was left at the "Sick Camp," about 50 miles from the mouth of that creek. The picture was made by "Jo. Chadwick," a young man from St. Louis, who accompanied the soldiers, and Mr. Catlin's statement was based upon what the young man told him.

I copy from page 70 of "Catlin's North American Indians":

> The above letter, it will be seen, was written some time ago, and when all hands (save those who were too sick) were on the start for the Pawnee village. Amongst those exceptions was I, before the hour of starting had arrived; and, as the dragoons have made their visit there, and returned in a most jaded condition, and I have again got well enough to write, I will render some account of the excursion, which is from the pen and pencil of my friend Jo., who went with them and took my sketch and note books in his pocket.

The Wichitas claim to hold the leased district, by the same kind of title, by which the Choctaws and Chickasaws held their lands, in the state of Mississippi. They are mistaken. The Wichita title rests on what Niastor said, that his mother told him, that his grandfather and great-grandfather told her. This tradition is the sole basis of their "*aboriginal* title." But the boundaries of the Choctaw country, in Mississippi, were defined in the third article of the Choctaw treaty of January 3, 1786. 7 Stat. 21. Those of the Chickasaw country were defined in the third article of the Chickasaw treaty of January 10, 1786. 7 Stat. 24. They then occupied the very lands, which they sold to the United States, fifty years afterwards. In March, 1680, Hennepin found the Chickasaws where they were in 1786. Account of Hennepin's Discovery, 1 French Hist. Col. La., pp. 205, 206. Tonti found them in the same country, in October, 1681. Memoir of de Tonti, Id. p. 60. Du Pratz published his history, in Paris, in 1758. On pages 410, 411, of volume 2, he says:

> We had a war with the Tchicachas. We sent against them the Chatkas, our allies, to the number of 3,000.

He gives an account of the battle, which proved disastrous to the Choctaws. At page 138, he inserts his map, on which the Choctaws and Chickasaws are located where they were in 1786. In December, 1682, La Salle found

the Chickasaws in the same locality. 1 Margry, 551, 55
Adair's history (London, 1775) and his map, both, locat
the Choctaws and Chickasaws where they were in 178
This title of the Choctaws and Chickasaws, to their land
in Mississippi, is based not on tradition like that of th
Wichitas, to the leased district, which, even if true
would destroy their title, but on authentic history, which
carries it back more than 200 years.

The evidence introduced by the Wichitas, then, wholly fails to prove such an occupancy, either of the Wichita reservation, or of the leased district, as could support an aboriginal title. But these six items of proof, just considered, are not the only obstacles that confront the Wichitas. The proofs submitted by the appellees conclusively show that, before 1859, the Wichitas never occupied, except temporarily, and at long intervals, any part of the leased district.

I will now present the substance of the evidence which we have introduced in disproof of the claims of the Wichita and affiliated bands. The documents will be cited in their numerical order.

Evidence in disproof of Wichita title.

1. No. 1 will be considered hereafter.

2. Lieutenant Beach testifies to the following facts:

Melish's map of 1818 shows a "Panee" village upon Red river, *just west of the 96th meridian.* Darby shows a "Panis" village upon the Red river, *at about* 97° 31' *west longitude.* Pike shows "Pawnee hunting ground" at about 103° west longitude. Disturnell shows "Pawnies" upon Red river, at two places *between* 93° *and* 97° *west longitude.* Humboldt shows the "Tauaizes" between 102° and 103° west longitude. The De Cordova map

shows the "Towash" on the Brazos. Disturnell shows the "Toyask" on the Red river, east of the 97th meridian.

Not one of these localities is within the "leased district."

Nos. 3 and 4 have already been considered.

No. 5. In 1834, fifty-six years after De Mesieres visited the *Taovaiase* village, and 75 years after Parilla's defeat, Colonel Henry Dodge, of the United States dragoons, marched, with his regiment, from Fort Gibson to a village, which he calls the "*Toyash* village." The journal of this expedition contains the following statements, quoted on pages 853, 854, of the record in United States *v.* Texas:

July 15th. Comanches, Kiowas and the band called by us Pawnee Picts, but correctly termed the Toyash, are friends and to a certain extent allies. The Comanches are, we learn, the largest band, the proudest and boldest: therefore the colonel has resolved to visit them first: thence to the Toyash village.

July 16th. * * The Comanche captains informed us that it is but a short distance to their camp. * * Two or three miles brought us in sight of their camp situated in a valley. * * The Comanches have hoisted an American flag over their camp. * * We are now in sight of a chain of peaks, so-called mountains, bearing south and west. Behind these are the Toyash villages. Some of these hills cannot be less than 2,000 feet above the prairie at their base.

July 19th. Marched for the Toyash village, twenty-three miles southwest. * *

July 20th. The command moved. * * West * * thirty-seven miles; road literally of granite rock for miles. We encamped five miles from the Toyash village, which is situated on a branch of the Red river. Width of the branch of Red river about five hundred feet from bank to bank.

July 21st. The command marched for the Toyash village: proceeded a mile or two, when we met about sixty Indians, who came out to meet us. * * We soon reached the village, which is situated immediately under mountains of granite some six hundred feet in height. In front of the village runs the river. * *

The point, at which Col. Dodge met the Toyash, or Wichitas, was on the North Fork, near the mouth of Otter Creek, about six miles, by land, from Red river. His narrative shows that, on his march to their village, he passed the Comanches, who constituted a very large tribe.

If it shows that the Wichitas were in the leased district, in 1834, it also shows that the Comanches were there at the same time. It does not show that any Wichitas were then within 50 miles of the Wichita reservation.

No. 6. On page 201 of Margry, volume 2, occurs the following statement of La Salle, *made in* 1682:

I have one of them (a boy), of the nation of the Pana, who live more than two hundred leagues westward, on one of the branches of the Mississippi, and inhabit there two villages near each other. Rec. 98.

If the distance of these villages from the Mississippi was 200 leagues *by land*, they were further west than the western limit of the leased district. If the distance was 200 leagues *by the course of the Red river*, they were east of the eastern boundary of the leased district.

No. 7. In Bernard, 188, Amsterdam, 1734, Tonti, under date of February, 1688, says:

When I arrived among the Taensas, the chiefs of that nation informed me of their quarrel with the Natchitoches on account of the salt, in which the latter would give them no share, and they prayed that I would intervene for their reconciliation. I willingly undertook this mediation. Thirty Taensas joined themselves to our company. We arrived, after a march of eight days, at the village of the *Natchitoches*. This nation makes but one people with two other nations, which are the *Ouasita* and the *Capicis*. These chiefs of three nations being assembled, I was made to take a seat in their midst. The thirty Taensas, before they took their places, asked permission to go to the temple to implore their God to aid them in securing a good peace. * * These conventions being made, they swear a mutual peace, and dance the Calumet. Then I took leave of them all. Rec. 94,

This shows that in 1688 the Wichitas resided in Louisiana, in the locality which is now the site of the town of Natchitoches.

Nos. 8 and 9. In La Harpe's journal, 6 Margry, 289, 292, under date of September 3, 1719, he says:

At gun-shot distance from their habitations, we crossed a beautiful rivulet enclosed by a thin wood, above which are the villages, situated on declivities along the southwest branch of the river of the Alkansas. These villages make only one, the houses joining themselves one to another, running from east to west, one league, in the most beautiful situation possible to be seen. The natives of these establishments are the Touacaras, Toayas, Caumaches, Aderos, *Ousitas*, Ascanis, Quataquois, Quicas-

quiris, Honechas. They can furnish six thousand persons of both sexes. The 8th, I caused all the principal chiefs of these nations to assemble, in order that I might be informed by them of the position of the river of the Alcansas, the nearest dwelling place of the Spaniards, the commerce which they carried on with the Padoucas. To which they answered me that their river formed two branches below their village; that the branch, upon which their dwellings were situated, extended towards the setting sun to villages of the Spaniards and Padoucas. Rec. 95, 96,

If this proves that the habitat of the Wichitas was within the leased district, in 1719, and that, therefore, they were the proprietors of the leased district, it also proves that the habitat of every other one of the tribes mentioned was within the leased district, and that each one of them was its owner. What it really proves, I submit, is that La Harpe met parts of these tribes temporarily encamped near the confluence of the Canadian with the Arkansas. This encampment must have been located either at the junction of the Canadian with the main stream of the Arkansas, in what is now the Cherokee nation, or at the confluence of the north and south forks of the Canadian, on the boundary between the Creek and Cherokee nations. There are no other points on the Canadian answering La Harpe's description. In either case the "Ousitas" were more than seventy-five miles from the nearest point of the leased district.

No. 10. The "History of Louisiana," by Du Pratz, published in Paris, in 1758, contains, at page 243 of volume 2, the following statement:

From the River Rouge to the Arkansas there *is no nation*. There *was* one on the Black river; this was the *Ouichitas* who had given their name to that river. Nothing remains at present of this nation, the Chickasaws having destroyed it in great part, and the remnant having retired amongst the Cadodaquioux, amongst whom the Chickasaws dare not disturb them. Rec. 97.

This shows that, prior to 1758, the Wichitas had resided on the Washita river, (to which they had given their name), within the district constituting the present state of Louisiana, and were driven thence, westward, by the Chickasaws, into the Caddo nation, which, as is elsewhere proven,

was located in northwestern Louisiana and northeastern Texas.

No. 11. Jeffrey's History, London, 1761, page 165, vol. 1.

About a hundred leagues from the place where this river falls into the *Mississippi* are the habitations of a vast nation called *Cadodaquiouz*, which extends, in different tribes, a vast way. They, as well as the people before mentioned, have a language peculiar to themselves; but that of the *Chickasaws* is understood among them all, like *lingua Franca*, in the Levant; they call it the vulgar tongue.

The *Ouachitas* are intermixed among them, having abandoned the Black river, to which they gave name, to avoid the rage of the *Chickasaws*, who dare not follow them; for the same reason the *Taensas*, who formerly inhabited this coast, near a river to which they lent their denomination, withdrew to the neighborhood of the *Mobileans*, where we before took notice of them. Rec. 98.

This corroborates the statement made in Du Pratz's History of Louisiana. The Washita of Louisiana was formerly named the Black river.

No. 15. In 1 Schoolcroft, 239, will be found the following statement, made August 20, 1847, by David G. Burnet, formerly president of the republic of Texas:

The Whacoes, Tawacanies, Toweash, Aynies, San Pedros, Nabaduchoes, Nacadochuts, and Hitchies are small tribes, or fragments of tribes, and separately considered, are quite insignificant. They have been long resident in Texas, and properly belong to it; but they are originally, the Hitchies excepted, of the Caddo stock, being offsets from that family. The Whacoes are the most considerable of these bands, amounting probably to 150 warriors, it being understood among Indians that every adult male is a warrior. They are a stealthy, thieving, faithless race, and have done much mischief, first and last, on our frontier. They live in a village on the Upper Brazos, and raise corn, beans, pumpkins, &c., and usually spend the winter months in hunting. The other small parties, amounting to about fifty families each, live in villages, on the waters of the Trinity and Neches, and cultivate the ground to a small extent.

The Hitchies, once a distinct and isolated tribe, have so intermarried with their neighbor bands that they have lost their identity, and may be considered merged into the common stock. The Caddoes formerly resided on Red river of Louisiana, above Natchitoches and below the Great Raft, and were included in the jurisdiction of the Indian agency stationed, in 1819, at Natchitoches. They removed to Texas a few years ago and now claim to be Texas Indians. Rec. 103.

This statement of Ex-President Burnet shows that the Wichitas (Toweash) were in Texas, in 1847, and "proper" belonged" to that republic.

No. 18. A narrative of the exploration of the Red river of Louisiana, in 1852, by Capt. Randolph B. Marcy, assisted by Lieut. George B. McClellan (Sen. Ex. Doc. No. 54, 32d Cong., 2d Sess.), contains the following statements:

The Wichitas are an insignificant tribe, in point of numbers, not having more than five hundred souls in the nation, and are not, of course, prepared to substantiate or enforce their title to this country; and indeed I very much doubt if they have any claims upon the consideration or generosity of our government, being the most notorious and inveterate horse thieves upon the borders. P. 69.

We reached the villages (which were situated upon the banks of Rush creek) and encamped about half a mile below them in the valley. * * There are two villages here occupied by the *Wichitas* and Wacos respectively. * * The village of the *Wichitas* has forty-two lodges, each containing two families of about ten persons. * * With the exception of a few families that live upon the Canadian, the whole *Wichita* nation is concentrated at this place; their numbers do not exceed five hundred souls. They have, during the early settlement of Texas, been more trouble to the people upon the northern border of that state than any other Indians. They have no regard for truth, will steal, and are wholly unworthy of the least confidence, and their vicious propensities are only kept in check now by force. * *

The particular district embracing the Wichita mountains has, for many years, been occupied and (with much justice, as it seems to me) claimed by the Wichita Indians, who have a tradition that their original progenitor issued from the rocks of these mountains, and that the Great Spirit gave him and his posterity the country in the vicinity for a heritage, and here they have continued to live and plant corn for a long time.

They have a large stock of horses and mules, many of which are the small Spanish breed, with the Mexican brand upon them, while others are large, well-formed animals, and have undoubtedly been stolen from the border white settlers. * *

This extensive belt of woodland (Cross Timbers), which forms one of the most prominent and anomalous features upon the face of the country, is from five to thirty miles wide, and extends from the Arkansas river, in a southwesterly direction, to the Brazos some four hundred miles. (88. 128.

Captain Marcy's journal indicates that in 1852 the Wichitas, excepting a few families, were located on Rush creek. This location was not in the leased district. He also states (of course not of his own personal knowledge) that the Wichitas, for many years prior to 1852, had occupied and claimed the district embracing the Wichita mountains.

No. 19. Kennedy's Texas, 1841, vol. 1, p. 349, contains the following:

In alliance with the Wacos were the Pawnee Picts, or Toweashes, residing on the Red river, sometimes on the side of the United States, and sometimes in Texas. Rec. 102.

No. 21. At page 72, of part 1, of French's Historical Collections of Louisiana, New York, 1846, appears the the following statement, in the English language, purporting to be a translation of Tonti's narrative:

We set off on the 12th, with 12 Taencas, and, after a voyage of twelve leagues to the N.W., we left our boat and made twenty leagues portage, and, on the 17th of February, 1790 (1788?) came to *Natchitoches*. They made us stay at the place, which is in the midst of the three villages called *Natchitoches*, *Ouasita* and *Capiché*. The chiefs of the three nations assembled, and before they began to speak, the 30 Taencas, who were with me, got up and, leaving their arms, went to the temple, to show how sincerely they wished to make a solid peace. Rec. 102.

From this statement it appears that in 1788, or 1790, the Wichitas resided within the district which now constitutes the state of Louisiana, in the vicinity of the present town of Natchitoches.

Nos. 24 to 39, inclusive, are tracings of maps locating the Wichitas, in different years, at different points outside the leased district.

No. 40. The report of Indian agent, dated "Special agency for Texas, on Purdanallas, near Fredericksburg, Oct. 6th, 1851," contains this statement:

The tribes and bands met here are Lapans, Comanches, Muscalaros, Apaches, Delawares, Cadoes, Toncaways, Wacoes, *Witchetaws*, and few wandering tribes. Rec.

It appears that, in 1851, the Wichitas were in Texas.

Nos. 41 to 65, inclusive, are tracings of maps locating the Wichitas outside the leased district.

No. 66. Moore's description of Texas, 1844, 2d ed., contains the following:

The principal tribes now residing within the limits of Texas are * * the Toweash. They live high up on the Colorado, above the San Saba. Rec. 102

This makes the Wichitas residents of Texas in 1844.

No. 67. In Martin's History of Louisiana, page 102, it is stated that in 1699,

Bienville and St. Denys returned to Biloxi. They had found the country, through which they intended to pass, entirely covered with water, and had proceeded to the village of the *Wachitas*, in which they found but five huts, the Indians having mostly removed to the *Natchitoches*. Rec. 127.

This statement imports that in 1699 the *Wichitas* were in Louisiana, near the *Natchitoches*, who are shown, by all the authorities, including ancient maps as well as narratives of travellers, to have resided near the place which is now the site of the city of Natchitoches in the state of Louisiana. The village of the *Wichitas* is located in that vicinity on the maps of the 17th and 18th centuries.

No. 68. Notes of Captain Marcy's Expedition of 1854, Philadelphia, 1856.

The surveying parties having concluded their labors, we struck tents this morning and marched to Fort Belknap, where we camped for a short time, to procure stores and prepare for future work, in locating and surveying lands for the Caddos, Ionies, Ah-nan-da-kas, To-wac-konies, Wichitas, and Tonkah-was, who exist in this neighborhood. * *

We arrived at Fort Belknap on the seventh (September, 1854). At a council, held here, the Ionies and Ah-nan-dah-kas were represented by Jose Maria, the Caddos by Tinah, the Wichitas and Wacos by O-che-ash and Ack-a-quash, and the To-wac-ko-nies by Utsiocks. * *

The Indians, who exist in the vast regions of the far southwest, are the Comanches, * * Wichitas, * * and Navajoes, all nomadic, and the * * Shawnees and Delawares who live in permanent houses.

As far as could be ascertained, there are 80 Wichita men, 112 women and 122 children. They are most arrant horse thieves and scoundrels, and have given more trouble to the settlers in Texas than any other tribe.

They have a village up on Rush creek, a tributary to the Washita, a kind of rendezvous for them, from which they make constant marauding expeditions.

Fort Belknap, one of the most distant posts on this frontier, is situated about a mile from the Brazos. Pages 212, 213, 228. Rec. 124.

This document shows that in 1854 the Wichitas resided in the "neighborhood" of Fort Belknap, which was situated about a mile from the Brazos river in the state of Texas; that they had on Rush creek, *east of the leased district*, a rendezvous from which they made constant marauding expeditions.

No. 72. Statement of A. J. Raines, March 11, 1836.

Hon. Lewis Cass,
Secretary of War.

For the last five years, I have had much communication with the Comanche Indians and their allies. They inhabit the country from latitude 33°, on Red river, to the Rio del Norte, extending north to the road that leads from Saint Louis to S'ta Fe, south to the headwaters of Trinity, Guadaloupe, Brazos and Colorado rivers of Texas. * * The different tribes are Comanche, Kyawas, Towash or Southern Pawnees, Cados, Wacos, and Skiddies. * * Depredating upon the Mexicans of the interior states, ravaging their towns, carrying off large numbers of horses and mules, murdering their people and taking prisoners and converting them into servants, naturally prompts these wandering hordes to look upon themselves as the most powerful of nations * *

They have, from time to time, murdered more than fifty of our people, on the road from St. Louis to S'ta Fe, and on the frontiers of Arkansas; and as Arkansas appears to be the place (and I hope a permanent home) for our friendly Indians, it is desirable, on their account also, that we cultivate a good understanding with these land pirates of the great west. Appendix Rec. 63.

This statement shows that in 1836 several Indian tribes, including the Wichitas, roamed over the country between the headwaters of the Texas rivers,—the Trinity, Guadaloupe, Brazos and Colorado,—and the road from St. Louis to Santa Fe, stealing, murdering and taking prisoners.

No. 73. Report of Captain J. Brown, Little Rock, July 18th, 1837. Having named the Choctaws, Cherokees, Creeks, Seminoles, Senecas, Shawnees, Quapaws and Osages, he says:

The foregoing comprise all the tribes of Indians residing within the Acting Superintendency of the Southwestern Territory. Appo. 246.

This superintendency included the country between the Arkansas and Red rivers, extending westward to the one hundredth meridian of longitude, but did not include the state of Texas. Capt. Brown's statement shows that in 1837 the *Wichitas* did not *reside* in the leased district.

No. 74. Report of Indian agent, Chickasaw agency, May 27, 1844. He says:

I have just heard that the two boys, that were missing from Trinity river, in the republic of Texas, about the last of February, or first of March, ult., (at the time that their father, mother, and two children were murdered, in the most shocking manner, the lady had her limbs cut off

at her body) are now among the Wichitaw Indians, who live north of Red river, and south of the False Washita, and are within the Chickasaw district of the Choctaw nation. * *

You will please excuse me for giving you my opinion of what ought to be done. It is this: that some discreet person should be sent there, with a tolerably strong command, and induce those Indians to give up the prisoners, and also the Indians who committed the murder, and let them know distinctly that they will not be permitted to live in this country and go into Texas (a republic that we are on the most friendly terms with) and commit murder, and then fly into this for protection.

This report bears the following indorsement by the commissioner of Indian affairs:

Respectfully referred to the secretary of war. The outrage was committed on Texan citizens, but by wild Indians who are as much inhabitants of that republic as of our territory. The murderers should be delivered up to Texas and the lads liberated; and as they are now within our limits the matter is respectfully submitted.

No. 101. Report of Indian agent, Torry's Trading House, July 9, 1849.

The Wacos, Tahwocarros, Keechies and Wichitas have been perfectly quiet for some time past. They are making corn on the Brazos.

This shows that the Wichitas were in Texas, during the planting season, in 1849.

No. 102. Report of Indian agent, Chickasaw agency, August 29, 1849.

The Witchetaws have been, for some time, living in the western part of the (Chickasaw) district, and the Chickasaws would be very much pleased for them to move off. * * The Witchetaws and Caddoes have had some difficulties this spring. The Witchetaws stole several horses from the Caddoes; and the Caddoes went to the camp of the Wichetaws, and requested them to give them up. The Witchetaws positively refused, and the Caddoes * * drove off a number of the Witchetaws' horses. The Witchetaws saw and followed them, and, after going a mile or two, the Caddoes were overtaken and fired on by the Witchetaws. The Caddoes returned the fire and, during the fight, the Caddoes lost two men killed and one wounded; the Witchetaws lost ten or twelve killed and wounded. * * The Keechies are also opposed to the Witchetaws. They say that the Witchetaws are continually committing depredations upon the citizens of Texas. * * These people I have no control over; but I thought it my duty to put a stop to their stealing and killing each other, if I could by counsel. If they were to fight for a month, I would have no means to put a stop to it.

No. 112. Report of Indian agent, San Antonio, November 2, 1853.

I have the honor to enclose a report by special agent Hill, in answer to your communication enclosing to Jesse Stem, reports, &c., in regard to the Wacos and Wachita Indians, which I would commend to your consideration. These Indians left Texas, immediately after that difficulty, and have not returned since. Our frontier has consequently been relieved from the worst and most thieving bands of Indians now in the United States, and the beneficial results to the frontier citizens of Texas, since they were attacked by Maj. Sibley, is clearly perceptible. • • I do not approve paying for the property taken from them, from the fact that they are notorious thieves, and had no property but what they had stolen from some one else; and in that attack they have been taught a lesson that has so far proved beneficial; and now, to give them indemnity, will only encourage them to commence their old practices.

No. 113. Report of Indian agent, San Antonio, Texas, September 16, 1854.

There now reside on our border, in the Choctaw and Chickasaw reserve, the Wichitas, Wacoes, Tah-waccones, Keechies, and small bands of Ionies and a considerable band of Kickapoos. They have from time to time, crossed into Texas, and have, during the year, stolen large numbers of horses and committed other serious depredations on our citizens.

No. 114. Report of Indian agent, Fort Belknap, Texas, September 20, 1854.

The Wichitas I have not met during the year; in fact they may be considered in a state of open hostility with our people on this portion of the frontier. They commit depredations, by stealing horses, from time to time, as opportunities offer and prospects of escape will justify.

No. 115. Report of commissioner of Indian affairs for 1856.

The flattering success in Texas gives promise that, by a similar policy, the southern Comanches, Wichitas and other wandering bands may be successfully colonized on the western end of the Choctaw country.

This report shows that in 1856 the Wichitas were nomads, whom it was desirable to colonize within the leased district.

No. 116. Report of Indian agent, Brazos agency, Texas, December 27, 1856.

On the 26th inst. we were visited by ten camps of Wichita Indians, who came in for the purpose of expressing their sincere friendship for the Indians of the reserve. They show a strong desire to settle here and come under the rules and regulations of this agency.

This report shows that the Wichitas, in 1856, preferred a home in Texas to a home in the leased district.

No. 117. Report of Indian agent, March 6, 1857.

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That country for a number of years has been a general rendezvous of horse thieves, viz: Witchitas, Keechies, Kickapoos and renegades from other tribes, who have carried on a very lucrative trade with Indians, and with white traders from the Creeks and Cherokees, and white traders from Arkansas, and a large portion of the horses stolen from Texas have been disposed of in this very territory. App. Rec. 73.

This report shows the purpose and character of the alleged "residence" of the Wichitas in the Wichita mountains.

No. 118. Report of Indian agent, Brazos agency, Texas, April 30, 1857.

It appears that the Wichitas are very destitute, having lost or eaten nearly all their horses. Some of them have, this spring, visited this agency, and have procured seed corn for planting, and, by the advice of spl. agent Ross, are now planting corn, at their village near the mouth of the Big Wichita. * * By the adoption of these suggestions, I feel confident that success will attend the efforts, proposed to be made, of at once colonizing the Wichitas and other Indians, and that our frontier will be soon relieved of the serious depredations that have heretofore interrupted its quiet. App. Rec 262.

This report shows that in April, 1857, a part of the *Wichitas* resided and were planting corn, on the Big Wichita, in Texas, and that there was hope that the state would soon be relieved of their presence.

No. 119. Report of commissioner of Indian affairs for 1858.

I regret to state that no progress has yet been made in carrying out the provision in the act of March 3, 1857, for "collecting and establishing the southern Comanches, Wichitas, and certain other bands of Indians, on reservations to be located south of the Arkansas river and west of the ninety-eighth degree of longitude." Those Indians are wild and lawless, in their disposition and habits, and cannot be brought together without danger of difficulties accruing among themselves, or of their committing forays upon the western Choctaws and Chickasaws, with whom they will be brought into close proximity, and whom we are bound, by treaty stipulations, to protect from such casualties. A strong military force, in the region of country where it is intended to settle them, is absolutely necessary, to hold in check and control them, and to afford the requisite protection to the agent appointed to take them in charge. App. 268.

This report shows that in November, 1858, the *Wichitas* were still *wild* and *lawless* Indians, whom it was dangerous to colonize in the leased district.

No. 120. Report of Indian agent, San Antonio, Texas, December 19th, 1858.

The Wichitas have, on several occasions, within the last three years, been refused permission by me to emigrate to Texas and settle on the reserve at Brazos. Ab. 264.

This report shows that the *Wichitas* looked not to the leased district for a home, but to the Brazos river in Texas.

No. 121. Order of C. E. Mix, acting commissioner of Indian affairs, March 30, 1859.

So soon as it may be practicable and safe for the Wichitas to remove to their new location, you will require them to go there, giving them to understand that it is to be their permanent home, and that none of them must leave the reservation, without the permission of the agent. Ab. 270.

This order implies that pressure was requisite to place and keep the Wichitas in their *new* "*home*."

No. 126. Report of Indian agent, Wichita agency, Indian Territory, Oct. 1, 1868.

The work of building fences and putting in crops commenced, with commendable energy and zeal, on the part of the Shawnees and Delawares, they using the ploughs with very little assistance and instruction: the Wichitas and some of the other tribes refusing to make any effort in that direction, saying they could not think of making a squaw of themselves, by working. The women and children, however, managed to plant and cultivate an amount of ground beyond my expectation. Ab. 27.

And yet on page 21 of their answer the appellants paint this picture of Wichita rural life:

The Wichita Indians were always industrious, peaceful and non-nomadic. They were an agricultural people, raising crops of corn, melons, and pumpkins, which they traded with the Comanches and other roving tribes. Ans. Ab. Rec. 34

No. 127. Report of Indian agent, Wichita agency, August 20, 1877.

The Wichitas, Wacoes and Towaconies are virtually one people, speaking the same language, the names Wacoes and Towaconies being given to the descendants of two bands of the Wichitas, who, about one hundred years ago, left the main tribe on the Neosho river, in Kansas, one taking up a residence on the Arkansas river, near the present town of Wichita, and the other pushing on to Texas. Ab. 273.

This opinion is fortified by the Wichita tradition to which Uts-tuts-kins and Niastor testify. And if any alleged prehistoric fact, connected with the Wichitas, has such verisimilitude as to warrant its acceptance on Indian tradition, it is this fact of their early habitat on the Neosho river, in what is now the state of Kansas.

No. 141. Report of Indian Agent, Anandarko, September 1, 1881.

It is said that about one hundred years ago two bands left the main tribe (the Wichitas) on the Neosho river, in Kansas, one taking up its residence on the Arkansas river, near the present town of Wichita, Kansas, and the other going to Texas. Apx. 206.

No. 155. Report of Commissioner of Indian Affairs for 1890.

The Wichita reservation, in Indian Territory, is defined in an unratified agreement, made October 19, 1872: * * there is no evidence that they hold it by any higher title than that contained in said unratified agreement, although they claim to have resided thereon for many years prior to said order. Apx. 272.

No. 149. Report of Indian Commissioners, Washington, August 8, 1846.

The other little bands, viz: Witchataws, Toweash, Towaconies, Keechies, and Wacoes are inconsiderable, in number, and degenerate in character. * * They have the reputation of being the best horse thieves in the prairie. Apx. 179

Report of Texas Commissioner of Indian Affairs, Houston, November 3, 1838.

The Pawnee Picts or Toweashes reside on Red river; they are sometimes in the United States and sometimes in Texas. * * They are in alliance with the Wacoes and Caddoes, and their depredations are generally confined to the upper Brazos country. Apx. Sen Reps 30 Cong 1 Sess. p. 479

The report of August 8, 1846, shows what these "industrious, peaceful, non-nomadic agriculturists" were doing, in 1846. The report of the Texas commissioner shows where they "resided," in 1838.

No. 153. P. H. Dunbar in his "Pawnee Indian" says:

* * The Wichitas, I am told, have a tradition that the primitive home of themselves and the Pawnees was upon the Red river, below the mouth of the Wichita. This would place them in close proximity with the Caddos. Rec. 131.

It must certainly be easier to accept this tradition, which locates the primitive home of the Wichitas in Texas, than the tradition that the progenitor of the Wichitas was born of a rock, thereafter named the Wichita mountain,—a repetition of the old fiasco: "*Parturiunt montes, nascetur ridiculus mus.*"

No. 154. Bienville's Journal shows that in 1700 the Wichitas were on the Washita river, in the state of Louisiana. Rec. 132.

No. 160. The deposition of James Mooney shows that the Wichitas themselves gave the name "Wichita mountain" only to the extreme western spur of the range, commonly called the Wichita Mountains, and that they said they gave their name to it, because they had once lived there. They said they left it and went to Fort Sill, in the summer "after the stars fell," that is to say, in the summer of 1834. Colonel Dodge found the Wichitas at the western extremity of this range in 1834. But they had not resided there long; for the old Wichita, Uts-tuts-kins, who also testifies that the Wichitas left this locality in 1834, says that he was a *young man* when Colonel Dodge visited the Wichita village, in 1834, and that when they moved from Texas to that village he was eleven years of age. They may therefore have resided five or six years at the western extremity of the Wichita range, in the southern part of the leased district. Rec. 186.

No. 161. The letter of Stokes and Arbuckle, dated September 15, 1835, shows that some of the Wichitas were then in the state of Texas, and some north of the Red river. Rec. 138.

No. 163. Wm. Darby's Description of Louisiana, Second Edition, 1817, contains the following statement:

The Panis or Towiache Indians have their village at 97° W. lon. and 35° 20′ N. lat. * A ridge of hills winds along the south bank of Red

river near the Panis village, discharging the waters southwards towards the gulf. Rec. 139.

This *probably* locates the village in Texas. It *certainly* does not locate it in the leased district; for the eastern boundary of that district is the 98th meridian.

At this point it may be well to ascertain the location of the Toyash village visited by Col. Dodge, in 1834. The counsel for the Wichitas located this village near the mouth of the stream named on the map, Elk creek, which they asserted was near the centre of the leased district. They established the location by the deposition of Capt. H. L. Scott. Capt. Scott testified on the 9th day of July, 1896. He stated that he was then 43 years of age. Col. Dodge's visit to the Toyash village, therefore, occurred 19 years before Capt. Scott was born. The captain does not testify that he had any personal knowledge as to the place where it occurred. I quote the concluding paragraph of his direct testimony as follows:

The witness having answered the above interrogatories in compliance with the rule of the court requiring him to state whether he knows of any other matter relative to the claim in question, and if he do to state it, says:

I have a copy of Catlin's "North American Indians." Catlin was an artist, and made a trip through this country with the First United States Dragoons in 1834. There is in this book a picture of the Wichita village on the North Fork of Red river as it was in 1834, at the base of the Wichita mountains, in what is now known as "Devil's Canyon." Rec. 192.

Capt. Scott says that the village, represented in Catlin's picture, was in the "Devil's Canyon." And the counsel asserted that the village, visited by Col. Dodge, was the village represented in Catlin's picture, and that the Devil's Canyon was at a point near the mouth of Elk creek. But how did Capt. Scott know that 19 years before his birth these Toyash wigwams were located in the Devil's Canyon? The captain's testimony, on this point, is not even hearsay evidence. It is guesswork of the lowest order and most valueless character. Capt. Scott did not know

that the picture, which he found in Catlin's book, was a representation of a Wichita village, occupied in 1834, in the Devil's Canyon, or anywhere else. Catlin was never within 50 miles of the spot where Col. Dodge met the Toyash. The theory, according to which this spot is located near the mouth of Elk creek, is based on the discovery, by W. F. Cummins, in 1891, of the remains of a Mexican village and of an Indian village near that locality. The time when the Indian village was occupied is altogether conjectural. So is the identity of the occupants of that village. Moreover Cummins testifies that *the remains of the Mexican village were in the "Devil's Canyon," and those of the Indian village were half a mile distant.*

The counsel for the Wichitas, however, has presented the testimony of another witness, whose statements on this point are neither hearsay, nor guesswork, but are made on his own personal knowledge and furnish the only testimony given, on personal knowledge, on this point, in the case at bar. This witness was the Wichita, Uts-tuts-kins. He testified, in 1882, as follows:

Afterwards the young chief concluded would all move to Neosho; after living there some time they moved to Salt Fork, and from there to the Red hills on the north fork of the Canadian, where they made corn three years, and then moved to mouth of Otter creek, on North fork of Red river, and divided into three parties—one to the mouth of the Little Wichita on main Red river, and one to Clear fork of Brazos, and the other remained at the mouth of Otter creek.

The chief at mouth of Otter creek died, and his people joined those at mouth of Wichita, and in five years the chief died at Clear fork, and his people joined those at mouth of Wichita, and all were together again and lived there a long time. I (Uts-tuts-kins) was born at the mouth of the Wichita. While we lived there white men came in seach of money, had a little fight, and whites left.

Afterwards Wichitas disagreed as to where they should stop, but went to mouth of Cache creek. I was then young. At Cache creek had trouble with Osages, and wounded our chief in cheek; and then we had smallpox, and lost more than half our people; from there we moved to mouth of Otter creek. I was then 11 years old. While at mouth of Otter creek I concluded to go with some young friends on warpath east, and saw no Indians, but when coming home found long trail made by Indians or whites, but when we got home found soldiers holding

council. Soldiers come with boy they had captured at Coffey's bend on Red river. Our chief said we would some day have to do as whites do. This was just 48 years ago. Moved from Otter creek to where Fort Sill is now, and remained 6 years. Our big chief was buried there, and we afterwards moved to Rush Springs. We lived there about 8 years when Van Dorn had fight with Comanches near our place; that was in 1858. We then moved to Caddo creek, near Fort Arbuckle; found Indians and soldiers and considered them intruders, but did not care to make any trouble with them.

The above and foregoing is a correct translation of statement made by Uts-tuts-kins in the spring or summer of 1882. Apfo. 136, 137.

Uts-tuts-kins names the mouth of Otter Creek six times, and locates the village, where the council was held, at the mouth of Otter Creek, which is only six or eight miles from Red river; but is more than 40 miles from the nearest point in the Wichita reservation.

No. 76. Report of commissioner of Indian affairs for 1845.

This is a large district, and requires the undivided attention of the present efficient superintendent, owing to the unsettled condition of the Comanches, Witchetaws and other tribes who lead a wandering life. Sometimes being in Texas and sometimes in the United States, it has been impossible to extend over them the eye of this department. They have neither belonged, hitherto, to the one government, nor to the other; and, although several attempts have been made to negotiate with them, every effort of the kind has thus far proved unsuccessful. Apfo. 249.

This report shows that in 1845 the Wichitas belonged neither to the republic of Texas nor to the United States, but were sometimes on one side of the boundary line and sometimes on the other.

No. 77. Statement of P. P. Pitchlynn, Washington, January 19, 1846.

The To-wi-ash, Waco, Tow-a-gany and Washita Indians are on the Red river, above the Cross Timbers, with their villages on both sides and near each other. Rec. 282.

No. 78. Report of Commissioner P. M. Butler, Council Ground, Comanche Peak, 20 March, 1846.

The talk of each chief is herewith enclosed as expressive of their views in their own language. * *

Talk of Car-ce-ro-ka, chief of the Wichita and Towiash tribes.

"My Brother: We got the word that our great father had sent com-

missioners here to see us, and that our red brothers, the Muscogees, Cherokees, Chickasaws and Choctaws were with them, to make a big peace. When we first heard it we were scared to death. Some of our young men had been out, on a war party, and had stolen some of the commissioners' horses. We did not stop to get up our horses, but catched the first we could come to, and hurried here to meet you. * * From this day forward there shall be no more killing and stealing from Texas by our people; and there shall be peace as long as the sun rises and sets. We chiefs have thought deep on it, and come to this conclusion. * * Our young men have brought in all the horses, that they stole from you, and delivered them up to you to-day. All the rest that we have will be brought down and delivered at the next council, when we meet you. * * You told us to quit warring and stealing from Texas, which we agree to. But does our great father mean that we shall quit stealing from the Spaniards? Our young men must have horses from somewhere."

The Towacone chief spoke a second time and said:

"It is my duty to tell the big captain that my red brother, the Kechis has told him a lie. He has said his people have no horses stolen from Texas. I saw seven head, myself, about a week ago." Rec. 254.

This report shows that, in 1846, the Wichitas resided in Texas.

No. 80. Statement, by Indian agent, July 17, 1846, of "*Names of Indian delegation from the Prairies of Texas*," who visited Washington, in that month. This list includes the names of Yo-sa-quash and Ish-ar-e-wah, chiefs of the *Wichitas*. It is accompanied by a recommendation that a large medal be awarded to Yo-sa-quash, and a smaller one to Ish-ar-e-wah. It is also accompanied by an estimate of the expense of returning the delegates to Torry's Trading House, *on the Brazos river, in the state of Texas*. These documents show that the *Wichitas*, who made the treaty of 1846, lived in Texas. Rec. 66.

No. 81. Report of Indian agent, Austin, Texas, October 27, 1846.

The Wacos, Wichitas, and Keechies have stolen quite a number of horses, on our northern frontier, but have spilled no blood.

No. 82. Report of Indian agent, Austin, Texas, May 16, 1847:

The Comanches, Lapans, Tonkahras, Caddoes, Ionies, Anandacos Keechies, and the small band, of Shawnees, Delawares and Cherokees

are all perfectly peaceable, and I can hear nothing of a hostile character charged against them.

The Waccos, Towacorros, and Wichitas have committed numerous depredations on our citizens, in the last few months. The latter part of Feby. last, they attacked a party of our citizens and killed two men. They are continually down on our borders, and have stolen several hundred head of horses. In the immediate vicinity of this place, about ten nights since, they stole 20 horses, and made their escape with them.

I would again earnestly call the attention of the department to the absolute necessity of taking prompt measures to chastise those Indians. It is a loss of time to think of inducing them to remain quiet by peaceful measures. They have been in treaty with the Texas and U. S. governments, for 4 or 5 years, and broken their treaty engagements almost as soon as made, and are now doing more damage to our citizens than at any previous time. And, as the Chief Aquaquash says, "They were born thieves and nothing but force will prevent them from stealing." They not only depredate on the whites, but steal from the friendly Indians, and must, in a short time, unless taken in hand, cause much difficulty, as neither our citizens or the friendly Indians will put up with them much longer. * * They steal our horses and kill our citizens, with perfect impunity. The Comanches and all the Indians that are true are extremely anxious that the government should send troops into the Indian country, and particularly that those bands should be broken up. They offer their services as guides, whenever the government will order a force sufficient for that purpose. * * Rec. 254. 255.

It will be found that the word "borders," as used by Major Neighbors in many reports, refers, not to that part of Texas immediately south of Red river, but to the region south of the boundary between the whites and Indians in Texas, previously designated by General Houston. This report shows that in 1847 the Wichitas were, as usual, in the state of Texas, murdering citizens and stealing horses.

No. 84. Report of Indian agent, July 15, 1847. He reports that no depredations had been committed by the Wichitas, since June 22, 1847. 244. Rec. 69.

No. 85. Report of Major George Andrews, September 3, 1847. The Wichitas visit Fort Washita in the Chickasaw nation. They are "erratic" Indians. 245. Rec. 68.

No. 86. Report of Indian agent, September 14, 1847. He found the Wichitas in Texas, about 175 miles above Torry's Trading House. He says:

I found the Indians residing in that neighborhood, viz: the Keechies, Wacos, Wichitas and Tah wah carros (whose village is about six miles further up the river) in a very contented and happy condition. Ab. 25.

No. 87. Report of Indian agent, October 12, 1847.

He reports that the Wichitas were present at the distribution, at the Texas agency, on the 28th of September, 1847. Aff. 252.

No. 88. Report of Indian agent, March 2, 1848.

The only depredation, that can be traced to these bands, is a theft, committed by three Keechies and one Wichita, who stole twelve horses from our settlements. Aff. 253.

No. 89. Report of Indian agent, March 16, 1848.

The lines proposed to be run, for the purpose of establishing the boundaries of "Peters'" colony, will pass directly through the country now occupied by the Keechies, Wichitas, Wacos, Tah wac carros, Caddos, Ionies, and Tenawish Indians. Rec. 256

This colony was wholly within the state of Texas. And this report shows that the Wichitas were there in 1848.

No. 90. Report of Indian agent, April 28, 1848. This report encloses the following statement of C. E. Barnard, interpreter:

On the 9th inst. three surveyors, engaged in running the line of Peters' colony, were killed and scalped, by some Indians, supposed to be Wichitas. Aff. 254.

This would seem to indicate the presence of Wichitas in Texas.

No. 91. Report of Indian agent, June 15, 1848.

The Wichitas still hold themselves aloof from our councils, and occupy a very doubtful and threatening position, since their people were killed by Capt. Highsmith's company. I am informed, by the friendly Indians, that they are making preparations to attack our frontier, as soon as their corn is harvested. Aff. 255.

This shows that the Wichitas were then raising corn in Texas. The frontier mentioned was the line, within the state of Texas, separating the Texas Indians from the whites.

No. 92. Report of Indian agent, August 10, 1848.

Since the date of my last report there has been no movement worthy of notice among our border tribes of Indians, until about the 1st instant, when a small party, supposed to be Wichitas, Wacoes, and some of the upper Comanches, made a descent on our frontier, visiting the stations of Captains Highsmith and Crump, when they succeeded in stealing from the former company thirty, and the latter twenty, horses. (App. 257.

This frontier was the line separating the Texas Indians from the whites.

No. 94. Report of Indian agent, September 14, 1848.

I have not as yet been able to see any of the Wichitas, but have sent them a talk, and shall proceed to the upper Brazos to see them in a few days. (App. 258,

This shows that the Wichitas were then in Texas.

No. 95. Report of Indian agent, December 26, 1848.

During the whole fall they (the Wichitas) have been absent from their villages, under the pretext of hunting. They have been most of the time on the headwaters of Red river and in the neighborhood of the Wichita mountains. (App. Rec 8.

This report, by the agent for the Texas Indians, shows that the villages of the Wichitas were in Texas, in 1848; but they had been, for some time, absent from their villages.

No. 96. Report of Indian agent, March 7, 1849.

These Indians (Wichitas and other tribes) range promiscuously across our frontier, from Red river to the Rio Grande, during the greater portion of the year, and seek shelter, during the winter, in the upper Cross Timbers of Texas. (App. 258

This report shows not only that the Wichitas ranged over northern Texas, but that they wintered in the Texas Cross Timbers.

No. 97. Report of H. G. Catlett, May 12, 1849:

He says the Wichitas, Towash and Keechies live near together, upon the Brazos head of the Trinity, and upon the Big Wichita (the main southern branch of Red river). These localities were in Texas. (App. 259.

No. 98. Report of Lieutenant F. Hamilton, Fort Graham, Texas, May 31, 1849.

Aquaquash, chief of the Wacoe Indians, arrived at this post, on the 25th inst., with a small portion of his tribe. He informed me that he

had succeeded in making the Wichitas deliver up to him a portion of the horses they had stolen from citizens of this state. * * He also informed me that a small portion of his tribe, together with a large party of Towakarros, were not far behind, were bringing in the stolen horses, together with Tad-a-da, chief of the Wichitas, and a few of his warriors * * The horses, that Aquaquash recovered, were brought in on the 27th inst., accompanied by nearly one hundred Wacoes, Towakarros and Wichitas. * * I had, at his request, a talk with the great Wichita chief, Tad-a-da. He has promised in future to be friendly, and to do all in his power to prevent his tribe from stealing horses.

This shows that in 1849 the Wichitas were in Texas.

No. 99. Report of Major R. A. Arnold, Fort Worth, Texas, June 18, 1849.

Ne-o-cho-se-ras, chief of the Tah-wah-carros, and Gideos, with two other chiefs of the Wichita tribe, are now visiting me. This is the party who lately came into Fort Graham (on the Brazos distant 60 miles), under A-qui-quash, the Wacoe chief, bringing and delivering up some 35 horses and mules, which they had taken from the Wichetas. These horses, &c., had been stolen from citizens by the Wichetas.

This report, corroborating that of Lieut. Hamilton, shows that the Wichitas were in Texas in 1849.

No. 100. Report of Lieutenant F. Hamilton, Fort Graham, Texas, June 22, 1849.

Since this post has been established, it has been visited by parties of the Delawares, * * Wichitas and Towaharros, at different times.

This report also shows that the Wichitas were in Texas in 1849.

No. 103. Report of interpreter, Barnard's Trading House, Texas, October 9, 1849.

The Keechis, Wacoes, Wichitas and Tonkahuas are all quiet and awaiting your arrival, to hear what the president has to say to them.

This report shows that the Wichitas were in Texas, in October, 1849.

No. 104. Report of Indian agent, Austin, Texas, November 2, 1850.

The Wichitas, Tonkaways and Keechies I did not see. They are, as I am informed, somewhere on Red river, and have formed a general combination for the purposes of plunder. It is this combination that does most of the horse stealing along the frontier. I do not expect them at the council; consider them beyond my control, and refer them to the government, as a set of rascals who ought to be exterminated.

This report shows that the Wichitas were in Texas in 1850.

No. 105. Statement of C. G. Todd, March 25, 1851. Referring to the boundary line between the whites and Indians in Texas, established by Gen. Houston, in 1843, he says that it has tended to the preservation of peace. Aff. 264.

No. 106. Report of Indian agent, July, 1851. He reports that the Wichitas have "left Texas and are now inhabiting the Washita mountains north of Red river." Aff.

No. 107. Report of Indian agent, Fort Graham, Texas, March 18, 1852.

They (the Comanches) say that most of the depredations on our frontier are committed by the Witchitas, and the Comanches north of Red river. Aff. Rec. 70.

No. 108. Report of Indian agent, Fort Belknap, Texas, June 12, 1852.

As reported, under date of May 12, last, I have been making a tour in the Indian country, and visiting the Indian villages on the Brazos. I find that the Wichita Indians, formerly of Texas, and associates of the Wacoes and Towaccarros, have recently been making very frequent depredations on the frontiers of Texas below this and are now constantly engaged in stealing horses, and passing through this vicinity, on their way to their homes, in the Wichita mountains beyond Red river.

These depredations are recently becoming so frequent, two or three small parties having passed along here with stolen horses, since I left Fort Graham, that I have conceived it to be my duty to call on the military, for a party of dragoons, for the purpose of visiting the Wichitas, at their homes, recovering the stolen property in their possession, and taking some hostages, or other security, for the future. I apprehend no occasion to resort to force. Aff. Rec. 70

This report shows that the Wichitas, having previously resided in Texas, were in the Wichita mountains in June, 1852, and were constantly making depredations thence into Texas and stealing horses in that state. Aff.

No. 109. Report of George T. Howard, superintendent, June 14, 1852. His "Estimate of the different tribes of Indians in Texas" includes the Wichitas. Aff. Rec. 71.

No. 110. Report of Indian agent, Fort Graham, Texas, October 8, 1852. Aff. 265.

Under date of 12 June, last, I communicated the fact that the Wichita
had been in the habit of visiting the frontiers of Texas, in small parties,
and committing occasional depredations on her citizens, and, although
they are perhaps not now strictly within the jurisdiction of Texas, I con-
ceived it to be my duty to make an effort to arrest these practices, and
establish some understanding with them, more especially as they have
been parties to treaties with the government heretofore made within the
limits of this state, and so far as I know, are not under the charge of any
other officer or agent of the government.

I accordingly dispatched a messenger (a chief of the Wacoes) to their
villages, in the Wichita mountains, with some tobacco, and a talk to them
upon the subject of their depredations, and a demand of such stolen
property as they had in their possession. Soon afterwards, and while I
was out in the Indian country, another party of this tribe robbed the
train of W. Mackay of eight horses and mules. I thereupon procured a
small escort, under command of Lt. Beall, of 5th Inf., and started after
my messenger, intending to visit the Wichitas in person. We encountered
a succession of rains and high waters, which so embarrassed and delayed
us, that after swimming several streams, we were finally stopped by Red
river, within forty-five miles of the Wichita village, and being too nearly
out of provisions to await the subsidence of the stream, were compelled
to return.

My messenger brought back eight stolen horses, which were given up
by the Wichitas, and reported that the chief of that tribe expressed the
determination to put a stop to these aggressions of his people.

Besides these I recovered four government horses, from other Indian
tribes, while on this expedition.

Lieutenant Beall afterwards, in the month of August, while out in
search of Captain Marcy and his command (then reported to have been
massacred by the Comanches), visited the Wichita villages, and held a
talk with them. They then delivered up six more horses and mules and
so far as I know, have committed no outrage on this frontier, since the
robbery of Mackay's train. * * Appendix, 266

This report shows that in October, 1852, the Wichitas
still made their rendezvous, in the Wichita mountains
the base of their horse-stealing operations in Texas.

No. 111. Report of Indian agent, supposed to have been made in 1853.

Having taken considerable pains to get information with regard to
those associate bands of wild Indians, the Wacoes, Wichitaws, Tow-
carres and Keechies, I submit it to the department for what it is worth.
These bands, although small in number, are more trouble and commit
more depredations upon the people of Texas than all the other bands that
roam through her territory, extending their predatory excursions down
into the settlements, as far as the San Antonio river; travelling mostly
on foot, avoiding the military posts, they swoop down upon the settlers
and drive off their animals with impunity, not even sparing their enemies
the Delawares and other Indians friendly to the whites. This leads to
frequent hostile meetings, and whilst with me, a party of Delawares
brought in the bleeding scalps of some Wacoes, who were caught stealing
their horses. Exp. Rec. 71

This report shows that the Wichitas were then roaming through Texas territory, committing depredations upon the people as far south as the San Antonio river.

Second.

The Treaty of 1835.

The Wichitas claim another basis for their title to the land in controversy. They base it upon an admission alleged to have been made on the 24th of August, 1835, in a treaty between the United States and the Comanches, Wichitas and other Indians. But this invocation of the treaty of 1835, in maintenance of the Wichita title, must prove unsuccessful for many reasons.

In order to establish their claim that, by this treaty, the United States and the Choctaws recognized the aboriginal title of the Wichitas to the district in controversy the counsel assume:

(1.) That the treaty refers to settlements, towns and hunting grounds, in the leased district, and *not elsewhere*, and requires the parties, who are Indians, to refrain from certain acts, in the leased district, and *not elsewhere*.

(2.) That, as a consequence, the United States and the Choctaw nation solemnly admitted that the Wichitas had such towns and hunting grounds in the leased district.

(3.) That thereby the United States and the Choctaw nation recognized the possession, by the Wichitas, of the "customary" Indian title by occupancy to that country.

I submit that the opposing counsel mistake the scope and effect of this treaty. There were three parties to the treaty: (1) The United States; (2) The Comanche and Wichitaw nations and their associated bands, or tribes, of Indians; and (3) The Cherokees, Muscogees, Choctaws,

Osages, Senecas and Quapaws. The counsel for the Wichitas show, on page 24 of their answer, that, prior to 1859, the Wacos, Towaconies, Caddos, Ionis, Keechies, and Delawares, some or all of whom must have been the associated bands mentioned in the treaty, never lived in the leased district. At the date of the treaty their home was in a foreign country, in Texas, one of the provinces of Mexico. They had hunting grounds in Texas. Whatever towns and settlements they had were in Texas. If they had any hunting grounds, or towns, or settlements in the leased district, or elsewhere in the United States, they held them, not by an aboriginal title, but temporarily by permission of the United States, or of the Choctaw nation. If the United States and the parties of the third part, by signing this treaty, admitted that the Wichitas had "towns and hunting grounds and dominion," in the Wichita reservation, between the Washita and Canadian rivers, they also admitted that the Comanches, and their associated bands, had "towns and hunting grounds and dominion" in that reservation. If, by such admission, they acknowledged that the Wichitas held an aboriginal title to this Wichita reservation, as a hunting ground, they also acknowledged that each one of the associated bands, whoever they were, and also the Comanches held such an aboriginal title.

The "treaty with the Comanche and Witchetaw nations and their associated bands or tribes of Indians," signed August 24, 1835, and the "treaty with the Kioway, Ka-ta-ka and Ta-wa-ka-ro nations and their associated bands or tribes of Indians," signed May 26, 1837, contain, respectively, the following articles:

Article 1. There shall be perpetual peace and friendship between all the citizens of the United

Article 1st. There shall be perpetual peace and friendship between all the citizens of the United

States of America, and all the individuals composing the Comanche and Witchetaw nations and their associated bands or tribes of Indians, and between these nations or tribes and the Cherokee, Muscogee, Choctaw, Osage, Seneca and Quapaw nations or tribes of Indians.

Article 2. Every injury or act of hostility by one or either of the contracting parties on the other, shall be mutually forgiven and forever forgot.

Article 3. There shall be a free and friendly intercourse between all the contracting parties hereto, and it is distinctly understood and agreed by the Comanche and Witchetaw nations and their associated bands or tribes of Indians, that the citizens of the United States are freely permitted to pass and repass through their settlements or hunting ground without molestation or injury on their way to any of the provinces of the republic of Mexico, or returning therefrom, and that each of the nations or tribes named in this article, further agree to pay the full value for any injury their people may do to the goods or property of the citizens of the United States taken or destroyed, when peaceably passing through the country they inhabit, or hunt in, or elsewhere. And the United States hereby guaranty to any Indian or Indians of either of the said Comanche or Witchetaw nations, and their associated bands or tribes of Indians, a full indemnification for any horses or other property which may be stolen from them: Provided, that the property so stolen cannot be recovered, and that sufficient proof is produced that it was actually stolen by a citizen of the United States, and within the limits thereof.

Article 4. It is understood and agreed by all the nations or tribes of Indians parties to this treaty,

States of America and all the individuals composing the Kioway, Ka-ta-ka, and Ta-wa-ka-ro nations and their associated bands or tribes of Indians, and between these nations or tribes and the Muscogee and Osage nations or tribes of Indians.

Article 2d. Every injury or act of hostility by one or either of the contracting parties on the other, shall be mutually forgiven and forever forgot.

Article 3d. There shall be a free and friendly intercourse between all the contracting parties hereto; and it is distinctly understood and agreed by the Kioway, Ka-ta-ka, and Ta-wa-ka-ro nations, and their associated bands or tribes of Indians, that the citizens of the United States are freely permitted to pass and repass through their settlements or hunting ground without molestation or injury, on their way to any of the provinces of the republics of Mexico or Texas, or returning therefrom, and that the nations or tribes named in this article further agree to pay the full value of any injury their people may do to the goods or property of the citizens of the United States, taken or destroyed when peaceably passing through the country they inhabit, or hunt in, or elsewhere. And the United States hereby guaranty to any Indian or Indians of the Kioway, Ka-ta-ka, and Ta-wa-ka-ro nations, and their associated bands or tribes of Indians, a full indemnification for any hor es or other property which may be stolen from them, provided that the property so stolen cannot be recovered, and that sufficient proof is produced that it was actually stolen by a citizen of the United States, and within the limits thereof.

Article 4th. It is understood and agreed by all the nations or tribes of Indians, parties to this treaty,

that each and all of the said nations or tribes have free permission to hunt and trap in the Great Prairie west of the Cross Timbers, to the western limits of the United States.

Article 5. The Comanche and Witchetaw nations and their associated bands or tribes of Indians, severally agree and bind themselves to pay full value for any injury their people may do to the goods or other property of such traders as the president of the United States may place near to their settlements or hunting ground for the purpose of trading with them.

Article 6. The Comanche and Witchetaw nations and their associated bands or tribes of Indians, agree, that in the event of any of the red people belonging to the nations or tribes residing south of the Missouri river and west of the state of Missouri, not parties to this treaty, should visit their towns or be found on their hunting ground, that they will treat them with kindness and friendship and do no injury to them in any way whatever.

Article 7. Should any difficulty hereafter unfortunately arise between any of the nations or tribes of Indians parties hereunto, in consequence of murder, the stealing of horses, cattle, or other cause, it is agreed that the other tribes shall interpose their good offices to remove such difficulties, and also that the government of the United States may take such measures as they may deem proper to effect the same object, and see that full justice is done to the injured party.

Article 8. It is agreed by the commissioners of the United States, that in consequence of the Comanche and Witchetaw nations and their associated bands or tribes of Indians having freely and will-

that each and all of the said nations or tribes have free permission to hunt and trap in the Great Prairie west of the Cross Timbers to the western limits of the United States.

Article 5th. The Kioway, Ka-ta-ka, and Ta-wa-ka-ro nations and their associated bands or tribes of Indians agree and bind themselves to pay full value for any injury their people may do to the goods or other property of such traders as the president of the United States may place near to their settlements or hunting ground for the purpose of trading with them.

Article 6th. The Kioway, Ka-ta-ka and Ta-wa-ka-ro nations and their associated bands or tribes of Indians, agree, that in the event any of the red people belonging to the nations or tribes of Indians residing south of the Missouri river, and west of the states of Missouri and Arkansas, not parties to this treaty, should visit their towns, or be found on their hunting ground, that they will treat them with kindness and friendship, and do no injury to them in any way whatever.

Article 7th. Should any difficulty hereafter unfortunately arise between any of the nations or tribes of Indians, parties hereunto, in consequence of murder, the stealing of horses, cattle, or any other cause, it is agreed that the other tribes shall interpose their good offices to remove such difficulties; and also that the government of the United States may take such measures as they may deem proper to effect the same object, and see that full justice is done to the injured party.

Article 8th. It is agreed by the commissioners of the United States that in consequence of the Kioway, Ka-ta-ka and Ta-wa-ka-ro nations and their associated bands or tribes of Indians having freely and will-

ingly entered into this treaty, and it being the first they have made with the United States or any of the contracting parties, that they shall receive presents immediately after signing, as a donation from the United States; nothing being asked from these nations or tribes in return, except to remain at peace with the parties hereto, which their own good and that of their posterity require.

Article 9. The Comanche and Wichetaw nations and their associated bands or tribes, of Indians, agree, that their entering into this treaty shall in no respect interrupt their friendly relations with the republic of Mexico, where they all frequently hunt and the Comanche nation principally inhabit; and it is distinctly understood that the government of the United States desire that perfect peace shall exist between the nations or tribes named in this article and the said republic.

Article 10. This treaty shall be obligatory on the nations or tribes parties hereto from and after the date hereof, and on the United States from and after its ratification by the government thereof.

Done and signed and sealed at Camp Holmes on the eastern border of the Grand Prairie, near the Canadian river in the Muscogee nation, this twenty-fourth day of August, one thousand eight hundred and thirty-five, and of the independence of the United States the sixtieth.

ingly entered into this treaty, and it being the first they have made with the United States, or any of the contracting parties, that they shall receive presents immediately after signing, as a donation from the United States; nothing being asked from the said nations, or tribes, in return, except to remain at peace with the parties hereto, which their own good and that of their posterity require.

Article 9th. The Kioway, Ka ta-ka and Ta-wa-ka-ro nations, and their associated bands or tribes of Indians, agree, that their entering into this treaty shall in no respect interrupt their friendly relations with the republics of Mexico and Texas, where they all frequently hunt and the Kioway, Ka-ta-ka and Ta-wa-ka-ro nations sometimes visit; and it is distinctly understood that the government of the United States desire that perfect peace shall exist between the nations or tribes named in this article, and the said republics.

Article 10th. This treaty shall be obligatory on the nations or tribes, parties hereto, from and after the date hereof, and on the United States from and after its ratification by the government thereof.

Done and signed and sealed at Fort Gibson, this twenty-sixth day of May, one thousand eight hundred and thirty-seven, and of the independence of the United States the sixty-second.

Appendix 16

The stipulation of article 3, in the treaty of 1835, was expressly made applicable to each of the other parties of the second part, as well as to the Comanches and Wichitas. This article requires the Comanche and Wichita nations and their associated bands or tribes to permit citizens of the United States to pass and repass freely and

without molestation through their settlements, or hunting grounds, on their way to and from any of the provinces of the republic of Mexico. There is no intimation that these settlements or hunting grounds are confined to the leased district. The language is general,—without retriction.

Again each of the nations or tribes, named in this article, agrees to pay the full value for any injury, their people may do, to the goods or property of citizens of the United States, taken, or destroyed, when peaceably passing through the country they inhabit, or hunt in, or elsewhere.

Article 4 is not more a grant of the right to hunt and trap west of the Cross Timbers *by* the Wichitas, *to* any or all of the other tribes who were parties to the treaty, than it is such a grant *by* each of the other tribes *to* the Wichitas. The language of the article places them all on the same footing. If this treaty of 1835 means that the Wichitas had settlements and hunting grounds, in the leased district, and were, therefore, the owners of that district, it also means that the "associated bands" had settlements and hunting grounds, in that district, and were, therefore, its proprietors. But there is no proof, and there can be no pretense that either of these bands, except the Comanches, ever resided for a single month in this district.

The "pristine habitat" of the Comanches, was probably south of the Red river. Some of them had crossed the river, and hunted in the leased district, and established camps or settlements there. The obligation of the Comanches, under the third article of the treaty, to give free and safe passage through their hunting grounds and camps, or settlements, south of the Red river, was as clear and strong as was their obligation to give free and safe passage through camps, or settlements and hunting

grounds, which the United States, by the terms of that treaty, permitted them to occupy temporarily north of the river. The obligation imposed on the other parties of the second part, to accord free and safe transit through their ancient towns and settlements and hunting grounds *south* of the Red river, was as strong as was their obligation to give free and safe transit through lands which they were permitted, by the treaty, to use as hunting grounds *north* of the river.

The obligation, imposed by article 3 of the treaty of August 24, 1835, upon the Wichitas, whose "pristine habitat" was not in the leased district, to permit the parties of the third part to pass freely and safely through the hunting ground, in the Cross Timbers, south of the Red river, which they used when Mesieres visited them in 1788, was just as plain and imperative as was the obligation which it imposed upon them, to permit free and safe transit through any region in which the United States and the Choctaws, by the treaty, permitted them to hunt, north of the Red river.

Unless the terms "settlements" and "hunting ground," in this treaty, refer to settlements and hunting ground outside the leased district, they are meaningless, as to the associated bands, who were parties to the treaty. The treaty binds each one of these bands to refrain from molesting citizens of the United States, entering their settlements, or hunting ground, on their way to any of the provinces of Mexico. The answer of the Wichitas and affiliated bands shows, and the evidence incontrovertibly proves that these bands were Texas Indians, had settlements in Texas, and had no settlements elsewhere. The treaty required them to refrain from the molestation of travellers, in their own settlements, in Texas; or, as to them, this third article of the treaty amounted to nothing.

The sixth article required these bands to refrain from doing any harm to Indians, strangers to the treaty, visiting their settlements, which settlements were in Texas, and nowhere else.

The use of the terms "settlements" and "hunting ground," in the treaty, then, did not imply that any of these bands had settlements in the leased district, and were therefore proprietors of the leased district. These words implied *per se* nothing whatever, as to the location of the settlements of any tribe, or band, included among the "Comanche and Wichita nations and their associated bands or tribes," who constituted the second party to the treaty of 1835. Nor did these words imply that either of these tribes, or nations, was the proprietor of the leased district, or of any other particular district or territory.

Nor does the statement, in the 9th article, that "the Comanches principally inhabit" Mexico (which then included Texas), imply that either of these nations, or tribes, owned the leased district. These words did imply that the Comanche tribe did not constantly, or for the greater part of the year, inhabit the leased district; but they did not imply, for they could not imply, that the associated bands did not inhabit Mexico, which included Texas,—they did not, and could not, imply that the Wichitas had not inhabited Mexico, at different times, and for long periods, prior to their removal, in 1834, to the western spur of the Wichita mountains, where Colonel Dodge found them in that year.

But the counsel for the Wichitas assert that the only parties of the second part, to the treaty of 1835, were the Comanches and Wichitas. They made this assertion in the face of the fact that, in seven different paragraphs of the treaty, the "Comanche and Wichita nations, and their associated bands, or tribes of Indians," are designated as

parties of the second part. And they contend (1) that the United States made no admission whatever as to the "associated bands;" and (2) that the United States could not have intended to admit that the Comanches had a "pristine habitat," in the leased district, because the fact was that they had not a "pristine habitat" therein. The fact that they had no "pristine habitat," in the district, proved that the United States did not intend to admit that they had such "pristine habitat." This implied, of course, that the alleged fact that the Wichitas had a "pristine habitat," in the leased district, was evidence showing that the United States intended to admit that *they* had such "pristine habitat," in that district. The admission proved the fact and, in a spirit of reciprocity, the fact proved the admission.

Suppose there were no evidence that the Wacos, Towaconies, Caddos, Ionis, Keechies, and Delawares were parties to the treaty. The material fact would remain that, if the treaty meant that the Wichitas had settlements and hunting grounds in the leased district, and were, therefore, owners of that district, it also meant that the "associated bands or tribes," *whoever they were*, had settlements and hunting grounds in the leased district, and were, therefore, owners of that district. The treaty shows that the parties to the treaty included tribes, or bands, associated with the Comanches and Wichitas. It is obvious that ownership of the leased district, by these tribes, or bands, *whoever they were*, is fatal to the claim of exclusive ownership by the Wichitas.

Now the parties, of the second part, named in the Wichita agreement of 1891, and in the act of 1895, conferring upon the courts jurisdiction of this case, are the "Wichita and affiliated tribes or bands of Indians," just as the parties of the second part, to the treaty of 1835, were

"the Comanche and Wichita nations and their associated bands or tribes of Indians." The counsel for the Wichitas, on pages 16 and 17 of their answer, say:

> These defendants (the Wichita and Affiliated Bands of Indians) admit that they comprise the remnants of the ancient tribes, the Wichitas, Wacos, Towaconies, Caddos, Ionis, (not mentioned in the petition) Keechies, and Delawares.

But then, if these tribes, or bands, were not the associates of the Comanches and Wichitas, in 1835, who were their associates? The only proofs, presented in this case, tend to show that these very bands must have been their associates. I respectfully refer the court to the statement of David G. Burnet, ante page 146; the extract from Kennedy's Texas, ante page 148; the report of A. J. Raines, ante page 150; and the report of the Texas commissioner of Indian affairs, ante page 155.

The counsel for the Wichitas contended that it was not competent for the United States, in the treaty of 1835, to secure from the Wichitas a promise, not to injure the persons or property of citizens of the United States, in their settlements, towns, or hunting grounds, in Mexico. But if it was proper, in 1835, for the United States to enter into any treaty, at all, with a band of 175 wandering Wichitas, who had been found in territory of the United States, away from their own homes, it certainly was competent for the United States to secure, from them, a pledge not to molest citizens of the United States, either while they (the Wichitas) remained in the territory of the United States, or after they returned to their own homes.

The position of the counsel was that, although the authorities had found bands of Mexican Indians, within the United States, and were anxious to secure guaranties of good behavior on their part, they could lawfully obtain no such guaranties, as to their behavior *in Mexico*, otherwise than by treaties with the Mexican government, whereby

that government should become responsible for their conduct. The government of the United States took a different view; and obtained from the "Comanche and Wichita nations and their associated bands or tribes of Indians," stipulations touching, not only their treatment of *American citizens, in Mexico*, but also their treatment of the *Mexican government, and people in Mexico*. This latter stipulation is contained in article 9, of the treaty of 1835.

As a muniment of title, this treaty of 1835 stands confronted by the treaty concluded on the 26th of May, 1837, between the "United States and the Kioway, Ka-ta-ka and Ta-wa-ka-ro nations, and their associated bands or tribes of Indians." If the court will compare these two treaties, it will be found that, with the exception of a few wholly immaterial words in the last article of each, they are, *mutatis mutandis*, absolutely identical. If it be true that, in the former treaty, the United States admitted that the Wichitas and their associated bands were the proprietors of the leased district, then, for a like reason, it must also be true, that, in the latter treaty, the United States admitted that the Kioway, Ka-ta-ka and Ta-wa-ka-ro nations and their associated bands were proprietors of the leased district. If it be true that, in the former treaty, the Muscogees and Osages acquired the right to hunt, in the territory west of the Cross Timbers, from the Wichitas, it must also be true that, in the latter treaty, the Muscogees and Osages acquired their right to hunt, in the country west of the Cross Timbers, from the Ka-ta-kas, or Ta-wa-ka-ros, or Kioways. If it be true that this grant, in the treaty of 1835, of the right to hunt, in the country west of the Cross Timbers, proved that country to be the property of the Wichitas, it must also be true that the grant, in the treaty of 1837, of the right to hunt there, proved the country to be the property of

the Ka-ta-kas, or Ta-wa-ka-ros, or Kioways. If it be true that the acceptance of the promise, in the first treaty, not to interfere with travel to Mexico, was a recognition of the title of the Wichitas to the leased district, so also must it be true that the acceptance of a like promise, in the second treaty, was a recognition of the title of the Ta-wa-ka-ros, Kioways, and Ka-ta-kas to the same land.

If the acceptance, by the United States, of the stipulation in the third article of the treaty of 1835 amounted to a recognition of the title of the Wichitas, to the leased district, the acceptance of the same stipulation in the third article of the treaty of 1837 amounted to a recognition of the title of the Ka-ta-kas, and Ta-wa-ka-ros and Kioways to that district.

If the fourth article, in the treaty of 1835, amounted to a recognition of the Wichita title, the fourth article, in the treaty of 1837, amounted to a recognition of the Ka-ta-ka title. If it recognized the title of the Wichitas, it also recognized the title of the Ta-wa-ka-ros, Kioways, Comanches, Cherokees, Muscogees, Choctaws, Osages, Senecas and Quapaws. Indeed the Osage and Muscogee titles obtained a recognition stronger than that of the Wichitas, for they were parties to both treaties, and the Wichitas were parties to only one.

The "settlements and hunting ground," referred to in articles 5 and 6 of the two treaties, include, of course, the settlements and hunting grounds of the associated bands. If the presence of these words proved that the Wichitas had, from time immemorial, had settlements and hunting grounds in the leased district, their presence also proved that the associated bands had from time immemorial had hunting grounds in the leased district. If the presence of these words proved the Wichitas to have been the

original and sole proprietors of the leased district, their presence also proved that the Kataka, Kioway and Comanche tribes were its original and sole proprietors, and that the Wichitas were, therefore, not its only "original and *sole*" proprietors. This "*proof*," like the monster in the fable, devours itself.

It is not true that, by this treaty, the United States and the Choctaws recognized, in these foreign-born Indians, a right, held from time immemorial, to the land which the United States had, in 1820, conveyed to the Choctaws in payment for their country east of the Mississippi river. It is not true that the effect of the treaty was to hold the United States to an acknowledgment of the existence of Wichita, Waco, Towaconi, Caddo, Ioni, and Keechi towns, settlements, and hunting rights, where none in fact existed. It is not true that the treaty amounted to a solemn, binding recognition, by the United States, or by the Choctaws, of any title of any kind to the land now in controversy, or to any other part of the leased district, or to the country west of the leased district. The effect of the treaty was to grant the privilege of hunting, in the western country, to *all* the parties of the second part, and also to grant that privilege to all the parties of the third part, except the Choctaws who were made owners of that western country by the treaty of October 18, 1820, and needed no new grant to secure to them the privilege of hunting on their own lands. Another effect of the treaty was to secure from these foreign-born savages, who constituted the party of the second part, a promise not to kill or rob the more civilized parties of the second part, either in Texas or in the leased district, or in the western country, or *anywhere else*.

The mere fact that the United States entered into the treaty of 1835 with the "Comanches and Wichitas and

their associated bands or tribes of Indians" is no evidence that the Wichitas were owners or bona-fide residents of any part of the territory of the United States. Nor is it any evidence that the authorities of the United States admitted or considered them to be such owners or residents. It is no more evidence that the Wichitas were, or were considered, such owners or residents, than that the Comanches or the associated bands were, or were considered, such. Learning that these Indians were within the limits of the United States, and apprehending mischievous consequences to the civilized Indians and whites, the president concluded to avail himself of their presence, within the jurisdiction of the United States, to tie their hands, as far as possible, by a treaty. The result was the treaty of 1835.

The journal of the commissioners who negotiated this treaty shows that the object of the United States was to secure peaceful relations between the powerful Comanches and the weak but vicious Wichitas, and their associated bands or tribes, on one side, and the whites and civilized and semi-civilized Indians, on the other; that the United States authorities entered into this treaty, not because they regarded the great Comanche nation, or the little Wichita tribe, or either of the associated bands, as the owners of the leased district, but because these wild Indians had located their wigwams there, for the time being, and were troublesome neighbors to other Indians, as well as to the whites.

The history of the leased district furnishes evidence tending to rebut this claim that the Wichita title was recognized by the United States, in the treaty of 1835. Seven treaties relating to this land were made, between the years 1803 and 1856, viz., with the Quapaws in 1818, with the Choctaws in 1820, with the Osages in 1825, with

the Choctaws in 1830, with the Comanches and Wichitas and their associated bands in 1835, with the Choctaws and Chickasaws in 1837, and with the Choctaws and Chickasaws in 1855. These treaties disclose no recognition, or suggestion of any title held, or claim preferred by the Wichitas, to an interest in this land. Moreover, in the treaty of 1855, the United States, instead of recognizing the Wichitas as aboriginal owners of the leased district, actually leased that district from the Choctaws and Chickasaws for the use of the Wichitas and other tribes of Indians. And on the 3d of March, 1857, an appropriation was made, by congress,

> For the expenses of collecting and establishing the southern Comanches, Wichitas, and certain other bands of Indians, on reservations to be located south of the Arkansas river and west of the 98th degree of longitude, fifty thousand dollars.

Articles 9 and 10 of the treaty of 1855 show that the Wichitas were not, prior to the negotiation of that treaty, occupants of the Wichita reservation, and that, in order to secure a place for them on that reservation, it was necessary to make an arrangement with the Choctaws and Chickasaws, who were the owners of the land.

Third.

The Fort Arbuckle Agreement.

The Wichitas assert, as the third basis of their title, that in 1859 Messrs. Rector and Neighbors, agents of the United States, promised the leased district, which included the Wichita reservation, to the Wichitas, Wacos, Towaconies, Caddos, Ionies, Keechies and Delawares; and that the acting commissioner of Indian affairs approved this action of Messrs. Rector and Neighbors. At that time these bands, including men, women and children,

numbered less than 1,500. The leased district contained 7,713,239 acres of land. It is claimed then, in effect, that this alleged action of the agents and acting commissioner was effectual to invest each man, woman and child with a title to 5,142 acres. But the fact is that the land, to which the alleged promise of Neighbors and Rector related, was not the whole of the leased district, nor was it the whole of the Wichita reservation, which contained 743,610 acres, but was only a tract of 154,093 acres, embracing a part of the Wichita reservation.

So far as the affiliated bands are concerned, the "aboriginal title" has no "pristine habitat" roots. It is merely an Arbuckle manufacture. But where did these Indian agents obtain the power to transfer, or affect, by direct or indirect means, the title to 7,713,239 acres of land, which had been the property of the Choctaws for 29 years? Such a transfer could not be effected, even by the government of the United States, otherwise than in the exercise of one of the very highest powers of sovereignty,—the power of eminent domain. The counsel think Neighbors and Rector were clothed with this exalted prerogative. They are mistaken. I respectfully refer the court, for the details of this Arbuckle miracle, to the report of Commissioner Hiram Price, printed on pages 39 and 40 of Senate Executive Document No. 13, 48th Congress, 1st Session, which document constitutes No. 5 of the claimants' proofs in rebuttal.

Fourth.

The Unratified Agreement of 1872.

Appendix, 38.

The counsel for the government contended that the Wichita and affiliated bands were entitled, not only to allotments of 160 acres of land to each man, woman and

child, amounting to 169,000 acres, but also to the proceeds of the sales of the unallotted lands, amounting to 574,010 acres. He based this alleged right of the Indians upon the unratified agreement of 1872.

On the 19th of October, 1872, Mr. Walker, the commissioner of Indian affairs, signed an agreement with certain Wichitas, Caddos, Towaconies, Wacos and Keechies, granting to them, for a home, the tract of land now known as the Wichita reservation. This tract contains 743,610 acres, that is to say, 589,517 acres more than the tract alleged to have been promised them, by Rector and Neighbors, in 1859. Mr. Walker had no antecedent authority to make this agreement, either from congress, or from the president, or from the secretary of the interior. The agreement has been twice submitted to congress, for approval, and twice rejected. The answer of the Wichita and affiliated bands contains the following averment:

> Because of the repeated recommendations of the Indians in the so-called leased district, among whom were these defendants and depredations made by Indians other than these defendants, commissioners were sent, in 1872, to the Indian Territory, from whence, in that year, were taken to Washington City certain of the chiefs and head men of the tribes and bands composing these defendants. These chiefs and head men were hastily selected by the Indian agent, prior to the departure of the commissioner, and were not, in any way, delegated or empowered to act for these defendants, in the cession of any lands.

The Indians denied that those who signed the agreement of 1872, on their behalf, had any authority to sign it; and they repudiated the agreement.

Assuming that this agreement, if the persons who signed it had been duly authorized to sign it, and it had been duly ratified by all the parties, would have justified the allotment of a part of the Wichita reservation to the Wichita and affiliated bands, and the payment to them of the proceeds of the sales of the residue of the reservation, the court must, I think, conclude that the agree-

ment, having, in fact, been signed without antecede
authority, from either party, and then repudiated
both parties, cannot constitute valid ground for a
right, title, or claim of those Indians.

But then, suppose it to be true that Mr. Walker h
been duly authorized to sign the agreement, and th
the Indian signers had been duly authorized by their r
spective bands to sign it; and suppose, further, that t
United States and the several bands of Indians had su
sequently ratified the agreement. On that hypothes
could the court lawfully render the decree demanded
the counsel for the government? He asks the court
decree (1) that to each man, woman and child of t
Wichita and affiliated bands shall be allotted 160 acres
land, in the Wichita reservation; and (2) that the pr
ceeds of the sale of the unallotted land shall also be pa
to them, *provided* they relinquish all claim to interests
other land. Under this second head of relief, he as
the United States to purchase a quitclaim of all interes
of these Indians in other lands, by the payment, to the
of the proceeds of the sale of the bulk of the Wichi
reservation. In other words, he proposes a virtual e
change of these unallotted lands for other lands claime
by the Indians. He proposes that the United States sha
acquire lands, by purchase from other Indians, and sha
pay for those lands, not with money, nor with lands
the United States, but with lands of the Choctaws an
Chickasaws.

Can this court lawfully comply with the counsel's de
mands? If the treaty of 1866 had invested the Unite
States with the absolute beneficial ownership of the lease
district, the United States could, of course, settle Indian
on a part of the land, and pay the proceeds of the sal
of the residue to the Wichita and affiliated bands. Bu

if the land is held, by the United States, on the condition to settle Indians thereon, the United States cannot settle Indians on a part, and pay the proceeds of the sale of the residue to the Witchita and affiliated bands, otherwise than in the exercise of the power of eminent domain, making just compensation to the Choctaws and Chickasaws for their interest in the land so sold.

This so-called agreement, which was signed by persons who had no antecedent authority from the United States or the Indian bands, and was repudiated by all the parties thereto, cannot be effective either to vest, or confirm, or recognize, in the Wichita and affiliated bands, a title to the Wichita reservation. Assuming that, under the treaties between the United States and the Choctaws and Chickasaws, it is competent for the United States to allot to each of these Indians 160 acres of selected land, we must, I submit, find it impossible to make the unratified agreement of 1872 a just or reasonable excuse for diverting, from the claimants to the Wichita and affiliated bands, the proceeds of the sales of the unallotted lands.

Summary of Proofs Relating to the "Pristine Habitat" of the Wichitas.

Summarizing the evidence in disproof of the claim that the leased district was the "pristine habitat" of the Wichitas, we find them located in Texas, in different years, by documentary proofs printed in the Record at pages designated as follows: 1759, 93; 1817, 139; 1824, 135; 1835, 161; 1836, 64; 1843, 133; 1844, 126; 1846, 65; 1846, 252; 1846, 253; 1847, 256; 1847, 67; 1847, 68; 1847, 100; 1848, 68; 1848, 257; 1849, 68; 1849, 69; 1849, 70; 1849, 258; 1849, 262; 1851, 63; 1854, 127; 1856, 72; 1857, 262.

We also find the Wichitas located in Texas, in different years, by documentary proofs printed in the Appendix to the Record at pages designated as follows: 1778, 89; 1788, 95; 1805, 102; 1847, 252; 1848, 253; 1848, 254; 1848, 256; 1848, 257; 1848, 258; 1849, 259; 1849, 260; 1856, 267; 1856, 268.

They are located in Louisiana, in different years, by documentary proofs printed in the Record at pages designated as follows: 1669, 127; 1688, 103; 1697, 94; 1700, 132; Prior to 1758, 98; Prior to 1761, 98.

The Wichitas are located in Texas on fourteen maps, as follows: 1802, Robin, Rec. p. 109; 1818, Melish, Rec. p. 111; 1830, Austin, Rec. p. 112; 1836, Lee, Rec. p. 113; 1837, Texas Land Office, Rec. p. 113; 1839, Hunt and Randel, Rec. p. 115; 1839, Hunt and Randel, Outline, p. 115; 1841, Kennedy, Rec. p. 116; 1858, State Map of Texas, Rec. p. 121; 1848, De Cordova, Rec. p. 122; 1848, Creutzbar, Rec. p. 122; 1846, Tanner, Rec. p. 121; Darby, Rec. p. 124; 1856, Creutzbar, Rec. p. 125.

They are located in Louisiana, on six maps, as follows: 1703, De l'Isle, Rec. p. 78; 1715, Moll, Rec. p. 81; 1722, De l'Isle, Rec. p. 82; 1703, De l'Isle, Rec. p. 90; 1720, De l'Isle (Bernard), Rec. p. 91; 1741, Popple, Rec. p. 104.

They are located west of the 100th meridian on three maps, as follows: 1836, Young, Rec. p. 114; 1841, Kennedy (No. 2), Rec. p. 117; 1842, Outline Indian Localities, Rec p. 112.

The Panis (Wichitas) are located north of the Arkansas river on five maps, as follows: 1703, De l'Isle, Rec. p. 78; 1710, Senex, Rec. p. 79; 1715, Moll, Rec. p. 80; 1722, De l'Isle, Rec. p. 82; 1703, De l'Isle, Rec. p. 90.

The Paniassa (Wichitas?) are located north of the Arkansas river on twelve maps, as follows: 1703, De l'Isle, Rec. p. 78; 1710, Senex, Rec. p. 79; 1715, Moll, Rec. p. 80

1715, Moll, Rec. p. 81 ; 1741, De l'Isle, Rec. p. 82; 1722, De l'Isle, Rec. p. 82; 1735, Popple, Rec. p. 84; 1735, Popple, Rec. p. 84 ; 1778, Le Rouge, Rec. p. 86; 1737, Popple, Rec. p. 89; 1703, De l'Isle, Rec. p. 90; 1776, Mitchell, Rec. p. 126.

Twenty-seven different tribes of Indians were located between the Red and Arkansas rivers, at different times, on different maps, as follows, viz:

1. *Chacacants.* 1720, De l'Isle (Bernard), Rec. p. 86; 1737, Popple, Rec. p. 89; 1753, American Map, Rec. p. 86; 1759, Palairet, Rec. p. 105; 1776, Mitchell, Rec. p. 107; 1777, Jeffery, Rec. p. 107; 1778, Le Rouge, Rec. p. 108; 1794, Pownall, Rec. p. 108; 1778, Le Rouge, Rec. p. 118; 1776, Mitchell, Rec. p. 126.

2. *Quirreches.* 1753, American Map, Rec. p. 86; 1759, Palairet, Rec. p. 105; 1772, Bowen, Rec. p. 106; 1772, D'Amille, Rec. p. 106; 1777, Jeffery, Rec. p. 107; 1802, Robin, Rec. p. 109; 1815, Pinkerton, Rec. p. 110; 1778, Le Rouge, Rec. p. 108; 1776, Mitchell, Rec. p. 126.

3. *Quainco.* 1753, American Map, Rec. p. 86; 1720, De l'Isle (Bernard), Rec. p. 86; 1759, Palairet, Rec. p. 105; 1776, Mitchell, Rec. p. 126; 1777, Jeffery, Rec. p. 107; 1778, Le Rouge, Rec. p. 118; 1794, Pownall, Rec. p. 108; 1776, Mitchell, Rec. p. 126.

4. *Caniouis.* 1753, American Map, Rec. p. 86; 1759, Palairet, Rec. p. 105; 1776, Mitchell, Rec. p. 126; 1778; Le Rouge, Rec. p. 18.

5. *Paniassa.* 1753, American Map, p. 86; 1772, Bowen, Rec. p. 106; 1772, D'Amille, Rec. p. 106; 1794, Pownall, Rec. p. 108; 1776, Mitchell, Rec. p. 126; 1778, Le Rouge, Rec. p. 108.

6. *Osages.* 1778, Le Rouge, Rec. p. 108; 1737, De l'Isle (Bernard), Rec. p. 86, (Les Akensa).

7. *Mentous.* 1703, De l'Isle, Rec. p. 78; 1710, Senex,

Rec. p. 79; 1715, Moll, Rec. p. 80; 1772, Bowen, Rec. p. 106; 1772, D'Amille, Rec. p. 106; 1794, Pownall, Rec. p. 108.

8. *Taensas.* 1700, De l'Isle, Rec. p. 78; 1715, Moll, Rec. p. 81; 1733, De l'Isle, Rec. p. 83.

9. *Les Sitoue.* 1703, De l'Isle, Rec. p. 78.

10. *Cahenoua.* 1703, De l'Isle, Rec. p. 78; 1715, Moll, Rec. p. 81; 1759, Palairet, Rec. p. 105.

11. *Chaquanhe.* 1710, Senex, Rec. p. 79; 1720, De l'Isle, (Bernard) Rec. p. 91.

12. *Les Tongua.* 1703, De l'Isle, Rec. p. 78.

13. *Nassoni.* 1703, De l'Isle, Rec. p. 78; 1722, De l'Isle, Rec. p. 91; 1733, De l'Isle, Rec. p. 83.

14. *Wihaias.* 1703, De l'Isle, Rec. p. 78.

15. *Nihata.* 1710, Senex, Rec. p. 79; 1715, Moll, Rec. p. 81; 1737, Popple, Rec. p. 89; 1733, De l'Isle, Rec. p. 83.

16. *Chicantesou.* 1735, Popple, Rec. p. 84; 1720, De l'Isle, Rec. p. 91; 1737, Popple, Rec. p. 89.

17. *Ouanihinan.* 1735, Popple, Rec. p. 84; 1720, De l'Isle, Rec. p. 91; 1737, Popple, Rec. p. 89.

18. *Comanches.* (Tetans) 1823, Dirwald, Rec. p. 111; 1836, Young, Rec. p. 114; 1841, Kennedy, Rec. p. 16.

19. *Kio-hu-ha-has.* 1777, Jeffery, Rec. p. 107; 1794, Pownall Rec. p. 108.

20. *Canicous.* 1794–8, De Lozieres, Rec. p. 109.

21. *Kansas Hunting Grounds.* 1815, Pinkerton, Rec. p. 110.

22. *Nabici.* 1735, Popple, Rec. p. 84; 1720, De l'Isle, Rec. p. 91; 1737, Popple, Rec. p. 89.

23. *Pawnee Hunting Grounds.* 1815, Pinkerton, Rec. p. 110.

24. *Genaiches.* 1735, Popple, Rec. p. 84; 1737, Popple, Rec. p. 89.

25. *Cancatinos.* 1815, Pinkerton, Rec. p. 110.

26. *Nadsoos.* 1772, D'Amille, Rec. p. 106; 1776, Mitchell, Rec. p. 126; 1778, Le Rouge, Rec. p. 108; 1794, Pownall, Rec. p. 108; 1778, Le Rouge, Rec. p. 108; 1776, Mitchell, Rec. p. 126.

27. *Canessis.* 1759, Palairet, Rec. p. 105; 1772, Bowen, Rec. p. 106; 1772, D'Amille, Rec. p. 106; 1777, Jeffery, Rec. p. 107; 1794, Pownall, Rec. p. 108; 1815, Pinkerton, Rec. p. 110; 1778, Le Rouge, Rec. p. 108; 1776, Mitchell, Rec. p. 126.

The Caddos to whose family the Wichitas claim to belong are located in southwestern Arkansas, northwestern Louisiana and northeastern Texas on thirty-two different maps as follows: 1700, De l'Isle, Rec. p. 78; 1703, De l'Isle, Rec. p. 78; 1710, Senex, Rec. p. 79; 1715, Moll, Rec. p. 80; 1715, Moll, Rec. p. 81; 1722, De l'Isle, Rec. p. 82; 1733, De l'Isle, Rec. p. 83; 1746, Boehme, Rec. p. 85; 1703, De l'Isle Rec. p. 90; 1720, De l'Isle (Bernard) Rec. p. 91; 1741, Popple, Rec. p. 104; 1755, Old American Map, Rec. p. 104; 1759, Palairet, Rec. p. 105; 1761, Roque, Rec. p. 105; 1772, Bowen, Rec. p. 106; 1772, D'Amille, Rec. p. 106; 1776, Mitchell, Rec. p. 126; 1777, Jeffery, Rec. p. 107; 1778, Le Rouge, Rec. p. 108; 1794, Pownal, Rec. p. 108; 1794–8, De Loziers, Rec. p. 109; 1812, Arrowsmith and Lewis, Rec. p. 110; 1815, Pinkerton, Rec. p. 110; 1818, Melish, Rec. p. 111; 1823, Dirwald, Rec. p. 111; 1833, Outline Indian Localities Rec. p. 112; 1836, Lee, Rec. p. 113; 1839, Hunt and Randel, Rec. p. 115; 1839, Outline Hunt and Randel, Rec. p. 115; 1823, Melish Rec. p. 117; 1778, Le Rouge Rec. p. 118; Darby, Rec. p. 123.

HALBERT E. PAINE,
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FEB 27 1900
JAMES H. McKENNEY,
Clerk.

United States Supreme Court.

OCTOBER TERM, 1899.

Filed Feb. 27, 1900.

No. 337.

UNITED STATES vs. CHOCTAW NATION ET AL.

No. 338.

WICHITA BAND ET AL. vs. UNITED STATES ET AL.

No. 339.

CHOCTAW NATION ET AL. vs. UNITED STATES ET AL.

APPENDIX TO RECORD.

Printed for the Convenience of the Supreme Court.

Motion Allowed by Court of Claims, December 30, 1899.

The claimants move the Court of Claims for leave to withdraw from the files the ninety-eight documentary proofs, which were excluded from the record transmitted to the Supreme Court, and to print them, at the claimants' cost, for the convenience of the Supreme Court. The following are the grounds of this motion:

1. It will not be practicable, either for the claimants to produce, or for the Supreme Court to examine, on the trial, the ninety-eight publications which contain said proofs, many of which are bulky volumes.

2. It will be inconvenient for the Justices themselves to procure these publications, in order to "take judicial notice" of said proofs.

J. M. WILSON,
GEO. T. BARNES,
Attys. for Choctaws.

Answer, C. C. N.

H. E. PAINE,
Atty. for Chickasaws.

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United States Supreme Court.

OCTOBER TERM, 1899.

No. 337.

UNITED STATES *v.* CHOCTAW NATION ET AL.

No. 338.

WICHITA BAND ET AL. *v.* UNITED STATES ET AL.

No. 339.

CHOCTAW NATION ET AL. *v.* UNITED STATES ET AL.

APPENDIX TO RECORD.

I.—JURISDICTIONAL ACT.

No. 1. An act of Congress approved March 2, 1895, entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30, 1896; and for other purposes."

That, as the Choctaw and Chickasaw Nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, which claim is controverted by the United States, jurisdiction be, and is hereby, conferred upon the Court of Claims to hear and determine the said claim of the Choctaws and Chickasaws, and to render judgment thereon, it being the intention of this act to allow said Court of Claims jurisdiction, so that the

rights, legal and equitable, of the United States and the Choctaw and Chickasaw Nations, and the Wichita and affiliated bands of Indians in the premises, shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party in the hearing of said claim; and the Attorney-General is hereby directed to appear in behalf of the Government of the United States, and either of the parties to said action shall have the right of appeal to the Supreme Court of the United States: *Provided*, That such appeal shall be taken within sixty days after the rendition of the judgment objected to, and that the said courts shall give such causes precedence: *And provided further*, That nothing in this act shall be accepted or construed as a confession that the United States admit that the Choctaw and Chickasaw Nations have any claim to or interest in said lands, or any part thereof.

That said action shall be presented by a single petition, making the United States and the Wichita and affiliated bands of Indians parties defendant, and shall set forth all the facts on which the said Choctaw and Chickasaw Nations claim title to said land; and said petition may be verified by the authorized delegates, agents, or attorney of said nations upon information and belief as to the existence of such facts, and no other statement or verification shall be necessary: *Provided*, That if said Choctaw and Chickasaw Nations do not bring their action within ninety days from the approval of this act, their claim shall be forever barred: *And provided further*, That it shall be the duty of the Attorney-General of the United States, within ten days after the filing of said petition, to give notice to said Wichitas and affiliated bands, through the agents, delegates, attorneys, or other representatives of said bands, that said bands are made defend-

ants in said suit, of the purpose of said suit, that they are required to make answer to said petition, and that Congress has, in accordance with article five of said agreement, adopted this method of determining their compensation, if any. And the answer of the Wichitas and affiliated bands shall state the facts on which they rely for compensation, and may be verified by their agents, delegates, attorneys, or other representatives, upon their information and belief as to the existence of such facts, and no other statement or verification shall be necessary: *And provided also*, That said Wichitas and affiliated bands shall file their answer in said suit within sixty days after they shall receive from the Attorney-General of the United States the notice herein provided for, unless further time is granted by the court, and in the event of failure to answer they may be barred from all claim in the premises aforesaid.

The said Court of Claims shall receive and consider as evidence in the suit everything which shall be deemed by said court necessary to aid it in determining the questions presented, and tending to shed light on the claim, rights, and equities of the parties litigant, and issue rules on any department of the Government therefor if necessary.

It is hereby further provided that said Choctaw and Chickasaw Nations may, at any time before the rendition of final judgment in said case by the Court of Claims, negotiate with the commissioners appointed under section sixteen of the act of Congress approved the third day of March, eighteen hundred and ninety-three (Twenty-seventh Statutes, page six hundred and forty-five), or with any successor or successors in said commission, for the settlement of the said matters involved in said suit, and move the suspension of such action until such negotiations shall

be accepted or rejected by Congress, such settlement, however, to be made with the concurrence of the Secretary of the Interior and Attorney-General of the United States. 28 Stat. 898.

II.—TREATIES.

No. 2. Treaty of November 28, 1785, between the United States and the Cherokee Nation.

Art. 4. The boundary allotted to the Cherokees, for their hunting grounds, between the said Indians and the citizens of the United States, within the limits of the United States of America, is and shall be the following, viz. * * * 7 Stat. 18.

In Worcester *v.* Georgia, 6 Pet. 515, it was contended that the use of the word "allotted" implied that the United States had previously owned the lands within the allotted boundary, and by the treaty conveyed them to the Indians. But the court said:

The language, used in treaties with the Indians, should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. To contend that the word '*allotted*,' in reference to the land guarantied to the Indians in certain treaties, indicates a favor conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

No. 3. Treaty of January 3, 1786, between the United States and the Choctaw Nation.

Art. 3. The boundary of the lands hereby allotted to the Choctaw Nation, to live and hunt on within the limits of the United States of America, is and shall be the following, viz: Beginning at a point on the thirty-first degree of north latitude, where the Eastern boundary of the Natches district shall touch the same, thence east, along the said thirty-first degree of north latitude, being the southern boundary of the United States of America, until it shall strike the eastern boundary of the lands on which the Indians of the said nation did live and hunt, on the twenty-ninth of November, one thousand and seven hundred and eighty-two, while they were under the protection of the King of Great Britain; thence northerly, along the said eastern boundary, until it shall meet the northern boundary of the said lands; thence westerly, along the said northern boundary, until it shall meet the western boundary thereof; thence southerly, along the same, to the beginning; saving and reserving, for the establishment of trading posts, three tracts or parcels of land, of six miles square each, at such places as the United [States] in congress assembled shall think proper; which posts and the lands annexed to them shall be to the use and under the government of the United States of America. 7 Stat. 21.

No. 4. Treaty of January 10, 1786, between the United States and the Chickasaw Nation.

Art. 3. The boundary of the lands hereby allotted to the Chickasaw Nation, to live and hunt on, within the limits of the United States of America, is and shall be the following, viz: Beginning on the ridge that divides the waters

running into the Cumberland from those running into the Tennessee, at a point in a line to be run northeast, which shall strike the Tennessee at the mouth of Duck River; thence running westerly along the said ridge till it shall strike the Ohio; thence down the southern banks thereof to the Mississippi; thence down the same to the Choctaw line or Natches district; thence along the said line, or the line of the district, eastwardly as far as the Chickasaws claimed and lived and hunted, on the twenty-ninth of November, one thousand seven hundred and eighty-two. Thence the said boundary eastwardly shall be the lands allotted to the Choctaws and Cherokees, to live and hunt on, and the lands at present in the possession of the Creeks; saving and reserving, for the establishment of a trading post, a tract or parcel of land, to be laid out at the lower part of the Muscle Shoals, at the mouth of Ocochappo, in a circle, the diameter of which shall be five miles on the —— River, which post and the lands annexed thereto shall be to the use and under the government of the United States of America. 7 Stat. 24.

No. 5. Treaty of October 24, 1801, between the United States and the Chickasaw Nation.

Art. 1. The Mingco, principal men and warriors of the Chickasaw nation of Indians give leave and permission to the president of the United States of America, to lay out, open and make a convenient wagon-road, through their land, between the settlements of Mero district, in the State of Tennessee, and those of Natchez, in the Mississippi Territory, in such way and manner as he may deem proper; and the same shall be a highway for the citizens of the United States and the Chickasaws. 7 Stat. 65.

No. 6. Treaty of December 17, 1801, between the United States and the Choctaw Nation.

Art. 2. The Mingos, principal men and warriors of the Chactaw nation of Indians do hereby give their free consent that a convenient and durable wagon-way may be explored, marked, opened, and made, under the orders and instructions of the President of the United States, through their lands, to commence at the northern extremity of the settlements of the Mississippi Territory, and to be extended from thence, by such route as may be selected and surveyed, under the authority of the President of the United States, until it shall strike the lands claimed by the Chickasaw nation; and the same shall be and continue forever a high-way, for the citizens of the United States and the Choctaws. 7 Stat. 67.

No. 7. Treaty of October 17, 1802, between the United States and the Choctaw Nation.

Art. 2. The said line, when thus remarked and re-established, shall form the boundary between the United States and the said Choctaw nation, in that quarter. 7 Stat. 74.

No. 8. Treaty of April 30, 1803, between the United States and France.

Article 1. Whereas by the article the third of the treaty concluded at St. Ildelfonso the 9th Vendémiaire, an. 9 (1st October, 1800), between the First Consul of the French Republic and his Catholic Majesty, it was agreed as follows: 'His Catholic Majesty promises and engages on his part to cede to the French Republic, six months after the full and entire execution of the conditions and stipulations herein relative to His Royal Highness the

Duke of Parma, the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it; and such as it should be, after the treaties subsequently entered into between Spain and other states.' And whereas, in pursuance of the treaty, and particularly of the third article, the French Republic has an incontestible title to the domain and to the possession of the said territory: The First Consul of the French Republic, desiring to give to the United States a strong proof of his friendship, doth hereby cede to the said United States, in the name of the French Republic, forever, and in full sovereignty, the said territory, with all its rights and appurtenances, as fully and in the same manner as they have been acquired by the French Republic, in virtue of the above-mentioned treaty concluded with his Catholic Majesty. 8 Stat. 200.

No. 9. The treaty between the United States and the Quapaw tribe or nation, signed August 24, 1818, contains the following article:

Art. 2. The undersigned chiefs and warriors, for themselves and their said tribe or nation, do hereby, for, and in consideration of, the promises and stipulations hereinafter named, cede and relinquish to the United States, forever, all the lands within the following boundaries, viz: Beginning at the mouth of the Arkansaw river; thence, extending up the Arkansaw, to the Canadian fork, and up the Canadian fork to its source; thence south, to Big Red river, and down the middle of that river, to the Big Raft; thence, a direct line, so as to strike the Mississippi river, thirty leagues in a straight line, below the mouth of Arkansaw; together with all their claims to land east of the Mississippi, and north of the Arkansaw river, included

within the colored lines 1, 2, and 3, on the above map, with the exception and reservation following, that is to say: the tract of country bounded as follows: Beginning at a point on the Arkansaw river, opposite the present post of Arkansaw, and running thence, a due southwest course, to the Washita river; thence, up that river, to the Saline fork; and up the Saline fork to a point, from whence a due north course would strike the Arkansaw river at the Little Rock; and thence, down the right bank of the Arkansaw, to the place of beginning; which said tract of land, last above designated and reserved, shall be surveyed and marked off, at the expense of the United States, as soon as the same can be done with convenience, and shall not be sold or disposed of, by the said Quapaw tribe or nation, to any individual whatever, nor to any state or nation, without the approbation of the United States first had and obtained. 7 Stat. 176.

Prior to 1818, the leased district had always been considered the property of the Quapaws, not only by the former governments of the country, France and Spain, but also by the Osages, the neighbors of the Quapaws.

Letter of commissioners Clark and Chouteau, Sept. 1816; claimants' evidence in rebuttal, No. 162.

No. 10. Treaty of October 18, 1820, between the United States and the Choctaw Nation.

Preamble.

Whereas it is an important object, with the President of the United States, to promote the civilization of the Choctaw Indians by the establishment of schools amongst them; and to perpetuate them, as a nation, by exchang-

ing, for a small part of their land here, a country beyond the Mississippi River, where all, who live by hunting and will not work, may be collected and settled together.—And whereas it is desirable to the state of Mississippi to obtain a small part of the land belonging to said nation; for the mutual accommodation of the parties, and for securing the happiness and protection of the whole Choctaw nation, as well as preserving that harmony and friendship which so happily subsists between them and the United States, James Monroe, * * on the one part, and the Mingos * * of the Choctaw nation, * * on the other part, have freely and voluntarily entered into the following articles, viz:

Art. 1. To enable the President of the United States to carry into effect the above grand and humane objects, the Mingoes, Headmen and Warriors of the Choctaw nation, in full council assembled, in behalf of themselves and the said nation, do, by these presents, cede to the United States of America all the land lying and being within the boundaries following, to wit:—Beginning on the Choctaw boundary, east of Pearl River, at a point due south of the White Oak Spring, on the old Indian path; thence north to said spring; thence northwardly to a black oak standing on the Natchez road, about forty poles eastwardly from Doak's fence, marked A. J. and blazed, with two large pines and a black oak standing near thereto and marked as pointers; thence a straight line to the head of Black Creek or Bouge Loosa; thence down Black Creek or Bouge Loosa to a small lake; thence a direct course so as to strike the Mississippi one mile below the mouth of the Arkansas River; thence down the Mississippi to our boundary; thence around and along the same to the beginning.

Art. 2. For and in consideration of the foregoing ces-

sion on the part of the Choctaw nation, and in part satisfaction for the same, the Commissioners of the United States, in behalf of said States, do hereby cede to said nation a tract of country west of the Mississippi river, situate between the Arkansas and Red River, and bounded as follows:—Beginning on the Arkansas River, where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian Fork, and up the same to its source; thence due south to the Red River; thence down Red River three miles below the mouth of Little River, which empties itself into Red River, on the north side; thence a direct line to the beginning. 7 Stat. 210.

No. 11. Treaty of February 19, 1821, between the United States and Spain.

Article 3. The boundary line between the two countries west of the Mississippi shall begin on the Gulph of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river, to the 32d degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Nachitoches or Red River; then following the course of the Rio Roxo westward, to the degree of longitude 100 west from London and 23 from Washington; then crossing the said Red River and running thence, by a line due north, to the river Arkansas; thence following the course of the southern bank of the Arkansas to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818. But if the source of the Arkansas river shall be found to fall north or south of latitude 42, then the line shall run from the said source

due south or north, as the case may be, till it meets the said parallel of latitude 42, and thence, along the said parallel, to the South Sea: All the islands in the Sabine and the said Red and Arkansas rivers, throughout the course thus described, to belong to the United States; but the use of the waters and the navigation of the Sabine to the sea and of the said rivers Roxo and Arkansas, throughout the extent of the said boundary, on their respective banks, shall be common to the respective inhabitants of both nations.

The two high contracting parties agree to cede and renounce all their rights, claims and pretensions to the territories described by the said line; that is to say, the United States hereby cede to His Catholic Majesty and renounce forever all their rights, claims and pretensions to the territories lying west and south of the above described line; and, in like manner, His Catholic Majesty cedes to the said United States all his rights, claims and pretensions to any territories east and north of the said line; and, for himself, his heirs and successors, renounces all claim to the said territories forever. 8 Stat. 254.

No. 12. Treaty of January 20, 1825, between the United States and the Choctaw Nation.

Art. 1. The Choctaw Nation do hereby cede to the United States all that portion of the land ceded to them, by the second article of the treaty of Doak Stand, as aforesaid, lying east of a line beginning on the Arkansas, one hundred paces east of Forth Smith, and running thence due south to Red River; it being understood that this line shall constitute and remain the permanent boundary between the United States and the Choctaws; and the United States agreeing to remove such citizens, as may be

settled on the west side, to the east side of said line, and prevent future settlements from being made on the west thereof.

Art. 2. In consideration of the cession aforesaid, the United States do hereby agree to pay the said Choctaw Nation the sum of six thousand dollars annually forever. 7 Stat. 234, 235.

No. 13. Treaty of September 27, 1830, between the United States and the Choctaw Nation.

Art. 2. The United States, under a grant specially to be made by the President of the U. S., shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in fee simple, to them and their descendants, to enure to them while they shall exist as a nation and live on it; beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian Fork; if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeably to the treaty made and concluded at Washington City, in the year 1825 The grant to be executed so soon as the present treaty shall be ratified.

Art. 3. In consideration of the provisions contained in the several articles of this treaty, the Choctaw Nation of Indians consent and hereby cede to the United States the entire country they own and possess east of the Mississippi River; and they agree to remove beyond the Mississippi River early as practicable, and will so arrange their removal that as many as possible of their people, not exceeding one half of the whole number, shall depart

during the falls of 1831 and 1832; the residue to follo during the succeeding fall of 1833; a better opportuni in this manner will be afforded the Government to exte to them the facilities and comforts, which it is desirab should be extended in conveying them to their new hom

Art. 4. The Government and people of the Uni States are hereby obliged to secure to the said Choct Nation of Red People the jurisdiction and government all the persons and property, that may be within th limits west, so that no Territory, or State, shall ever ha a right to pass laws for the government of the Choct Nation of Red People and their descendants; and that part of the land granted them shall ever be embraced any Territory or State; but the U. S. shall forever sec said Choctaw Nation from and against all laws, exc such as, from time to time, may be enacted in their o National Councils, not inconsistent with the constituti treaties and laws of the United States; and except such may and which have been enacted by Congress, to the tent that Congress, under the constitution, are requir to exercise a legislation over Indian affairs. But t Choctaws, should this treaty be ratified, express a w that Congress may grant to the Choctaws the right punishing, by their own laws, any white man, who sh come into their nation and infringe any of their natio regulations. 7 Stat. 333, 334.

No. 14. Treaty of October 20, 1832, between the Uni States and the Chickasaw Nation.

The Chickasaw Nation find themselves oppressed their present situation, by being made subject to the l of the states in which they reside. Being ignorant the language and laws of the white man, they can

understand or obey them. Rather than submit to this great evil, they prefer to seek a home in the west, where they may live and be governed by their own laws. And believing that they can procure for themselves a home, in a country suited to their wants and condition, provided they had the means to contract and pay for the same, they have determined to sell their country and hunt a new home. The President has heard the complaints of the Chickasaws, and, like them, believes they cannot be happy and prosper, as a nation, in their present situation and condition, and being desirous to relieve them from the great calamity, that seems to await them, if they remain as they are, he has sent his Commissioner, Genl. John Coffee, who has met the whole Chickasaw Nation, in Council, and, after mature deliberation, they have entered into the following articles, which shall be binding on both parties, when the same shall be ratified by the President of the United States, by and with the advice and consent of the Senate.

Article 1. For the consideration hereinafter expressed, the Chickasaw Nation do hereby cede to the United States all the land which they own on the east side of the Mississippi River, including all the country where they at present live and occupy.

Art. 3. As a full compensation to the Chickasaw Nation for the country thus ceded, the United States agree to pay over to the Chickasaw Nation all the money arising from the sale of the land which may be received from time to time, after deducting therefrom the whole cost and expenses of surveying and selling the land, including every expense attending the same. 7 Stat. 381, 382.

No. 15. Treaty of May 24, 1834, between the United States and the Chickasaw Nation.

Art. 2. The Chickasaws are about to abandon t homes, which they have long cherished and loved; though hitherto unsuccessful, they still hope to fi country adequate to the wants and support of their ple, somewhere west of the Mississippi and within territorial limits of the United States; should they d the Government of the United States hereby conse protect and defend them against the inroads of any tribe of Indians and from the whites; and agree to them without the limits of any state or territory. Chickasaws pledge themselves never to make war any Indian people, or upon the whites, unless they a authorized by the United States. But if war be upon them, they will be permitted to defend themse until assistance be given to them by the United S as shall be the case. 7 Stat. 450.

No. 16. Treaty of August 24, 1835, with the Comanche, &c.

Article 1. There shall be perpetual peace and friendship between all the citizens of the United States of America, and all the individuals composing the Comanche and Witchetaw nations and their associated bands or tribes of Indians, and between these nations or tribes and the Cherokee, Muscogee, Choctaw, Osage, Seneca and Quapaw nations or tribes of Indians.

Article 2. Every injury or act of hostility by one or either of the contracting parties on the other, shall be mutually forgiven and forever forgot.

Treaty of May 26, with the Kioways, &c.

Article 1st. There shall petual peace and friendshi tween all the citizens of the States of America and all dividuals composing the K Ka-ta-ka, and Ta-wa-ka-ro and their associated bands o of Indians, and between nations or tribes and the Mu and Osage nations or tr Indians.

Article 2d. Every injury of hostility by one or either contracting parties on the shall be mutually forgive forever forgot.

Article 3. There shall be a free and friendly intercourse between all the contracting parties hereto, and it is distinctly understood and agreed by the Comanche and Witchetaw nations and their associated bands or tribes of Indians, that the citizens of the United States are freely permitted to pass and repass through their settlements or hunting ground without molestation or injury on their way to any of the provinces of the republic of Mexico, or returning therefrom, and that each of the nations or tribes named in this article, further agree to pay the full value for any injury their people may do to the goods or property of the citizens of the United States taken or destroyed, when peaceably passing through the country they inhabit, or hunt in, or elsewhere. And the United States hereby guaranty to any Indian or Indians of either of the said Comanche or Witchetaw nations, and their associated bands or tribes of Indians, a full indemnification for any horses or other property which may be stolen from them: Provided, that the property so stolen cannot be recovered, and that sufficient proof is produced that it was actually stolen by a citizen of the United States, and within the limits thereof.

Article 4. It is understood and agreed by all the nations or tribes of Indians parties to this treaty, that each and all of the said nations or tribes have free permission to hunt and trap in the Great Prairie

Article 3d. There shall be a free and friendly intercourse between all the contracting parties hereto; and it is distinctly understood and agreed by the Kioway, Ka-ta-ka, and Ta-wa-ka-ro nations, and their associated bands or tribes of Indians, that the citizens of the United States are freely permitted to pass and repass through their settlements or hunting ground without molestation or injury, on their way to any of the provinces of the republics of Mexico or Texas, or returning therefrom, and that the nations or tribes named in this article further agree to pay the full value of any injury their people may do to the goods or property of the citizens of the United States, taken or destroyed when peaceably passing through the country they inhabit, or hunt in, or elsewhere. And the United States hereby guaranty to any Indian or Indians of the Kioway, Ka-ta-ka, and Ta-wa-ka-ro nations, and their associated bands or tribes of Indians, a full indemnification for any horses or other property which may be stolen from them, provided that the property so stolen cannot be recovered, and that sufficient proof is produced that it was actually stolen by a citizen of the United States, and within the limits thereof.

Article 4th. It is understood and agreed by all the nations or tribes of Indians, parties to this treaty, that each and all of the said nations or tribes have free permission to hunt and trap in the Great

west of the Cross Timbers, to the western limits of the United States.

Article 5. The Comanche and Witchetaw nations and their associated bands or tribes of Indians, severally agree and bind themselves to pay full value for any injury their people may do to the goods or other property of such traders as the president of the United States may place near to their settlements or hunting ground for the purpose of trading with them.

Article 6. The Comanche and Witchetaw nations and their associated bands or tribes of Indians, agree, that in the event any of the red people belonging to the nations or tribes residing south of the Missouri river and west of the state of Missouri, not parties to this treaty, should visit their towns or be found on their hunting ground, that they will treat them with kindness and friendship and do no injury to them in any way whatever.

Article 7. Should any difficulty hereafter unfortunately arise between any of the nations or tribes of Indians parties hereunto, in consequence of murder, the stealing of horses, cattle, or other cause, it is agreed that the other tribes shall interpose their good offices to remove such difficulties, and also that the Government of the United States may take such measures as they may deem proper to effect the same object, and see that

Prairie west of the Cross Timbers to the western limits of the United States.

Article 5th. The Kioway, Ka-ta-ka, and Ta-wa-ka-ro nations and their associated bands or tribes of Indians agree and bind themselves to pay full value for any injury their people may do to the goods or other property of such traders as the president of the United States may place near to their settlements or hunting ground for the purpose of trading with them.

Article 6th. The Kioway, Ka-ta-ka and Ta-wa-ka-ro nations and their associated bands or tribes of Indians, agree, that in the event any of the red people belonging to the nations or tribes of Indians residing south of the Missouri river, and west of the states of Missouri and Arkansas, not parties to this treaty, should visit their towns, or be found on their hunting ground, that they will treat them with kindness and friendship, and do no injury to them in any way whatever.

Article 7th Should any difficulty hereafter unfortunately arise between any of the nations or tribes of Indians, parties hereunto, in consequence of murder, the stealing of horses, cattle, or any other cause, it is agreed that the other tribes shall interpose their good offices to remove such difficulties and also that the government of the United States may take such measures as they may deem proper to effect the same object, and see

full justice is done to the injured party.

Article 8. It is agreed by the commissioners of the United States, that in consequence of the Comanche and Witchetaw nations and their associated bands or tribes of Indians having freely and willingly entered into this treaty, and it being the first they have made with the United States or any of the contracting parties, that they shall receive presents immediately after signing, as a donation from the United States; nothing being asked from these nations or tribes in return, except to remain at peace with the parties hereto, which their own good and that of their posterity require.

Article 9. The Comanche and Witchetaw nations and their associated bands or tribes, of Indians, agree, that their entering into this treaty shall in no respect interrupt their friendly relations with the republic of Mexico, where they all frequently hunt and the Comanche nation principally inhabit; and it is distinctly understood that the government of the United States desire that perfect peace shall exist between the nations or tribes named in this article and the said republic.

Article 10. This treaty shall be obligatory on the nations or tribes parties hereto from and after the date hereof, and on the United States from and after its ratification by the government thereof.

that full justice is done to the injured party.

Article 8th. It is agreed by the commissioners of the United States that in consequence of the Kioway, Ka-ta-ka and Ta-wa-ka-ro nations and their associated bands or tribes of Indians having freely and willingly entered into this treaty, and it being the first they have made with the United States, or any of the contracting parties, that they shall receive presents immediately after signing, as a donation from the United States; nothing being asked from the said nations, or tribes, in return, except to remain at peace with the parties hereto, which their own good and that of their posterity require.

Article 9th. The Kioway, Ka-ta-ka and Ta-wa-ka-ro nations, and their associated bands or tribes of Indians, agree, that their entering into this treaty shall in no respect interrupt their friendly relations with the republics of Mexico and Texas, where they all frequently hunt and the Kioway, Ka-ta-ka and Ta-wa-ka-ro nations sometimes visit; and it is distinctly understood that the government of the United States desire that perfect peace shall exist between the nations or tribes named in this article, and the said republics.

Article 10th. This treaty shall be obligatory on the nations or tribes, parties hereto, from and after the date hereof, and on the United States from and after its ratification by the government thereof.

Done and signed and sealed at Camp Holmes on the eastern border of the Grand Prairie, near the Canadian river in the Muscogee nation, this twenty-fourth day of August, one thousand eight hundred and thirty-five, and of the independence of the United States the sixtieth. 7 Stat. 474, 475.

Done and signed and sealed at Fort Gibson, this twenty-sixth day of May, one thousand eight hundred and thirty-seven, and of the independence of the United States the sixty-second. 7 Stat. 533, 534, 535.

No. 17. The agreement of January 17, 1837, between the Choctaws and Chickasaws, contains the following provisions:

Article 1. It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country, to be held on the same terms that the Choctaws now hold it, except the right of disposing of it, which is held in common with the Choctaws and Chickasaws, to be called the Chickasaw district of the Choctaw nation, to have an equal representation in their general council, and to be placed on an equal footing, in every other respect, with any of the other districts of said nation, except a voice in the management of the consideration which is given for these rights and privileges; and the Chickasaw people to be entitled to all the rights and privileges of Choctaws, with the exception of participating in the Choctaw annuities, and the consideration to be paid for these rights and privileges, and to be subject to the same laws to which the Choctaws are; but the Chickasaws reserve to themselves the sole right and privilege of controlling and managing the residue of their funds, as far as is consistent with the late treaty between the said people and the government of the United States, and of making such regulations and electing such officers, for that purpose, as they may think proper.

Article 2. The Chickasaw district shall be bounded

as follows, viz: Beginning on the north bank of Red River, at the mouth of Island Bayou, about eight or ten miles below the mouth of False Wachitta; thence running north, along the main channel of said bayou, to its source; thence, along the dividing ridge, between the Wachitta and Low Blue rivers, to the road leading from Fort Gibson to Fort Wachitta; thence, along said road, to the line dividing Mushalatubbee and Pushmataha districts; thence, eastwardly, along said district line, to the source of Brushy creek; thence, down said creek to where it flows into the Canadian river, ten or twelve miles above the mouth of the south fork of the Canadian; thence west, along the main Canadian river to its source, if in the limits of the United States, or those limits; and thence due south to Red river, and down Red river to the beginning.

Article 5. It is hereby declared to be the intention of the parties hereto that equal rights and privileges shall pertain to both Choctaws and Chickasaws, to settle in whatever district they may think proper, and to be eligible to all the different offices of the Choctaw Nation, and to vote on the same terms in whatever district they may settle, except that the Choctaws are not to vote in anywise for officers in relation to the residue of the Chicksaw fund. 11 Stat. 573.

No. 18. Articles of a treaty made and concluded at Council Springs, in the county of Robinson, Texas, near the Brazos river, this 15th day of May, A. D. 1846, between P. M. Butler and M. G. Lewis, commissioners on the part of the United States of the one part, and the undersigned chiefs, counsellors, and warriors of the Comanche, I-on-i, Ana-da-ca, Cadoe, Lepan, Long-wha, Keechy,

Tah-wa-carro, Wichita, and Wacoe tribes of Indians and their associate bands in behalf of their said tribes, on the other part.

ARTICLE I.

The undersigned, chiefs, warriors, and counsellors, for themselves and their said tribes or nations, do hereby acknowledge themselves to be under the protection of the United States, and of no other power, State, or sovereignty whatever. * *

Given under our hands and seals this day and date above.

P. M. BUTLER,
M. G. LEWIS,
U. S. Com's.

Comanches. * * *

Wacoes. * * *

Keeches. * * *

Tonkaways. * * *

Wichetas.

To-sa-quash, White Tail. [his x mark.
Cho-wash-ta-ha-da, Runner, [his x mark.
Kow-wah, Shirt Tail, [his x mark.
Wich-qua-sa-is, Contrary, [his x mark.
His-si-da-wah, Stubborn, [his x mark.

Towa-karroes. * * *

Wacoes. * * *

9 Stat. 844.

No. 19. Treaty of February 2, 1848, between the United States and Mexico.

Article 5. The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence, up the middle of that river, following the deepest channel where it has more than one, to the point where it strikes the southern boundary of New Mexico; thence, westwardly, along the whole southern boundary of New Mexico (which runs north of the town called Paso), to its western termination; thence, northward, along the western line of New Mexico, until it intersects the first branch of the River Gila: (or, if it should not intersect any branch of that river, then to the point on the said line nearest to such branch, and thence, in a direct line, to the same:) thence down the middle of the said branch and of the said river, until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

The southern and western limits of New Mexico, mentioned in this article, are those laid down in the map entitled, "*Map of the United Mexican States, as organized and defined by various acts of the Congress of said Republic, and constructed according to the best authorities. Revised edition. Published at New York, in* 1847, *by J. Disturnell.*" Of which map a copy is added to this treaty, bearing the signatures and seals of the undersigned plenipotentiaries.

And, in order to preclude all difficulty in tracing, upon the ground, the limit separating Upper from Lower California, it is agreed that the said limit shall consist of

a straight line, drawn from the middle of the Rio Gila, where it unites with the Colorado, to a point on the coast of the Pacific Ocean, distant one marine league, due south of the southernmost point of the port of San Diego, according to the plan of said port made, in the year 1782, by Don Juan Pantoja, second sailing master of the Spanish fleet, and published at Madrid, in the year 1802, in the atlas to the voyage of the schooners Sutil and Mexicana, of which plan a copy is hereunto added, signed and sealed by the respective plenipotentiaries. 9 Stat. 926.

No. 20. Treaty of June 22, 1852, between the United States and the Chickasaw nation.

Art. 1. The Chickasaw tribe of Indians acknowledge themselves to be under the guardianship of the United States; and as a means of securing the protection guaranteed to them, by former treaties, it is agreed that an agent of the United States shall continue to reside among them.

No. 21. Treaty of June 22, 1855, between the United States and the Choctaw and Chickasaw Nations.

Whereas the political connection, heretofore existing between the Choctaw and Chickasaw tribes of Indians, has given rise to unhappy and injurious dissensions and controversies among them, which render necessary a readjustment of their relations to each other and to the United States; and whereas the United States desire that the Choctaw Indians shall relinquish all claim to any territory west of the one hundredth degree of west longitude, and also to make provision for the permanent settlement within the Choctaw country, of the Wichita and certain other tribes or bands of Indians, for which purpose the Choctaws and Chickasaws are willing to lease, on reason

able terms, to the United States that portion of their common territory which is west of the ninety-eighth degree of west longitude; and whereas the Choctaws contend that, by a just and fair construction of the treaty of September 27, 1830, they are of right entitled to the net proceeds of the lands ceded by them to the United States under said treaty, and have proposed that the question of their right to the same, together with the whole subject matter of their unsettled claims, whether national or individual, against the United States, arising under the various provisions of said treaty, shall be referred to the Senate of the United States for final adjudication and adjustment; and whereas it is necessary, for the simplification and better understanding of the relations between the United States and the Choctaw Indians, that all their subsisting treaty stipulations be embodied in one comprehensive instrument:

Now therefore the United States of America, by * * *, the Choctaws, by * * *, and the Chickasaws, by * * * do hereby agree and stipulate as follows, viz:

Art. 1. The following shall constitute and remain the boundaries of the Choctaw and Chickasaw country, viz: Beginning at a point on the Arkansas river, one hundred paces east of old Fort Smith, where the western boundary line of the state of Arkansas crosses the said river, and running thence due south to Red river; thence up Red river to the point where the meridian of one hundred degrees of west longitude crosses the same; thence north, along said meridian, to the main Canadian river; thence down said river to its junction with the Arkansas river; thence down said river to the place of beginning.

And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and

guaranty the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal undivided interest in the whole: Provided, however, no part thereof shall ever be sold without the consent of both tribes; and that said land shall revert to the United States, if said Indians and their heirs become extinct, or abandon the same.

Article 2. A district for the Chickasaws is hereby established, bounded as follows, to wit: Beginning on the north bank of Red river, at the mouth of Island Bayou, where it empties into Red river, about twenty-six miles on a straight line below the mouth of False Wachitta; thence running a northwesterly course, along the main channel of said bayou, to the junction of the three prongs of said bayou nearest the dividing ridge between Wachitta and Low Blue rivers, as laid down on Captain R. L. Hunter's map; thence northerly, along the eastern prong of Island Bayou, to its source; thence due north to the Canadian river; thence west along the main Canadian to the ninety-eighth degree of west longitude; thence south to Red river; and thence down Red river to the beginning: Provided, however, if the line running due north, from the eastern source of Island Bayou, to the main Canadian, shall not include Allen's or Wapanacka Academy, within the Chickasaw district, then an offset shall be made from said line, so as to leave said academy two miles within the Chickasaw district, north, west and south from the lines of boundary.

Article 3. The remainder of the country held in common by the Choctaws and Chickasaws shall constitute the Choctaw district, and their officers and people shall, at all times, have the right of safe conduct and free passage through the Chickasaw district.

Article 7. So far as may be compatible with the constitution of the United States, and the laws, made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property within their respective limits; excepting, however, all persons, with their property, who are not by birth, adoption, or otherwise, citizens or members of either the Choctaw or Chickasaw tribe; and all persons, not being citizens or members of either tribe, found within their limits, shall be considered intruders, and be removed from and kept out of the same by the United States Agent, assisted, if necessary, by the military, with the following exceptions, viz: Such individuals as are now or may be in the employment of the government and their families; those peacefully traveling, or temporarily sojourning in the country, or trading therein under license from the proper authority of the United States, and such as may be permitted, by the Choctaws and Chickasaws with the assent of the United States Agent, to reside within their limits, without becoming citizens or members of either of said tribes.

Article 9. The Choctaw Indians do hereby absolutely and forever quitclaim and relinquish to the United States all their right, title and interest in and to any and all lands west of the one hundredth degree of west longitude; and the Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude, for the permanent settlement of the Wichita and such other tribes or bands of Indians as the government may desire to locate therein, excluding, however, all the Indians of New Mexico and also those whose usual ranges at present are north of the Arkansas river, and whose

permanent locations are north of the Canadian river, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas, which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may, from time to time, be prescribed by the President for their government, provided however the territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore.

Article 10. In consideration of the foregoing relinquishment and lease, and as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct. 11 Stat. 611, 612, 613.

No. 22. Instructions to Commissioner Chouteau,—April 7, 1837.

It has been further stated that the Comanches are dissatisfied because the Creeks and Choctaws have extended their occupation and improvements to the country heretofore used by themselves as hunting grounds. This matter should be explained to them, so that they may *understand that the United States having purchased these lands from the tribes* possessing the occupant title, *has guaranteed the exclusive right* in it to the emigrant Indians. They cannot therefore be permitted to hunt upon it, after the latter are prepared to settle upon and cultivate it. Report of Commissioner, Dec. 1, 1837. Also Letter Book Ind. Off., No. 21, April 7, 1837.

No. 23. On the twenty-third of March, 1842, a patent for the land described in the second article of said treaty, including the land in controversy, and the rest of the "leased district," was issued by the United States to the Choctaw nation, in pursuance of the stipulation of the second article of said treaty, in the following words and figures:

To the United States of America, to all to whom these presents shall come, greeting:

Whereas, by the second article of the treaty began and held at Dancing Rabbit Creek on the fifteenth day of September, in the year of our Lord one thousand eight hundred and thirty (as ratified by the senate of the United States on the 24th day of February, 1831), by the commissioners on the part of the United States, and the mingoes, chiefs, captains, and warriors of the Choctaw nation, on the part of said nation, it is provided that "the United States, under a grant specially to be made by the president of the United States, shall cause to be conveyed to the Choctaw nation" a tract of country west of the Mississippi river, in fee simple, to them and their descendants, to inure to them while they shall exist as a nation, and live on it, beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas river, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red river and down Red river to the west boundary of the territory of Arkansas; thence north along that line to the beginning, the boundary of the same to be agreeably to the treaty made and concluded at Washington city in the year 1825:

Now, know ye that the United States of America, in consideration of the premises, and in execution of the agreement and stipulation in the aforesaid treaty, have

given and granted, and by these presents do give and grant, unto the said Choctaw nation the aforesaid "tract of country west of the Mississippi;" to have and to hold the same, with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, as intended "to be conveyed" by the aforesaid article, "in fee simple to them and their descendants, to inure to them, while they shall exist as a nation and live on it," liable to no transfer or alienation, except to the United States, or with their consent.

In testimony whereof, I, John Tyler, president of the United States of America, have caused these letters to be made patent, and seal of the general land office to be hereunto affixed. Given under my hand, at the city of Washington, the twenty-third day of March, in the year of our Lord one thousand eight hundred and forty-two, and of the independence of the United States the sixty-sixth.

By the president:

JOHN TYLER,
DAN'L WEBSTER,
Secretary of State.
JOHN C. SPENCER,
Secretary of War.
T. HARTLEY CRAWFORD,
Commissioner of Indian Affairs.

No. 24. Treaty of April 28, 1866, between the United States and the Choctaw and Chickasaw nations.

Article 3. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, provided that the said sum shall be invested and held by the United

States at an interest not less than five per cent., in trust for the said nations until the legislatures of the Choctaw and Chickasaw nations, respectively, shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by or belonging to said nations, respectively, and also to give to such persons who are residents, as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided, and immediately on the enactment of such laws, rules, and regulations the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter, less such sum, at the rate of one hundred dollars *per capita*, as shall be sufficient to pay such persons of African descent before referred to as, within ninety days after the passage of such laws, rules, and regulations, shall elect to remove, and actually remove, from the said nations respectively. And should the said laws, rules, and regulations not be made by the legislatures of the said nations, respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such

manner as the United States shall deem proper, the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove, those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations.

Article 4. The said nations further agree that all negroes not otherwise disqualified or disabled shall be competent witnesses in all civil and criminal suits and proceedings in the Choctaw and Chickasaw courts, any law to the contrary notwithstanding; and they fully recognize the right of the freedmen to a fair remuneration on reasonable and equitable contracts for their labor, which the law should aid them to enforce. And they agree, on the part of their respective nations, that all laws shall be equal in their operation upon Choctaws, Chickasaws, and negroes, and that no distinction affecting the latter shall at any time be made, and that they shall be treated with kindness and be protected against injury; and they further agree that while the said freedmen now in the Choctaw and Chickasaw nations remain in said nations, respectively, they shall be entitled to as much land as they may cultivate for the support of themselves and families, in cases where they do not support themselves and families by hiring, not interfering with existing improvements without the consent of the occupant, it being understood that in the event of the making of the laws, rules, and regulations aforesaid, the forty acres aforesaid shall stand in place of the land cultivated as last aforesaid.

Article 10. The United States reaffirms all obligations arising out of treaty stipulations or acts of legislation with

regard to the Choctaw and Chickasaw nations, entered into prior to the late rebellion, and in force at that time, not inconsisetnt herewith; and further agrees to renew the payment of all annuities and other moneys accruing under such treaty stipulations and acts of legislation from and after the close of the fiscal year ending on the thirtieth of June, in the year eighteen hundred and sixty-six.

Article 11. * * Should the Choctaw and Chickasaw people, through their respective legislative councils, agree to the survey and dividing their land, on the system of the United States, the land aforesaid, east of the 98th degree of west longitude, shall be, in view of the arrangements hereinafter mentioned, surveyed, and laid off in ranges, townships, sections and parts of sections; * *

Article 12. The maps of said surveys shall exhibit, as far as practicable, the outlines of the actual occupancy of members of the said nations, respectively, and when they are completed, shall be returned to the said land office, at Boggy Depot, for inspection by all parties interested, when notice for ninety days shall be given of such return. * *

Article 15. At the expiration of the ninety days' notice aforesaid, the selection, which is to change the tenure of the land, in the Choctaw and Chickasaw nations, from a holding in common, to a holding in severalty, shall take place, when every Choctaw and Chickasaw shall have the right to one quarter section of land. * *

Article 25. During ninety days from the expiration of the ninety days' notice aforesaid, the Choctaws and Chickasaws shall have the exclusive right to make selections, as aforesaid. * *

Article 30. The Choctaw and Chickasaw nations will receive into their respective districts, east of the ninety-

eighth degree of west longitude, in the proportion of one-fourth in the Chickasaw and three-fourths in the Choctaw Nation, civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory, not exceeding ten thousand in number, who shall have in the Choctaw and Chickasaw nations, respectively, the same rights as the Choctaws and Chickasaws, of whom they shall be the fellow-citizens, governed by the same laws and enjoying the same privileges, with the exception of the right to participate in the Choctaw and Chickasaw annuities and other moneys, and in the public domain, should the same, or the proceeds thereof, be divided *per capita* among said Choctaws and Chickasaws, and among others the right to select land as herein provided for Choctaws and Chickasaws, after the expiration of the ninety days during which the selections of land are to be made, as aforesaid, by said Choctaws and Chickasaws; and the Choctaw and Chickasaw nations pledge themselves to treat the said Kansas Indians in all respects with kindness and forbearance, aiding them in good faith to establish themselves in their new homes, and to respect all their customs and usages not inconsistent with the constitution and laws of the Choctaw and Chickasaw nations respectively. In making selections after the advent of the Indians and the actual occupancy of land in said nation, such occupancy shall have the same effect in their behalf as the occupancies of Choctaws and Chickasaws; and after the said Choctaws and Chickasaws have made their selections as aforesaid, the said persons of African descent mentioned in the third article of the treaty shall make their selections as therein provided, in the event of the making of the laws, rules, and regulations aforesaid, after the expiration of ninety days from the date at which the Kansas Indians are to make their selections

in provided, and the actual occupancy of such of African descent shall have the same effect in half as the occupancies of the Choctaws and aws.

e 31. And whereas some time must necessarily efore the surveys, maps, and selections, herein for, can be completed, so as to permit the said Indians to make their selections, in their order, hich time the United States may desire to remove Indians, from their present abiding places, it is greed that the said Indians may at once come Choctaw and Chickasaw nations, settling themmporarily as citizens of the said nations, respecpon such land as suits them and is not already

e 37. In consideration of the right of selection, fore accorded to certain Indians other than the s and Chickasaws, the United States agree to pay hoctaw and Chickasaw nations, out of the funds ns removing into said nations, respectively, under isions of this treaty, such sum as may be fixed by latures of said nations, not exceeding one dollar

* *

le) 43. The United States promise and agree that no rson, except officers, agents and employes of the ent, and of any internal improvement company, ns traveling through, or temporarily sojourning, id nations, or either of them, shall be permitted o said territory, unless formally incorporated and ed, by the joint action of the authorities of both into one of the said nations of Choctaws and aws, according to their laws, customs, or usages; article is not to be construed to affect parties re adopted, or to prevent the employment, tem-

porarily, of white persons, who are teachers, mechanics, or skilled in agriculture, or to prevent the legislative authorities of the respective nations from authorizing such works of internal improvement as they may deem essential to the welfare and prosperity of the community, or be taken to interfere with, or invalidate, any action which has heretofore been had, in this connection, by either of the said nations.

Art.(icle) 45. All the rights, privileges, and immunities heretofore possessed by said nations, or individuals thereof, or to which they were entitled under the treaties and legislation heretofore made and had in connection with them, shall be, and are hereby declared to be, in full force, so far as they are consistent with the provisions of this treaty.

Art.(icle) 46. Of the moneys stipulated to be paid to the Choctaws and Chickasaws under this treaty for the cession of the leased district, and the admission of the Kansas Indians among them, the sum of one hundred and fifty thousand dollars shall be advanced and paid to the Choctaws, and fifty thousand dollars to the Chickasaws, through their respective treasurers, as soon as practicable after the ratification of this treaty, to be repaid out of said moneys or any other moneys of said nations in the hands of the United States; the residue, not affected by any provision of this treaty, to remain in the treasury of the United States at an annual interest of not less than five per cent., no part of which shall be paid out as annuity, but shall be annually paid to the treasurer of said nations, respectively, to be regularly and judiciously applied, under the direction of their respective legislative councils, to the support of their government, the purposes of education, and such other objects as may be best calculated to promote and advance the welfare and happiness of said nations and their people respectively. 14 Stat. 769.

No. 25. Creek treaty of June 14, 1866.

Art. 3. In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain, * * * and in consideration of said cession of the west half of their lands, estimated to contain 3,250,560 acres, the United States agree to pay the sum of 30 cents per acre, amounting to 975,168 dollars. * * 14 Stat. 785.

Seminole treaty of March 21, 1866.

Art. 3. In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Seminoles cede and convey to the United States their entire domain. * * In considerationof said grant and cession of their lands, estimated at 2,169,080 acres, the United States agree to pay said Seminole Nation, the sum of three hundred and twenty-five thousand three hundred and sixty-two ($325,362) dollars, said purchase being at the rate of 15 cents per acre. 14 Stat. 756.

No. 26. Delaware treaty of July 4, 1866.

Whereas, Congress has by law made it the duty of the President of the United States to provide by treaty for the removal of the Indian tribes from the State of Kansas, and whereas the Delaware Indians have expressed a wish to remove from their present reservation in said State to the Indian country, located between the States of Kansas and Texas, and whereas the United States have by treaties negotiated with the Choctaws and Chickasaws, with the Creeks and with the Seminoles, Indian tribes residing in

said country, acquired the right to locate other Indian tribes within the limits of the same, * * *

Article 4. The United States agree to sell to the said Delaware Indians a tract of land ceded to the Government by the Choctaws and Chickasaws, the Creeks or the Seminoles, or which may be ceded by the Cherokees in the Indian country to be selected by the Delawares. * * 14 Stat. 793.

No. 27.

42d Congress, 3d Session. | HOUSE OF REPRESENTATIVES. | Ex. Doc. No. 65.

AGREEMENT WITH WICHITAS AND OTHER INDIANS.

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* * * * * * *

Articles of agreement made and concluded at Washington City, District of Columbia, this nineteenth day of October, A. D. 1872, by and between Francis A. Walker, Commissioner of Indian Affairs, representing the United States, of the one part, and the undersigned chiefs, headmen, and members of the Wichitas and other affiliated bands of Indians duly authorized to act for their people, of the other part, witnesseth:

Article 1. The United States hereby give and grant to the said Wichitas and other affiliated bands, for a home, the tract of country bounded as follows, to wit: Commencing at a point in the middle of the main channel of the Washita River, where the 98th meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the line of 98° 40′ west longitude, thence on said line of 98° 40′ due north to the middle of the main channel of the main Canadian River,

thence down the middle of said main Canadian River, to where it crosses the 98th meridian, thence due south to the place of beginning.

Art. 2. In consideration of the reservation provided for in the preceding article, the said Wichitas and other affiliated bands hereby cede and relinquish to the United States all right, title, interest, or claim of any nature whatsoever in and to any lands in Texas, Louisiana, Indian Territory, or elsewhere within the limits of the United States.

In testimony whereof the parties to this agreement have hereunto subscribed their names and affixed their seals on the day and year first above written.

FRANCIS A. WALKER,
Commissioner Indian Affairs,
Party of the first part.

ESSADUA, his x mark,
Head Chief of the Wichitas,

ESQUITZCHEW, his x mark,
Delegate for Wichitas,

NAR-TACH-SIS, his x mark,
Delegate for Wichitas,

GEORGE WASHINGTON, his x mark,

WAR-LOO-PEE, (Guadaloupe,) his x mark,
Chiefs of Caddoes,

ANTELOPE, his x mark,
Delegate for Caddoes,

DAVE, his x mark,
Chief of the Towoccaroes,

LONG SOLDIER, his x mark,
Delegate for the Wacoes,

RISING SUN, his x mark,
Chief of the Keechies,
Parties of the second part.

Witnesses:

HENRY E. ALVORD,
United States Special Commissioner.

PHILIP MCCOSKER,
United States Interpreter.

J. J. STURM,
United States Interpreter.

BLACK BEAVER, his x mark,
Delaware Indian.

Witness to mark:
H. E. A.

III.—LEGISLATION.

No. 28. Act of Congress of May 28, 1830.

Be it enacted, &c., That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States west of the River Mississippi, not included in any State or organized Territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside and move there, and to cause each of said districts to be so described, by natural or artificial marks, as to be easily distinguished from every other.

2. *And be it further enacted*, That it shall and may be lawful for the President to exchange any or all of such districts, so to be laid off and described, with any tribe or nation of Indians now residing within the limits of any of the States or Territories, and with which the United States have existing treaties, for the whole or any part of

portion of the territory claimed and occupied by such tribe or nation, within the bounds of any one or more of the States or Territories, where the land claimed and occupied by the Indians is owned by the United States, or the United States are bound to the State within which it lies to extinguish the Indian claim thereto.

3. *And be it further enacted*, That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided, always*, That such lands shall revert to the United States if the Indians become extinct or abandon the same. 4 Stat. 411.

No. 29. An act of the Chickasaw legislature, approved November 18, 1865, contains the following provision:

SEC. 1. Be it enacted by the legislature of the Chickasaw nation, That the governor of the Chickasaw nation be, and he is hereby, requested and authorized to appoint and commission three competent persons, by and with the advice and consent of the senate, as delegates to visit Washington city, during the next session of congress, with full and efficient powers to reconstruct, or enter into, new treaties, or conventions, with the United States of America.

No. 30. Congress has expressly acknowledged this trust. The act approved March 3, 1891 (26 Stat. 1025), contains the following clause:

Said lands have been ceded in trust by article three of the treaty between the United States and the said Choctaw and Chickasaw nations of Indians, which was concluded April 28, 1866, and proclaimed on the 10th day of August of the same year.

No. 31. Act of the Choctaw Council, approved December 21, 1866.

Whereas, the Senate of the United States did, on the 28th day of June, A. D. 1866, advise and consent to the ratification of the articles of agreement and convention between the United States and the Choctaw and Chickasaw commissioners, and the same having been confirmed by the President of the United States on the 10th day of July following; and

Whereas, the same having been submitted to the general council of the Choctaw Nation, and having been interpreted and fully explained; therefore,

SECTION 1. *Be it enacted by the general council of the Choctaw Nation assembled*, That the report of the Choctaw commissioners and all their acts respecting the negotiations of the late treaty made and concluded at Washington city between the United States and the Choctaw and Chickasaw nations of Indians be, and the same is hereby, received and approved.

SEC. 2. *Be it further enacted*, That the propositions contained in the 3d and 8th articles of said treaty are hereby deferred until the next regular session of the general council, and the 11th and 47th articles are hereby referred to the people at large, to be declared through their legal representatives in council at the October session, A. D. 1867, and the principal chief is hereby required to issue his proclamation, when he shall think expedient, calling the votes of the people, the specified article above.

SEC. 3. *Be it further enacted*, That this act take effect and be in force from and after its passage. Choctaw Laws, Ed. 1869, pp. 450, 451.

No. 32. Act of the Chickasaw legislature approved November 9, 1866.

SECTION 1. *Be it enacted by the legislature of the Chickasaw Nation*, That whereas a treaty was concluded at Washington city on the 28th of April, 1866, by commissioners duly appointed on the part of the Chickasaws, Choctaws, and the United States Government, which treaty was ratified with amendments by the United States Senate and confirmed by the President, the Chickasaw legislature does hereby give its assent and confirm the said treaty and its amendments made by the Senate of the United States.

SEC. 2. *Be it further enacted*, That the Chickasaw legislature does hereby give its assent to the sectionizing and allotment of the lands in severalty, under the system of the United States, as is provided for in the treaty of April, 1866, and the President of the United States is hereby requested to cause the same to be done as soon as may be practicable.

SEC. 3. *Be it further enacted*, That the provisions contained in article 3d of the said treaty, giving the Chickasaw legislature the choice of receiving and appropriating the three hundred thousand dollars therein named for the use and benefit of the Chickasaws, or passing such laws, rules, and regulations, as will give all persons of African descent, certain rights and privileges, be, and it is hereby, declared to be, the unanimous consent of the Chickasaw legislature, that the United States shall keep and hold said sum of three hundred thousand dollars for the benefit of the said negroes. And the governor of the Chickasaw

nation is hereby requested to notify the Government of the United States, that it is the wish of the legislature of the Chickasaw nation, that the Government of the United States remove the said negroes beyond the limits of the Chickasaw nation, according to the requirements of the 3d article of the treaty of April 28, 1866. Chickasaw Const. and Laws, 1866.

No. 33. The constitution of the Choctaw Nation contains the following provisions:

For the convenience and good government of the people of the Choctaw Nation we do make, ordain and establish four districts, in this nation, to be known by the following names and boundaries, viz: Mosholatubbe district, Pushamataha district, Apuckshunnubbe district, and Hotubbe district. * * *

The boundaries of Hotubbe district shall be embraced within the limits of the ninety-eighth and one hundredth degree of west longitude, and between Red river and Canadian river, known as leased land.

ARTICLE 4—JUDICIAL DEPARTMENT.

Until Hotubbe district shall be duly organized and officers elected therein, under this constitution the supreme court shall be composed of three supreme judges, one to be chosen from the Apuckshunnubbe district, one from the Pushamataha district, and one from the Mosholatubbe district, one of whom shall be styled chief justice, and two of whom shall constitute a quorum to do business.

ARTICLE 7—GENERAL PROVISIONS.

SECTION 1. Until Hotubbe district shall be duly organized the principal chief of the Choctaw Nation shall ex-

ercise such authority over the citizens of the nation living in that district as he may deem expedient for the protection of person, life, and property. Choctaw Laws, 1869; Constitution of 1861, pp. 7, 8, and 13.

No. 34. The 15th section of the act of congress approved March 3, 1891, 26 Stat. 1025, contains the following provision:

And the sum of two million nine hundred and ninety-one thousand four hundred and fifty dollars be and the same is hereby appropriated, out of any money in the treasury not otherwise appropriated, to pay the Choctaw and Chickasaw nations of Indians for all the right, title, interest, and claim, which said nations of Indians may have in and to certain lands now occupied by the Cheyenne and Arapahoe Indians under executive order; said lands lying south of the Canadian river, and now occupied by the Cheyenne and Arapahoe Indians; said lands have been ceded in trust, by article three of the treaty between the United States and the said Choctaw and Chickasaw nations of Indians, which was concluded April 28, 1866, and proclaimed on the 10th day of August of the same year.

For more than a quarter of a century the government had invariably held the cession of 1866 to be a cession in trust, when President Harrison, on the 18th of February, 1892, sent a message to congress, giving his reasons for delaying the payment of the money appropriated by the act of March 3, 1891, and expressing the opinion that the treaty had invested the United States with the absolute beneficial ownership of the land. This message was referred to the committee on Indian affairs, in each house of congress. The senate committee submitted Senate Report No. 552, 52d Congress, 1st session, and with the report the following resolution:

Resolved, That for reasons set forth in the report of the Committee on Indian Affairs upon the president's message of February 18, 1892, upon the appropriation of March 3, 1891, for payment to the Choctaw and Chickasaw nations for their interest in the Cheyenne and Arapahoe reservation, in the Indian Territory, submitted with this resolution, that it is the opinion of the Senate that there is no sufficient reason for interference in the due execution of the law referred to.

The debate commenced April 27, 1892; and on the 9th of May the senate came to a vote. An amendment was proposed as follows:

Provided, however, that, in the opinion of the senate, the president should require the leases and the conveyances, which shall be executed by the Choctaw and Chickasaw nations of Indians, mentioned in said appropriation, to contain a full and complete relinquishment of all the right, title, interest, and claim of said nations of Indians in and to all the lands between the 98th and 100th meridians of west longitude, formerly owned by them, and of all claim to reimbursement and compensation for and on account of the same.

This amendment was rejected by a vote of yeas 13, nays 41. The resolution was then adopted by a vote of yeas 43, nays 13. Cong. Rec. 52 Cong., 1st sess., p. 4093. The house of representatives by a vote of yeas 163, nays 47, adopted a resolution in the identical words of the senate resolution.

On the 17th of December, 1892, the house of representatives adopted the following resolution:

Resolved by the senate and house of representatives, that the secretary of the treasury be, and he is hereby, directed to retain and cover back into the treasury $48,800 of the appropriation made by congress, to pay

the Choctaw and Chickasaw tribes of Indians for their interest in land of the Cheyenne and Arapahoe reservation, dated March 3, 1891, which amount has been ascertained, by a recount of the allottees of the said Cheyennes and Arapahoes, to be, by that amount, more than is due the said Choctaws and Chickasaws, upon the purchase and settlement for their said interest.

The senate adopted the following amendment to this resolution, in which amendment the house concurred:

Provided, however, that neither the passage of the original act of appropriation to pay the Choctaw and Chickasaw tribes of Indians, for their interest in the lands of the Cheyenne and Arapahoe reservation, dated March 3d, 1891, nor of this resolution shall be held, in any way, to commit the government to the payment of any further sums to the Choctaw and Chickasaw Indians for any alleged interest in the remainder of the lands situate in what is commonly known and called the leased district.

IV.—JUDICIAL AUTHORITIES.

No. 35. In Russell *ex.* Southland, 12 Howard, 139, 147, the court said:

The question is whether this transaction was a mortgage or a sale. It is insisted on behalf of the defendants that this question is to be determined by inspection of the written papers alone, oral evidence not being admissible to contradict, vary or add to their contents. But we have no doubt extraneous evidence is admissible, to inform the court of every material fact known to the parties when the deed and memorandum were executed. This is clear both upon principle and authority.

In examining this question it is of great importance to inquire whether the consideration was adequate to induce a sale. Where no fraud is practiced and no inequitable advantages taken of pressing wants, owners of property do not sell it for a consideration manifestly inadequate, and therefore, in the cases on this subject great stress is justly laid upon the fact, that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold.

No. 36. In Peugh *vs.* Davis, 96 U. S. 336, the court said:

In equity, where the court acts on the real character of the transaction, any evidence written or oral tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument, has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the objects of the parties in executing or receiving the instrument. The object of the parties will be considered by a court of equity. It constitutes a ground for the exercise of its jurisdiction which will always be asserted to prevent fraud or oppression, and to promote justice.

No. 37. There has been considerable diversity of opinion, and much ingenious speculation on the claim of right to this country by the Europeans, founded on the title by discovery. We have seen that with respect to the English colonists in America, the claim was modified, and much of its extravagance destroyed by conceding to the native tribes, their political rights and privileges, as depend-

ent allies, and their qualified title to the soil. As far as Indian rights and territories were defined, and acknowledged by the whites by treaty, there was no question in the case, for the whites were bound by the moral and national obligations of contract, and good faith, and as far as Indian nations had formed themselves into regular organized governments, *within reasonable and definite limits*, necessary for the hunter state, there would seem to be no ground to deny the absolute nature of their territorial and political rights. But beyond these points our colonial ancestors were not willing to go. Kent's Comm. v. 3, p. 87.

No. 38. In Beecher *v.* Wetherby, 95 U. S. 517, 525, the court said:

But the right which the Indians held was *only that of occupancy. The fee was in the United States*, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that, in this matter, the United States would be governed by such considerations of justice as would control a christian people in their treatment of an ignorant and dependent race. Be that as it may, *the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties* neither of whom derives title from the Indians. *The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the Government.* It was so ruled in *Johnson* v. *McIntosh* (8 Wheat. 543),

in 1823, and in *United States* v. *Cook* (19 Wall. 591) in 1873. Other cases between those periods have affirmed the same doctrine. *Clark* v. *Smith* (13 Pet. 195). See, also, *Jackson* v. *Hudson* (3 Johns., N. Y., 375); *Veeder* v. *Guppy* (3 Wis. 502), and 8 Op. Atty. Genl., pp. 262-4. In *United States* v. *Cook*, the United States maintained replevin for timber cut and sold by Indians on land reserved to them, the court observing that the fee was in the United States, and only a right of occupancy in the Indians; that this was the title by which other Indians held their land, and that the authority of *Johnson* v. *McIntosh* on this point had never been doubted. . . . "The possession, when abandoned by the Indians, attaches itself to the fee without further grant."

No. 39. In Doe, Lessee of Poor, *v.* Considine, 6 Wall. 458, 461, the court said:

When a trust has been created, it is to be held large enough to enable the trustee to accomplish the objects of its creation. If a fee simple estate be necessary, it will be held to exist, though no words of limitation be found in the instrument, by which the title was passed to the trustee, and the estate created. On the other hand, it is equally well settled that, where no intention to the contrary appears, the language, used in the creation of the estate, will be limited and restrained to the purposes of its creation. And when they are satisfied, the estate of the trustee ceases to exist, and his title becomes extinct. The extent and duration of the estate are measured by the objects of its creation.

Jarman says: "Trustees take exactly the estate which the purposes of the trust require; and the question is not whether the testator has used words of limitation, or

expressions adequate to carry an estate of inheritance, but whether the exigencies of the trust demand the fee simple, or can be satisfied by any and what less estate."

Chancellor Kent says: "The general rule is that a trust estate is not to continue beyond the period required by the purposes of the trust; and, notwithstanding the device to the trustees *and their heirs*, they take only a chattel interest, where the trust does not require an estate of higher quality."

No. 40. In Topliff *v.* Topliff, 122 U. S. 131, the court quoted with approval, from Chicago *v.* Sheldon, 9 Wall. 50, 54, as follows:

In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, *the practical interpretation of the parties themselves is entitled to great if not controlling influence.* The interest of each generally leads him to a construction most favorable to himself, and, when the difference has become serious and beyond amicable adjustment, it can be settled only by the arbitrament of law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one.

No. 41. At common law, a trust, in a conveyance of land by one private person to another, could be created by parol, and could also be proven by parol evidence. Under the English statute of frauds, trusts of land could be created by parol, but could only be proven by written evidence. "Trusts, like uses, are, of their own nature, averrable, *i. e.*, may be declared by word of mouth with-

out writing; as if, before the statute of frauds, an estate had been conveyed unto, and to the use of, A and his heirs, a trust might have been raised, by parol, in favor of B. And the statute of frauds will be satisfied if the trust can be manifested, or proved, *by any subsequent acknowledgment by the trustee, as by an express declaration, or any memorandum to that effect*, or by a letter under his hand, or by his answer in chancery, or by his affidavit, or by a recital in a bond, or deed, or by a pamphlet written by the trustee, or by an entry in a bank deposit book; in short *by any writing in which the fiduciary relation of the parties and its terms can be clearly read.*" Lewin on Trusts, 1st Amer. from 8th Eng. Ed. pp. 51, 55, 56; cases cited and notes; Perry on Trusts, vol. 1, sec. 82, and cases cited; 4 Kent Com. 305 and cases cited; 1 Greenl. Ev. sec. 266, and cases cited; Osterman *v.* Baldwin, 6 Wall. 116; Foy *v.* Foy, 2 Hayw. 141.

No. 42. In the case of the Kansas Indians, 5 Wall. 737, 760, the court said:

There is, however, one provision in the Miami treaty,—being in addition to the securities furnished the Shawnees and Weas,—which, of itself, preserves the Miami lands from taxation. This particular provision exempts the lands from "levy, sale, execution and forfeiture." It is argued that these words refer to a levy and sale under judicial proceedings; but such a construction would be an exceedingly narrow one, whereas *enlarged rules of construction are adopted in reference to Indian treaties.* In speaking of these rules, Chief Justice Marshall says: "The language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptible of a more extended meaning than

their plain import, as connected with the tenor of the treaty."

Applying this principle to the case in hand, is it not evident that the words "levy, sale, execution and forfeiture," are susceptible of a meaning which would extend them to the ordinary proceedings for the collection of taxes? Taxes must be first levied; and they cannot be realized, without the power of sale and forfeiture, in case of non-payment. The position, it seems to us, is too plain for argument. The object of the treaty was to hedge the lands around with guards and restrictions, so as to preserve them for the permanent homes of the Indians. In order to accomplish this object, they must be relieved from every species of levy, sale and forfeiture—from a levy and sale for taxes, as well as the ordinary judicial levy and sale.

No. 43. In Choctaw Nation *v.* United States, 119 U. S. 1, 27, 28, 37, 38, the court said:

As was said by this court recently in the case of the United States *v.* Kagama, 118 U. S. 375, 383: "These Indian tribes *are* the wards of the nation; they are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states and receive from them no protection. Because of the local ill-feeling, the people of the states, where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive, and by Congress, and by this court, whenever the question has arisen."

The recognized relation between the parties to this controversy, therefore, is that between *a superior and an inferior*, whereby the latter is placed under the care and control of the former, and which, *while it authorizes the adoption, on the part of the United States, of such a policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing; and that inequality is to be made good by the superior justice which looks only to the substance of the right*, without regard to technical rules, framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws.

The rules to be applied, in the present case, are those which govern public treaties, which, even in case of controversies, between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations. And it is the treaties made between the United States and the Choctaw nation holding such a relation, the assumptions of fact and of right which they pre-suppose, the acts and conduct of the parties under them, which constitute the material for settling the controversies which have arisen under them. The rule of interpretation, already stated as arising out of the nature and relation of the parties, is sanctioned and adopted by the express terms of the treaties themselves. In the 11th article of the treaty of 1855, the government of the United States expresses itself as being desirous that the rights and claims of the Choctaw people, against the United States, "shall receive a just, fair and liberal consideration." * * *

The only money payments secured by the treaty, over and above the necessary expenditures in removing the Indians, in providing for their subsistence for twelve months, after reaching their new homes, and paying for their cattle and their improvements, are, first, an annuity of $20,000 for twenty years, commencing after their removal to the west; and, second, the amount to be expended in the education of forty Choctaw youths, for twenty years, and for the support of three teachers of schools for twenty years, together with the cost of erecting some public buildings, and furnishing blacksmiths, weapons and agricultural implements, in addition to the several annuities and sums secured, under former treaties, to the Choctaw nation and people. It is nowhere expressed in the treaty that these payments are to be made as the price of the lands ceded; and they are all only such expenditures as the government of the United States could well afford to incur, for the mere purpose of executing its policy in reference to the removal of the Indians to their new homes. As a consideration for the value of the lands ceded by the treaty, they must be regarded as a meagre pittance.

It is, perhaps, impossible to interpret the language of this instrument, considered as a contract between parties standing upon an equal footing and dealing at arm's length, as a conveyance of the legal title, by the Choctaw nation to the United States, to hold as trustee for the pecuniary benefit of the Choctaw people; and yet it is quite apparent that the only consideration for the transfer of the lands, that can be considered as inuring to them, is the general advantage which they may be supposed to have derived from the faithful execution of the treaty on the part of the United States; *and when, in that connection, it is considered that the treaty was not executed, on*

the part of the United States, according to its just intent and spirit, with a view to securing to the Choctaw people the very advantages which they had a right to expect would accrue to them, under it, it would seem as though it were a case where they had lost their lands, without receiving the promised equivalent. In such a case there is a plain equity to enforce compensation, by requiring the party in default to account for all the pecuniary benefits it has actually derived from the lands themselves.

It is notorious as a historical fact, as it abundantly appears from the record in this case, that great pressure had to be brought to bear upon the Indians to effect their removal, and the whole treaty was evidently and purposely executed, not so much to secure to the Indians the rights for which they had stipulated, as to effectuate the policy of the United States in regard to their removal. The most noticeable thing, upon a careful consideration of the terms of this treaty, is, that no money consideration is promised or paid for a cession of lands, the beneficial ownership of which is assumed to reside in the Choctaw Nation, and computed to amount to over ten millions of acres. It was not an exchange of lands east of the Mississippi River for lands west of that river. The latter tract had already been secured to them by its cession under the treaty of 1820.

It had accordingly been said in the case of Worcester *v.* Georgia, 6 Pet. 515, 582: The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, *as connected with the tenor of the treaty*, they should be considered as used only in the latter sense. * * How the words of a treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

No. 44. In re Ross, 140 U. S. 453, the court said:

It is a canon of interpretation to so construe a law, or a treaty, as to give effect to the object designed, and for that purpose, all of its provisions must be examined in the light of attendant and surrounding circumstances. To some terms and expressions a literal meaning will be given, and to others a larger and more extended one. The reports of adjudged cases and approved legal treatises are full of illustrations of the application of this rule. The inquiry, in all such cases, is as to what was intended in the law by the legislature, and in the treaty by the contracting parties.

No. 45. In Geoffroy *v.* Riggs, 133 U. S. 258, the supreme court was called upon to interpret the treaty of February 23, 1853, between the United States and France. That treaty contained the following clause:

In all the states of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property, by the same title, and in the same manner as the citizens of the United States.

The question, in the case, was whether citizens of France could inherit real property in the District of Columbia. The court held that, within the meaning of the treaty, the District of Columbia was one of the "states of the union," such construction being necessary to give consistency to the provisions of the treaty, and *not to defeat the consideration given to France, for her concession of certain rights to citizens of the United States.* The court said:

By the last clause of the article, the government of France accords to the citizens of the United States the

same rights, within its territory, in respect to real and personal property and to inheritance, as are enjoyed there by its own citizens. There is no limitation as to the territory of France in which the right of inheritance is conceded. And it declares that this right is given, by the government of the United States, to the citizens of France. To ensure reciprocity, in the terms of the treaty, it would be necessary to hold that by "*states of the union*" is meant all the political communities, exercising legislative powers in the country, embracing, not only those political communities which constitute the United States, but also those communities which constitute the political bodies known as territories, and the District of Columbia. It is a general principle of construction, with respect to treaties, that they shall be liberally construed, so as to carry out the apparent intention of the parties, to secure equality and reciprocity between them.

No. 46. The treaty of October 27, 1795, between the United States and Spain, secured certain privileges to the "subjects of his Catholic Majesty." In the case of the Pizarro, 2 Wheaton, 227, 245, it was contended that the term "subjects" did not include inhabitants of Spain, who were citizens or *subjects of other nations*. The court said:

As to the second objection, it assumes, as its basis, that the term "*subjects*," as used in the treaty, applies only to persons who, by birth, or naturalization, owe a permanent allegiance to the Spanish government. It is, in our opinion, very clear that such is not the true interpretation of the language. The provisions of the treaty are manifestly designed to give reciprocal and co-extensive privileges to both countries; and to effectuate this object, the term "*subjects*," when applied to persons owing allegiance

to Spain, must be construed in the same sense as the term "*citizens*" and "*inhabitants*," when applied to persons owing allegiance to the United States.

No. 47. Vattel says:

Since the sole object of the lawful interpretation of a deed ought to be the discovery of the thoughts of the author or authors of that deed, whenever we meet with any obscurity in it, we are to consider what probably were the ideas of those who drew up the deed, and to interpret it accordingly. This is the general rule for all interpretations. It particularly serves to ascertain the meaning of particular expressions, whose signification is not sufficiently determinate. Pursuant to this rule, we should take those expressions in their utmost latitude, when it seems probable that the persons speaking had in contemplation everything which, in that extensive sense, they are capable of designating; and, on the other hand, we ought to restrict their meaning, if the author appears to have confined his idea to what they comprehended, in their more limited signification. Let us suppose that a husband has bequeathed to his wife *all his money*. It is required to know whether this expression means only his ready money, or whether it extends also to that which is lent out, and is due on notes and other securities. If the wife is poor,—if she was beloved by her husband,—if the amount of the ready money be inconsiderable, and the value of the other property greatly superior to that of the money, both in specie and in paper,—there is every reason to presume that the husband meant to bequeath to her, as well, the money due to him, as that actually contained in his coffers. On the other hand, if the woman be rich,—if the amount of the ready specie be very con-

siderable, and the money due greatly exceeds, in value, all the other property,—the probability is that the husband meant to bequeath to his wife his ready money only.

By the same rule we are to interpret a clause in the utmost latitude that the strict and appropriate meaning of the words will admit, if it appears that the author had in view everything which that strict and appropriate meaning comprehends; but we must interpret it in a more limited sense, when it appears probable that the author of the clause did not mean to extend it to everything which the strict propriety of the terms might be made to include. As, for instance, a father, who has an only son, bequeaths to the daughter of his friend *all his jewels*. He has a sword enriched with diamonds, given him by a sovereign prince. In this case, it is certainly very improbable that the testator had any intention of making over that honorable badge of distinction to a family of aliens. The sword, therefore, with the jewels with which it is ornamented, must be excepted from the legacy, and the meaning of the words restricted to his other jewels. Vattel, Law of Nations, Book 2, c. 17, § 270.

If, however, the technical or other terms relate to things that have different degrees, we ought not scrupulously to adhere to definitions, but rather to take the terms in a sense agreeable to the context; for a regular definition describes a thing in its most perfect state; and yet it is certain that we do not always mean it in that state of its utmost perfection, when we speak of it. Now the interpretation should only tend to the discovery of the will of the contracting parties; to each term we should, therefore, affix that meaning which the party, whose words we interpret, probably had in contemplation. * * Id., § 277.

There is not, perhaps, any language that does not also contain words which signify two or more different things, and phrases which are susceptible of more than one sense. Thence arises ambiguity in discourse. * * The following is the rule that ought to direct the interpretation, in this as well as in the preceding case: We ought always to affix such meanings to the expressions as are most suitable to the subject or matter in question. For, by a true interpretation, we endeavor to discover the thoughts of the person speaking, or of the contracting parties in a treaty. Now it ought to be presumed that he who has employed a word, which is susceptible of many different significations, has taken it in that sense which agrees with his subject. Id., §§ 279, 280.

Every interpretation that leads to an absurdity ought to be rejected; or, in other words, we should not give to any piece a meaning from which any absurd consequences would follow, but must interpret it in such a manner as to avoid absurdity. * * The rule which we have just mentioned is absolutely necessary, and ought to be followed even when the text of the law or treaty does not, considered in itself, present either obscurity or ambiguity in the language. For it must be observed that the uncertainty of the sense we are to give to a law, or a treaty, does not solely proceed from the obscurity, or other defect, in the expression; but also from the limited nature of the human mind, which cannot foresee all cases and circumstances, nor take in, at one view, all the consequences of what is decreed or promised; and finally from the impossibility of entering into that immense detail. Laws and treaties can only be worded in a general manner; and it is the interpreter's province to apply them to particular cases, according to the intention of the legislature or of the contracting powers. Now, we are not, in any case, to

presume that it was their intention to establish an absurdity; and, therefore, when their expressions, taken in their proper and ordinary meaning, would lead to absurd consequences, it becomes necessary to deviate from that meaning just so far as is sufficient to avoid absurdity. Id., § 282.

The reason of the law, or of the treaty,—that is to say, the motive which led to the making of it, and the object in contemplation, at the time,—is the most certain clue to lead us to the discovery of its true meaning. * * The consideration of the reason of a law, or promise, not only serves to explain the obscure or ambiguous expressions, which occur in a piece, but also to extend or restrict its several provisions, independently of the expressions, and in conformity to the intention and views of the legislature, or the contracting parties, rather than to their words. For, according to the remark of Cicero, the language invented to explain the will ought not to hinder its effect. Id., § 289.

No. 48. Grotius says:

The best rule of interpretation is to guess at the will by the most probable signs, which signs are of two sorts, words and conjectures; which are sometimes considered separately, sometimes together. If no conjecture guides us otherwise, the words are to be understood according to their propriety, not the grammatical one, which regards the etymon and original of them, but what is vulgar and most in use; for use is the judge, the law and rule of speech. * * Conjectures are necessary when words and sentences are of several significations, which the rhetoricians call doubtful and ambiguous. * * The principal heads, from which these conjectures arise, are the matter, the effect, and the circumstances or connection.

First. From the matter, as the word *day* (if a truce be made for thirty days) ought not to be understood of natural days, but of artificial ones, as agreeable to the subject-matter. So the word *giving* is taken for a forbearance, according to the nature of the affair it is employed in. So the word *arms* sometimes signifies instruments of war, sometimes armed soldiers, and is to be interpreted either in this or that sense as the matter in hand requires. Secondly. From the effect, where the main thing to be observed is whether the word, taken in its common sense, does produce an effect contrary to reason. For when a word is ambiguous, we must rather take it in that sense which is liable to no absurdity. Lastly. From the circumstances and connection of the words with others, either spoken in the same place, or by the same person. That which proceeds from the same will, though delivered in some other place, or upon some other occasion, has thereby a connection which gives room for reasonable conjectures; for, in a dubious case, the will is presumed to be consonant to itself. Grotius, Book 2, c. 16, §§ 1, 2, 4, 5.

On the other hand, words are to be taken even more strictly than the propriety will bear, if it be necessary in order to avoid an injustice or an absurdity; and without such a necessity, if there be a manifest equity or advantage in the restriction, we are to confine ourselves within the narrowest bounds of their propriety, unless circumstances persuade us otherwise. Id. § 12.

No. 49. Rutherforth says:

Sometimes common usage has given two senses to the same word, one of which is more confined or includes fewer particulars; and this is called its strict sense; the other is more comprehensive, or includes more partic-

ulars; and this is called its large sense. Thus the word, "ware-house," is sometimes used in a large sense, to signify any place where a dealer in any sort of goods, or wares, lays them up, till he wants to bring them out to a place of sale; and it is likewise used in a strict sense, to signify the very place of sale; and then is not otherwise distinguished from a shop than as the former is a close and the latter an open place of sale. When we meet with a word of this sort, in a law, and are doubtful in which of the senses the legislator used it, we must have recourse to some other marks besides his words, to ascertain his meaning. Either of the senses is within the letter of the law, but, because other marks must be used to ascertain the meaning of the legislator besides his words, the interpretation is of the mixed sort.

Rutherforth, Inst., Book 2, c. 7, § 10.

No. 50. Public treaties are to be interpreted like other laws and contracts. Such is the inevitable imperfection and ambiguity of all human language that the mere words alone of any writing, literally expounded, will go a very little way towards explaining its meaning. Wheaton, International Law, Part 3, c. 2, § 17.

When the same provision, or sentence, expresses two meanings, that one which most conduces to carry into effect the end and object of the convention should be adopted. Phillimore, sec. 73.

Treaties of every kind are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction, and course of reasoning, which we apply to the interpretation of private contracts. 1 Kent

Comm. 174; Maryatt *v.* Wilson, 1 Bos. and Pull. 438, 439; Kent International Law, 391.

No. 51. In Cherokee Nation *v.* State of Georgia, 5 Peters, 1, 16, 17, Chief Justice Marshall, delivering the opinion of the court, said:

So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs, and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state, from the settlement of our country. The numerous treaties, made with them by the United States, recognize them as a people capable of maintaining the relations of peace and war, of being responsible, *in their political character*, for any violation of their engagements, or for any aggression committed on the citizens of the United States, by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

A question of much more difficulty remains. Do the Cherokees constitute a foreign state? * * It may well be doubted whether those tribes, which reside within the acknowledged boundaries of the United States, can, with strict accuracy, be denominated foreign nations. They may more correctly, perhaps, be denominated domestic, dependent nations.

No. 52. In Worcester *v.* The State of Georgia, 6 Peters, 515, 559, 560, 561, Chief Justice Marshall, delivering the opinion of the court, said:

The Indian nations had always been considered as distinct independent political communities, retaining their original, natural rights, as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. *They are applied to all in the same sense.* * *

In opposition to this original right, possessed by the undisputed occupants of every country,—to this recognition of that right, which is evidenced by our history in every change, through which we have passed,—is placed the charters granted by the monarch of a distant and distinct region, parcelling out a territory in possession of others, whom he could not remove and did not attempt to remove, and the cession made of his claims by the treaty of peace.

The actual state of things, at the time, and all history since explain these charters; and the king of Great Britain, at the treaty of peace, could cede only what be-

longed to his crown. These newly asserted titles can derive no aid from the articles so often repeated in Indian treaties, extending to them first the protection of Great Britain and afterwards that of the United States. These articles are associated with others recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence, its right of self-government, by associating with a stronger and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority are left in the administration of the state." At the present day more than one state may be considered as holding its rights of self-government under the guaranty and protection of one or more allies.

In the same case, pages 582, 583, Mr. Justice Washington said:

The president and senate, except under the treaty-making power, cannot enter into compacts with the Indians, or with foreign nations. This power has been uniformly exercised, in forming treaties with the Indians. * * * After a lapse of more than forty years since treaties with the Indians have been solemnly ratified by the general government, it is too late to deny their binding force. Have the numerous treaties, which have been formed with them, and the ratifications by the president and senate been nothing more than an idle pageantry?

By numerous treaties with the Indian tribes, we have

acquired accessions of territory, of incalculable value
the union. Except by compact, we have not even claim
a right of way through the Indian lands. We have reco
nized in them the right to make war. No one has ev
supposed that the Indians could commit treason again
the United States. We have punished them for the
violation of treaties; but we have inflicted the punis
ment on them, as a nation, and not on individual offen
ers among them, as traitors.

In the executive, legislative, and judicial branches
our government, we have admitted, by the most solem
sanctions, the existence of the Indians as a separate a
distinct people, and being vested with rights which co
stitute them a state or separate community, not as belon
ing to the confederacy, but as existing within it and,
necessity, bearing to it a peculiar relation.

No. 53. In the case of the United States *v.* Paine, Jud
Parker of the district court of the United States for t
western district of Arkansas, held as follows:

Now we must look to the acts of the government sin
the adoption of this treaty, in order to understand
purpose. We find that in the year 1866 it entered up
the policy of settling tribes of Indians, other than t
five civilized tribes, in the Indian country. Since th
time, by treaties, laws, and executive orders of the pre
dent, it has settled upon reservations in the Indi
country the Cheyennes, the Arapahoes, the Kiowas, t
Comanches, the Wichitas, the Pawnees, the Sacs a
Foxes, the Nez Perces, the Poncas, the Modocs, t
Kansas, the Osages, the Pottawatomies, the Absen
Shawnees, as well as some other small tribes. T
explains why the treaty-making power thought, on Ma
21, 1866, that there was an urgent necessity of the g

ernment for more lands in the Indian Territory. This shows that the government not only had a desire to locate other Indians in the Indian Territory, but to a great extent it has consummated that desire. It is a matter of public history that a number of these tribes, which have been removed to the Indian country, taking advantage of the embarrassment of the government growing out of the war of the rebellion, had gone on the war-parth. The government was desirous of securing peace with them, and of settling them upon reservations, where they could be civilized. It entered into treaties, by which they were to be and were removable to the Indian country. Then again, the white people in other localities were pressing on other tribes and demanding of the government their removal, to get them out of the way of the white settlements, and to locate them where they would be free from intrusion by whites. They were removed to the Indian country. It is true but few of these tribes were settled on the lands in controversy; but I cite the conduct of the government in order to arrive at its policy in regard to the Indian country, and from that policy I receive aid in the construction of the third article of the Seminole treaty. The government wanted to locate other Indians and freedmen thereon. What did the government mean by locating freedmen thereon? Let us again go back to the time when this treaty was made. We find that colored people were held in slavery in all the civilized tribes of the Indian Territory. Slavery was abolished there, as well as elsewhere in the United States, by the emancipation proclamation of the president, and by the thirteenth amendment to the constitution adopted the 13th of December, 1865; and such abolition of slavery was recognized by these tribes in the several treaties made with them in 1866. The government was desirous of

protecting these freedmen, and of securing them homes. It was not known how well the several Indian tribes, who had held them in slavery, would observe their pledges to secure them the rights they enjoyed. It was feared that prejudice, growing out of their former condition as slaves, and of race, would be so strong against them that they would not be protected by the Indians. The government had given them the boon of freedom, and it was in duty bound to secure it in all that the term implied to them. The government feared that to do this it might be necessary to settle them in a colony by themselves. This purpose of the government, should it become necessary, was manifested by the terms of the Choctaw treaty of April 15 (28) 1866. United States *v.* Paine, 2 McCrary, 290.

V.—EXECUTIVE ACTS.

No. 54. A letter of instructions from James Madison, secretary of state, to Robert R. Livingston, minister to France, written within nine months after the cession of Louisiana to the United States, contains the following paragraphs:

DEPARTMENT OF STATE, *January* 31, 1804.

SIR: The two last letters received from you bear date on the — and 30th September; so that we have been now four months without hearing from you. The last from me to you was dated on the 16th day of January, giving you information of the transfer of Louisiana on the 20th of December by the French commissioner, M. Loussat, to Governor Clayborn and Gen. Wilkinson, the commissioners appointed on the part of the United States to receive it. * * * With respect to the western extent of Louisiana, M. Loussat held a language more satisfactory. He con-

sidered the Rio Bravo or Del Norte, as far as the thirtieth degree of north latitude, as its true boundary on that side. The northern boundary, we have reason to believe, was settled between France and Great Britain by commissioners appointed under the treaty of Utrecht, who separated the British and French territories west of the Lake of the Woods by the forty-ninth degree of latitude.

This statement is repeated on page 575, in a subsequent letter from Mr. Madison to Mr. Livingston, dated March 31, 1804. M. Loussat was the commissioner who received the transfer of the Territory of Louisiana from Spain to France in 1800, and transferred it to the United States under the treaty of 1803.

American State Papers, Foreign Affairs, vol. 2, p. 574.

No. 55. James Madison, secretary of state, in his letter of instructions of April 15, 1804, to James Monroe and Charles Pinckney, ministers extraordinary to the court of Spain, says:

No final cession is to be made to Spain of any part of the territory on this side of the Rio Bravo, but in the event of a cession to the United States of the territory east of the Perdido; and, in that event, in case of absolute necessity only, and to an extent that will not deprive the United States of any of the waters running into the Missouri or the Mississippi, or of the other waters emptying into the Gulf of Mexico, between the Mississippi and the river Colorado emptying into the bay of St. Bernard.

American State Papers, Foreign Affairs, vol. 2, p. 630.

The bay of St. Bernard is now known as Matagorda bay.

No. 56. A letter of instructions from James Madison, secretary of state, to James Monroe and Charles Pinckney,

ministers extraordinary to the court of Spain, dated July 8, 1804, contains the following paragraph:

It is to be understood that a perpetual relinquishment of the territory between the Rio Bravo and Colorado is not to be made, nor the sum of —— dollars paid, without the entire cession of the Floridas, nor any money paid in consideration of the acknowledgment by Spain of our title to the territory between the Iberville, and the Perdido.

American State Papers, Foreign Affairs, vol. 2, p. 630.

No. 57. In a letter from James Monroe, minister extraordinary to Spain, to M. Talleyrand, a minister of the French Empire, dated Paris, November 8, 1804, he says:

Your excellency will receive within a paper containing an examination of the boundaries of Louisiana which, it is presumed, proves incontestably the doctrine above advanced, as also that the river Perdido, is the ancient, and, of course, present boundary of that province to the east, and the Rio Bravo to the west.

American State Papers, Foreign Affairs, vol. 2, p. 643.

No. 58. In a letter from the American ministers, Monroe and Pinckney, to the Spanish minister, Cevallos, dated January 28, 1805, they say:

By the cession of Louisiana by his majesty the Emperor of France to the United States it becomes necessary to settle its boundaries with the territories of his Catholic Majesty in that quarter. It is presumed that this subject is capable of such clear and satisfactory illustration as to leave no cause for any difference of opinion between the parties. By the treaty of April 30, 1803, between the United States and France the latter ceded

to the former the said province in full sovereignty, in the same extent and with all the rights which belonged to it under the treaty of October, 1800, by which she had acquired it of Spain. That the nature and extent of the acquisition might be precisely known, the article of the treaty of St. Ildefonso making the cession is inserted in that of Paris. To a fair and just construction, therefore, of that article the United States are referred for the extent of their rights under the treaty of 1803. There is nothing to oppugn its force or detract from the import of its very clear and explicit terms. We have the honor to present to your excellency a paper on this subject which we presume proves in the most satisfactory manner that the boundaries of that province, as established by the treaties referred to, are the river Perdido to the east and the Rio Bravo to the west. The facts and principles which justify this conclusion are so satisfactory to our government as to convince it that the United States have not a better right to the island of New Orleans, under the cession referred to, than they have to the whole district of territory which is above described.

American State Papers, Foreign Affairs, vol. 2, p. 637.

No. 59. A letter from the American ministers, Messrs. Monroe and Pinckney, to the Spanish minister, dated April 20, 1805, contains the following paragraphs:

By the memorial which we had the honor to present to your excellency on the 28th of January last, the epoch of the discovery of the Mississippi and of the waters which empty into it and of the bay of St. Bernard, and of the taking possession of same and of the country dependent thereon, is proved by documents which can not be questioned. By these it is established, in respect to the Mississippi, its waters, and dependent country, as low

down the river as the Arkansas by Messieurs Joliet and Marquette from Canada as early as the year 1673, and to its mouth by the Father Henison in 1680, and by De la Salle and Joutel, who descended the river with sixty men to the ocean and named the country Louisiana, in 1682; and in respect to the bay of St. Bernard in 1685. This was done, at those periods, in the name and under the authority of France, by acts which proclaimed her sovereignty over the whole country to other powers in a manner the most public and solemn, such as making settlements and building forts within it. Of these it is material to notice in the present inquiry two only, which were erected in the bay of St. Bernard, on the western side of the river Colorado, by M. De la Salle, who landed there from France with two hundred and forty persons in 1685. It was on the authority of the discovery thus made and of the possession so taken that Louis XIV granted to Anthony Crozat, by letters patent bearing date in 1712, the exclusive commerce of that country, in which he defines its boundary by declaring that it comprehended all the lands, coasts, and islands which are situated in the Gulf of Mexico between Carolina on the east and Old and New Mexico on the west, with all the streams which empty into the ocean within those limits, and the interior of the country dependent on the same. Such are the facts on which the claim of France rested; such are those on which that of the United States now rests.

The principles which are applicable to the case are such as are dictated by reason and have been adopted in practice, by European powers, in the discoveries and acquisitions which they respectively made in the New World; they are principles intelligible and at the same time founded in strict justice. The first of these is that when any European nation takes possession of any ex-

tensive seacoast, that possession is understood as extending into the interior of the country to the sources of the rivers emptying within that coast, to all their branches and the country they cover, and to give it a right in exclusion of all other nations to the same. * * * The second is that whenever one European nation makes a discovery and takes possession of any portion of that continent, and another afterwards does the same at some distance from it, where the boundary between them is not determined by the principle above mentioned, the middle distance becomes such of course. The justice and propriety of this rule is too obvious to require illustration. A third rule is that whenever any European nation has thus acquired a right to any portion of territory on that continent, that right can never be diminished or affected by any other power, by virtue of purchases made, by grants, or conquests of the natives within the limits thereof. It is believed that this principle has been admitted and acted on invariably since the discovery of America, in respect to their possessions there, by all the European powers. * * *

The above are the principles which we presume are to govern the present case. We will now proceed to apply these principles to the claim of the United States as founded on the facts above stated relative to the discovery and possession of Louisiana by France, and to designate the limit to which we presume they are justly entitled, by virtue thereof, in the quarter referred to. On the authority of the principle first above stated it is evident that, by the discovery and possession of the Mississippi, in its whole length, and the coast adjoining it, the United States are entitled to the whole country dependent on that river, its several branches, and the waters which empty into it within the limits of that coast.

The extent to which this would go it is not in our power to say; but the principle being clear, dependent on plain and simple facts, it would be easy to ascertain it.

It is equally evident by the application of the second principle to the discovery made by M. de la Salle of the bay of St. Bernard, and his establishment there on the western side of the River Colorado, that the United States have a just right to a boundary founded on the middle distance between that point and the then nearest Spanish settlement, which, it is understood, was in the province of Panuco, unless that claim should be precluded on the principle first above mentioned. To what point that would carry us it is equally out of our power to say, nor is it material, as the possession in the bay of St. Bernard, taken in connection with that of the Mississippi, has been always understood as a right to extend to the Rio Bravo, on which we now insist.

In support of this boundary we rely much on the grant of Louis XIV to Anthony Crozat in 1712. That grant, it is true, establishes no new right to the territory. The right had already accrued by the causes, and to the extent contended for, which was never abandoned afterwards, except by the treaty of 1763, which does not affect the present question. This boundary is also supported by the opinions of the best informed persons who have written on the subject with which we have become acquainted. By an extract from a work on Louisiana, written by the Colonel Chevalier de Champigny in 1773, who, being of the country, was doubtless well informed, the Rio Bravo is laid down as the western boundary of that province. This fact is again asserted, with more minuteness, in his second note to that work, in which he states that Louisiana was bounded before the treaty of 1763 to the west by the mountains of New Mexico and

the Rio Bravo. In a book containing several memoirs on different subjects, published about three years since at Paris, is one entitled "A Memoir, Historical and Political, on Louisiana," by the Count de Vergennes, minister of Louis XVI, in which it is stated that Louisiana is bounded to the east by Florida and to the west by Mexico. The opinion of geographers in general confirms that of other writers. By a chart of Louisiana, published in 1762, by Don Thomas Lopez, geographer to his Catholic Majesty, it appears that he considers the Rio Bravo as the boundary of the province, as it does by that of De Lisle of the Royal Academy of Science at Paris, which was revised and republished in 1782. Others might be quoted, but it is useless to multiply them.

American State Papers, Foreign Affairs, vol. 2, pp. 663, 664.

No. 60. A letter from James Monroe, secretary of state, to the Chevalier de Onis, the Spanish minister, dated June 10, 1816, contains the following paragraph:

DEPARTMENT OF STATE, *June* 10, 1816.

SIR: * * * With respect to the western boundary of Louisiana I have to remark that this government has never doubted, since the treaty of 1803, that it exended to the Rio Bravo. Satisfied I am, that if the claims of the two nations were submitted to an impartial tribunal, who, observing the principles applicable to the case, and tracing facts as to discovery and settlement, on either side, that such would be its decision. The discovery of the Mississippi, as low down as the Arkansas, in 1673, and to its mouth, in 1680, and the establishment of settlements on that river, and on the Bay of St. Bernard on the western side of the Colorado, in 1685, under the authority of

France, when the nearest settlement of Spain was in the province of Panuco, are facts which place the claim of the United States on ground not to be shaken.

American State Papers, Foreign Affairs, vol. 4, p. 430.

No. 61. Mr. John Quincy Adams, secretary of state, in his letter of March 12, 1818, to Mr. de Onis, the Spanish minister at Washington, said:

The claim of France always did extend westward to the Rio Bravo, and the only boundaries ever acknowledged by her before the cession to Spain of November 3, 1762, were those marked out in the grant from Louis XIV to Crozat. She always claimed the territory which you call Texas as being within the limits and forming a part of Louisiana, which in that grant is declared to be bounded westward by New Mexico, eastward by Carolina, and extending inward to the Illinois and to the sources of the Mississippi and of its principal branches. Mr. Cevallos says that these claims of France were never admitted nor recognized by Spain. Be it so. Neither were the claims of Spain ever acknowledged or admitted by France. The boundary was disputed and never settled; it still remains to be settled; and here is a simple statement of the grounds alleged by each of the parties in support of their claims:

ON THE PART OF THE UNITED STATES.

(1) The discovery of the Mississippi, from near its source to the ocean, by the French from Canada, in 1683.

(2) The possession taken, and establishment made, by La Salle, at the bay of St. Bernard, west of the rivers Trinity and Colorado, by authority from Louis XIV, in 1685.

(3) The charter of Louis XIV to Crozat, in 1712.

(4) The historical authority of Du Pratz and Champigny, and of the Count de Vergennes.

(5) The geographical authority of De Lisle's map, and especially that of the map of Don Thomas Lopez, geographer to the King of Spain, published in 1762. These documents were all referred to in the letter from Messrs. Pinckney and Monroe to Mr. Cevallos, of 20th April, 1805, since which time, and in further confirmation of the same claims, the Government of the United States are enabled to refer you to the following :

(6) A map published by Homann, at Nuremberg, in 1712.

(7) A geographical work published in 1717, at London, entitled "Atlas Geographicus, or a Complete System of Geography, Ancient and Modern ;" in which the map of Louisiana marks its extent from the Rio Bravo to the Perdido. In both these maps the fort built by La Salle is laid down on the spot now called Matagorda.

(8) An official British map published in 1755 by Bowen, intended to point out the boundaries of the British, Spanish, and French colonies in North America.

(9) The narrative published at Paris, of Hennepin in 1683, of Tonti in 1697, and of Joutel in 1713.

(10) The letter from Col. La Harpe to Don Martin D'Alarconne of 8th July, 1719 (A 1, B 2).

(11) The order from the French governor of Louisiana, De Bienville, to La Harpe of August 10, 1721 (C 3).

(12) The geographical work of Don Antonio de Alcedo, a Spanish geographer of the highest eminence ; this work and the map of Lopez, having been published after the cession of Louisiana to Spain in 1762, afford decisive evidence of what Spain herself considered as the western boundary of Louisiana when she had no interest in contesting it against another State (B 4).

ON THE PART OF SPAIN.

(1) The voyages of Ponce de Leon, Vasquez de Ayllon, Panfilo de Narvaez, Fernando de Soto, Luis Moscoso, and other Spanish travelers in the 16th century, who never made any settlement upon any of the territories in question, but who traveled, as you observe, into countries too tedious to enumerate.

(2) The establishment of the new kingdoms of Leon and Santander in 1595, and the province of Cohaquila in 1600.

(3) The province of Texas founded in 1690.

Here, you will please to observe, begins the conflict with the claims of France to the western boundary of Louisiana transferred by the cession of the province to the United States. The presidios or settlements of Las Texas were, by your own statement, adverse settlements to that of La Salle, who, six years before, had taken formal possession of the country in the name of and by authority of a charter from Louis XIV. They were preceded by an expedition from Mexico the year before; that is, 1689, to hunt out the French remaining of the settlement of La Salle. Now, what right had the viceroy of Mexico to hunt out the French who had formed a settlement under the sanction of their sovereign's authority? You will tell me that from the time when Santa Fe, the capital of New Mexico, was built Spain considered all the territory east and north of that province, as far as the Mississippi and the Missouri, as her property; that the whole circumference of the Gulf of Mexico was hers; and that Philip II had issued a royal order to exterminate every foreigner who should dare to penetrate to it; so that the whole question of right between the United States and Spain with regard to this boundary centers in this: the naked pre-

tension of Spain to the whole circumference of the Gulf of Mexico, with the exterminating order of Philip II on one side; and the actual occupancy of France, by a solemn charter from Louis XIV, on the other. Well might Messrs. Pinckney and Monroe write to Mr. Cevallos, in 1805, that the claim of the United States to the boundary of the Rio Bravo was as clear as their right to the island of New Orleans. * * *

From this work of Joutel it likewise appears that the fort and colony left by La Salle at the westward of the Colorado was destroyed, not as you state by the Indians, but by the Spaniards from Mexico, who, until that time, had never had any settlement of any kind nearer than Panuco, and who, by your own account, had no other right or authority for this act than the royal order of Philip II to exterminate all foreigners penetrating into the Gulf of Mexico.

The settlement of La Salle, therefore, at the head of the bay of St. Bernard, westward of the river, which he called Riviere aux Bœufs, but which you call Colorado of Texas, was not, as you have represented it, the unauthorized incursion of a private adventurer into the territories of Spain, but an establishment having every character that could sanction the formation of any European colony upon this continent, and the viceroy of Mexico had no more right to destroy it by a military force than the present viceroy would have to send an army and destroy the city of New Orleans. It was a part of Louisiana discovered by La Salle under formal and express authority from the King of France; and the royal exterminating order of Philip II was but one of the multitude of sanguinary acts which signalized the reign and name of that monarch, while the name of La Salle is entitled to stand high in the glorious role of the benefactors of

mankind. After this statement, founded upon the m
authentic documents, the foundation of the presidio
Texas, in 1693, was, by your own showing, an unla
ful encroachment upon the territories of France, wh
by the first of the three principles laid down
Messrs. Pinckney and Monroe at Aranjuez, and ab
referred to, extended, on the coast of the Gulf of Mexi
half way to the nearest Spanish settlement of Panu
viz., to the Rio Bravo.

Mr. Adams also cites the following correspondence
tween the French and Spanish officers commanding
the western frontier of Louisiana in the years 1719 a
1721:

A 1.

Don Martin D'Alarconne to M. de la Harpe.

TRINITY RIVER, *May* 20, 1719

MONSIEUR: I am very sensible of the politeness t
M. de Bienville and yourself have had the goodness
show to me. The orders I have received from the Ki
my master, are to maintain a good understanding with
French in Louisiana; my own inclinations lead me equa
to afford them all the services that depend upon
But I am compelled to say that your arrival at the N
sonite village surprises me very much. Your gover
could not be ignorant that the post you occupy belo
to my Government, and that all of the lands west of
Nassonites depend upon New Mexico. I counsel you
give advice of this to M. de Bienville, or you will fo
me to oblige you to abandon lands that the French h
no right to occupy.

I have the honor to be, sir,

D'ALARCONNE

B 2.

M. de la Harpe to Don Martin D'Alarconne.

NASSONITE, *July* 8, 1719.

MONSIEUR: The order from his Catholic Majesty to obtain a good understanding with the French of Louisiana and the kind intentions you have yourself expressed towards them accord but little with your proceedings. Permit me to inform you that M. de Bienville is perfectly informed of the limits of his Government, and is very certain that the post of Nassonite depends not upon the dominions of his Catholic Majesty. He knows also that the province of Las Texas, of which you say you are governor, is a part of Louisiana. M. de la Salle took possession in 1685, in the name of his most Christian Majesty; and since the above epoch possession has been renewed from time to time.

Respecting the post of Nassonite, I cannot comprehend by what right you pretend that it forms a part of New Mexico. I beg leave to represent to you that Don Antoine du Miroir, who discovered New Mexico in 1683, never penetrated east of that province or the Rio Bravo. It was the French who first made alliances with the savage tribes in this region, and it is natural to conclude that a river that flows into the Mississippi and the lands it waters belong to the King, my master.

If you will do me the pleasure to come into this quarter, I will convince you I hold a post I know how to defend.

I have the honor to be, sir,

DE LA HARPE.

C 3.

On the 10th of August, 1721, M. de la Harpe received the following order:

We John Baptiste de Bienville, Chevalier of the Military Order of St. Louis, and commandant-general for the king in the province of Louisiana:

It is hereby decreed that M. de la Harpe, commandant of the bay of St. Bernard, shall embark in the packet of the *Subtile*, commanded by Beranger, with a detachment of 20 soldiers, under M. de la Belile, and shall proceed forwith to the bay of St. Bernard belonging to this province, and take possession in the name of the king; and the west company shall plant the arms of the king in the ground, and build a fort upon whatever spot appears most advantageous for the defense of the place. If the Spaniards or any other nation have taken possession, M. de la Harpe will signify to them that they have no right to the country, it being well known that possession was taken in 1685 by De la Salle in the name of the King of France, etc.

BIENVILLE.

American State Papers, Foreign Affairs, vol. 4, pp. 471, 473, 478, 479.

No. 62. A letter from John Quincy Adams, secretary of state, to Don Luis de Onis, the Spanish minister, contains the following paragraphs:

DEPARTMENT OF STATE,
WASHINGTON, *October* 31, 1818.

SIR: Your letter of the 24th instant, and the proposals contained in it, offered as the basis of a treaty for

the adjustment of all the subjects in discussion between the United States and Spain, have been received and laid before the president of the United States.

I am directed by him to forbear entering into any examination of the historical disquisition, concerning the original pretensions of Spain to all the territories bordering on the Gulf of Mexico and the whole country included in the French colony of Louisiana, which you have thought proper to introduce into your note. The right of the United States to the river Mississippi and all the waters flowing into it, and to all the territories watered by them, remains as entire and unshaken by anything now adduced by you, as by anything which had ever preceded it, in the discussions between the two governments. It is established, beyond the power of further controversy; nor could it answer any useful purpose to reproduce proofs which have already, more than once, been shown, and which, remaining unimpaired, must henceforth be considered by the United States as not susceptible of refutation.

American State Papers, Foreign Affairs, vol. 4, p. 530.

No. 63. On the 12th of August, 1819, ten days before the treaty of February 22, 1819, expired, Mr. Forsyth, our minister to Spain, in a letter to Señor Salmon, the acting secretary of state, served upon the Spanish government the following official notice:

On the 12th day of August His Majesty's government gives notice, by your note of the 10th—of its determination to ratify? no, sir, to send a person to Washington, possessing the confidence of the king, and having the necessary qualifications to terminate this affair. Can it have escaped the observation of this government that this affair must terminate in ten days? While a failure

to resolve finishes the business, in a few days, this government thinks that a definite resolution cannot be taken, without first entering into various explanations with the United States, to some of which the government of the said United States has given occasion. * * The determination to send a messenger to the United States, for explanations, at this period, when his voyage, as it regards the convention, must be useless; and the only hope, which can be entertained from it, is that a new negotiation may be commenced,—a circumstance of especial weight, when it is recollected that this messenger might have been sent to Washington, the desired explanation might have been asked and given, there, prior to the 22d of August, if the king, your master, had decided promptly, on this course. Or is it in the inexplicable and studious avoidance of the natural order of proceeding, in a case of this kind—an application to the minister of the United States near the court of his Majesty, for these necessary explanations, when they might have been possibly long since given, and still may be given before the period arrives, when the convention of the 22d February ceases to be obligatory upon the parties to it? Am. St. Papers, For. Rel., v. 4, pp. 656, 657.

That "period" arrived on the 22d of August, 1819, six months after the treaty was signed.

No. 64. On the 21st of August, 1819, the day before the treaty expired, Mr. Forsyth served on the Spanish government the following notice:

He has the honor to announce that, after the 22d day of the present month, as the ratification of the convention of 22d February will not have been exchanged, all the claims and pretensions of the United States, which, with the spirit of moderation, the love of peace, and the de-

lusive expectation that all causes of difference and dispute with Spain, would be thereby adjusted and settled, they consented to modify or waive, will stand in the same situation as if that convention had never been made; that the United States will hold themselves free to press and enforce them, in any and every mode, consistent with honor, that their interest may require. Am. St. Papers, Id. p. 661.

No. 65. In a communication sent to the Spanish minister, on the 8th of May, 1820, Mr. Forsyth says:

What then must have been the sentiments of the president, upon finding, by your note of the 14th ultimo, that instead of explanations, His Catholic Majesty has instructed you to demand the negotiation of another treaty, and to call upon the United States for stipulations derogatory to their honor and incompatible with their duties, as an independent nation? * * The ratification of that treaty can now no longer be accepted by this government, without the concurrence of a constitutional majority of the senate of the United States, to whom it must be again referred. Am. St. Papers, Id. p. 687.

No. 66. On the 3d of May, 1820, Mr. Adams sent to the Spanish minister a letter, which concluded with the following paragraph:

But it is proper to apprise you that, if this offer be not accepted, the United States, besides being entitled to resume all the rights, claims and pretensions, which they had renounced by the treaty, can no longer consent to relinquish their claims of indemnity and those of their citizens from Spain for all the injuries which they have suffered and are suffering, by the delay of His Catholic

Majesty to ratify the treaty. The amount of claims of citizens of the United States, which existed at the time when the treaty was signed, far exceeded that which the United States consented to accept, as indemnity. The right of territory was and yet is to the Rio del Norte. I am instructed to declare that, if any further delay to the ratification, by His Catholic Majesty, of the treaty, should occur, the United States could not hereafter accept, either of $5,000,000 for the indemnities due to their citizens by Spain, nor of the Sabine for the boundary between the United States and the Spanish territories. Am. St. Papers, id. p. 684.

No. 67. On the 9th of May, 1820, President Monroe sent identical messages to the two houses of congress, in which, after giving notice of the refusal of Spain to ratify the treaty of February 22, 1819, he said:

The result, therefore, is that the treaty is declared to have no obligation whatever; that its ratification is made to depend, not on the considerations, which led to its adoption, but on a new article, unconnected with it, respecting which a new negotiation must be opened of indefinite duration and doubtful issue. * * The attitude of the United States must now be assumed, on full consideration of what is now due to their rights, their interest and honour, without regard to the powers or incidents of the late mission. Am. St. Papers, id. pp. 676, 677.

No. 68. Col. De Mesieres' expedition of 1778

First Report.

With one lieutenant and twenty-two soldiers from Bexar, six militiamen from Natchitoches, and his two sons, he

started from Bexar to Bucarely, where he arrived on the 9th day of March, 1778. * *

He remained, with a few soldiers and five militiamen, whom he kept with the retired lieutenant Tremiño, to go and see the *Tawa-oiases* and Mahas, to assure them of his good will due to that which they entertain for us, and to advise them to establish themselves in *the locality selected for them, which, as they desire, will be either on the Brazos or on the San Xavier river.* *

Second Report.

* *After seven days' march, he reached the Taovaiase village.* The beauty of the country, over which they travelled eighty miles, is beyond expression, being interspersed by many streams that will afford irrigation of the prairies, and the banks of which are covered with forests. The rocky foundation of their beds will render easy the opening of ditches, and finally it abounds in buffalos, herds of deer, and antelopes, turkeys, partridges, geese, cranes, rabbits, and hares, that contribute both to pleasure and to comfort on the road.

From the Brazos river, on which the Tuacanas dwell, *to the stream which waters the Taovaiase village, there is seen, on the right, a forest justly called, by the natives, the "Big Forest."* It is very thick, although not very wide. * The *Taovaiase nation is divided into two villages, one situated north of the "Rio Bermejo"* (Red river), or of Natchitoches, *and the other opposite. The former village* is composed of *thirty-seven houses,* and the *latter* of *one hundred and twenty-three* houses. * *They have fuel at hand, in that big forest* above mentioned, extending eighty leagues in length, and one, two, or more leagues in width, *where bear and wild hogs* are found. * The *Rio Ber-*

mejo runs from the mountains of New Mexico, at about four days' travel from the Taovaiases, and *forms three forks, which unite near the village.* He believes that the occupation of this site (Tao-vaiase village) by a good population, would be of the greatest advantage, in the present and future, it being our key to the north, from which intercourse might be kept up with friendly nations, such as the Comanches and Osages, and full knowledge of more remote ones might be obtained, and any invasion or undertaking, by the English, might be checked.

De Mesieres, having previously sent *notice of his approach to the Taovaiases, the chiefs went out to receive him,* out of the village, dismounted from their horses and raised him on their shoulders. * The day appointed by De Mesieres having come for a general assembly to present to them the gifts sent to them by the commanding general, through the governor of Texas, he assured them of the good will and protection of the two chiefs of the internal provinces and Louisiana. * *They asked De Mesieres to request the commanding general to send Spaniards, who would settle among them,* assuring him that the necessary assistance, for a new settlement, would not be wanting. He gave them his word to do so, *and gave to the two villages the names San Teodoro and San Bernardo, in honor of the two chiefs.* *

Two Englishmen introduced themselves into the vicinity of the Taovaiases, * *asking admission in their villages, to trade and make friendship with them. The Taovaiases did not admit them. On the contrary, having been cautioned by De Mesieres, on his former visit, they violently took from them the goods they were carrying, giving them only the liberty of withdrawing.* * He asked the Taovaiases to surrender the two bronze cannon, which Col. Don Diego Ortiz Parilla abandoned in the fatal cam-

paign, which he undertook against them. * *De Mezieres found among the Tawaiases ten Spaniards of New Mexico, prisoners bought from the Comanches.* Record, United States *v.* Texas, pp. 886, 890, 891, 892, 893, 894.

No. 69. The six printed documents hereto annexed, marked respectively A, B, C, D, E, F, relating to the Expedition of Fragoso, in 1788, are accurate extracts from pages 48, 49, 75, 108, 114, 137, 162, of House Executive Document No. 21, 50th Congress, 1st Session.

A.

Itinerary, diary, and computations of leagues of a journey of discovery from this the province of New Mexico, to the Fort of Natchistochis and the province of the Texas, undertaken by superior orders jointly with Don Pedro Vial, by me, the undersigned, commissioner, for this purpose.—Francisco Xavier Fragoso. Town of Santa Fé, the 24th of June, 1788.

June 24.—This day, all necessary preparations having been made, and after having received the orders of his lordship the governor of this province, Don Fernando de la Concha, and the correspondence and dispatches addressed to their lordship the governor and commandant of said fort and the province of Texas, at about the eleventh hour in the morning, I started from this capital, the town of Santa Fé, with the following persons: Don Pedro Vial, a native of Lyons, France; myself, Francisco Xavier Fragoso, of the city of Mexico; José Maria Romero, Gregorio Leyva, and Juan Lusero, natives of Santa Fé, shaping my course southward, in the direction of the Pecos Village. After leaving the woodland, entered a short cañon and reached a rolling table-land where the village was described. This day traveled 8 leagues.

June 25.—Started at 9 o'clock a. m., southward, leaving a table-land on the right, and heavy timber as far as the ford called the Pecos Ford, and halted at Bernal's. Ten leagues.

June 26.—Started at 6 o'clock a. m.; eastward; good land; reached "Las Gallinas" (The Chickens) at 6 o'clock p. m. It is an habitual camping ground. Eleven leagues.

June 27.—Started at 11 o'clock a. m.; eastward; good land; grass, fuel, and water; halted at 6 o'clock p. m. at a standing spring with cottonwood trees. Eight leagues.

June 29.—Started at 8 o'clock a. m.; same course; good land. There is on the south a low red table-land, and another 1 league distant; then a "Sabinas" (cypress) forest is seen about 2 leagues long. I halted without water at a place which I called San Pedro. Eight leagues.

June 30.—Started at 8 o'clock; same course; leaving a black table-land on the right, and on the left two low red hills and a very extensive waterless valley, which is called Santa Ana. Halted at 6 o'clock p. m. Ten leagues,

July 1.—Started at 7 o'clock a. m.; same course; leaving on the south a white table-land, and on the north some small lakes. Halted at 7 o'clock p. m. at the foot of a black table-land, which I called Santa Rosa. Twelve leagues.

July 2.—Started at 8 o'clock; same course; good land, with the same table-land on the right, and on the left a very extensive plain. After my reckoning, the table-land is about 10 leagues and the plain about 20 leagues long. There is a standing spring and one cottonwood tree. I halted at the spur of the table-land at 7 o'clock p. m. Twelve leagues.

July 3.—Started at 6 o'clock a. m.; eastward course.

Soon entered the plains, which are so extensive that nothing but the sky and plain are seen. Passed this day thirteen lakes. Halted at 7 o'clock p. m. at the head of the Rio Blanco (White River). Twelve leagues.

July 4.—Started at 5 o'clock; same course; keeping along said Rio Blanco, which is a running stream; level land; grass and fuel in abundance. Halted at 6 o'clock. Six leagues.

July 5.—Started at 5 o'clock a. m.; same eastward course down said river; good land. After traveling a short distance, struck the junction of a river which runs from the north and is called "Rio del Tule" (Spanish Dagger River); halted at 6 o'clock p. m. at the forks. Six leagues.

July 6.—Started at 9 o'clock a. m.; same course, still following the said Rio Blanco, on which I halted at 6 o'clock p. m., with fuel, grass, and water. Six leagues.

July 7.—Started at 5 o'clock a. m.; same course along the river, which becomes wider than gunshot distance; camped on its bank at 6 o'clock, at El Castor (The Beaver). Nine leagues.

July 8.—Started at 5 o'clock a. m.; same course, same river, and I camped in a cottonwood grove, where the hills become lower; it was about 7 o'clock p. m. Ten leagues.

July 9.—Started at 6 o'clock a. m.; same course and river, but was compelled to halt at 12 o'clock. Four leagues.

July 10.—Started at 9 o'clock a. m., having found a good watering place, as the river water is brackish; abundance of grass and fuel; same course, still along the river; camped at 3 o'clock p. m. Seven leagues.

July 11.—Started at 5 o'clock a. m.; same course and down the river, the Cumanchis having advised me not to

leave the river, which follows steadily that course; camped at 7 o'clock at San Diego; grass, fuel, and no stones. Twelve leagues.

July 12.—Started before daybreak; same river and course; land level; the river is wider; traveled until 8 o'clock p. m. Thirteen leagues.

July 13.—Started at about 4 o'clock a. m.; same course and river, and we saw on the north of the river the range of hills which, as we were told, was the Juamanes. Here another river running from the north joins the Blanco. It has much water, and is called "Rio de las Plumas" (Feather River); it is less brackish than the Blanco. I camped at about 7 o'clock p. m., on said river, at San Dimas, as I called the place. Twelve leagues.

July 14.—Started at 6 o'clock a. m.; same course and river; another river debouches, which comes from the north; it is wider. Here the rivers and hills become level, and another range of hills, not very high, is seen on the north; again another river, also running from the north, joins the Rio Blanco, and leaving a very extensive plain, I camped at about 6.30 p. m. Ten leagues.

July 15.—Started at 6 o'clock a. m.; same course and along said river; traveled over good land, well supplied with grass, fuel, and meat; halted at 7 o'clock p. m., and crossed the river, which is already very wide. This day I crossed a creek which runs from the south. Ten leagues.

July 16.—Started at 5 o'clock a. m. on a northern course, and on a very large Cumanchi trail, to overtake them and ascertain whether I was or was not on the right direction. I overtook them and camped with them at 6 o'clock p. m. Six leagues.

July 17.—Started at 7 o'clock a. m. to resume an eastern course, being guided by the same Cumanchi who guided Don Pedro Vial to Santa Fé, and he led me over very ex-

tensive plains, good lands, and on a straight line, with grass, fuel, and standing water. I camped at 10 o'clock p. m. at San Antonio. Twelve leagues.

July 18.—Started at 5 o'clock a. m., southward; halted on a river running from the north to join the Rio Blanco, and we understood to be called the San Marcos River. Camped at 6 o'clock p. m. Ten leagues.

July 19.—Started at 5 o'clock a. m.; same course, over plains; good land. The river is very boggy; it is joined by another large river running from the south, called by the Cumanchis "Del Almagre" (Ocher, or Vermilion); at a short distance another river running from the north forms its junction, and I gave it the name of Rio de Dolores (River of Sorrows). After crossing the river a plain intervenes, timbered with oak, and is called "San José." There I camped for the night, at 3 o'clock p. m. Eight leagues.

July 20.—Started at 5 o'clock a. m.; course eastward; after crossing the river struck a plain two or three leagues in length, and reached the Taguayachi (Tahuayase) villages at 9 o'clock a. m. Four leagues.

July 26.—Started at 6 o'clock a. m.; course southward. After crossing said river struck a very fine oak timber, on good level ground; the forest is about 4 leagues wide; next struck a wide and beautiful plain. Camped at the Santa Ana Springs at 5 o'clock. Seven leagues.

July 27.—Started at 6 o'clock a. m., eastward, over level land; several streams close to each other; good fuel and grass. I camped on a small stream at 6 o'clock p. m. The country to this day was alternately prairie and woods. The stream is called San Juan.

July 28.—Started at 6 o'clock a. m., same course, and after traveling 4 leagues we reached a very fine forest which is called "Monte Grande" (Cross Timbers), which

is said to be 200 leagues long and only 3 leagues wide there I camped. Four and one-half leagues.

July 31.—Started at 6 o'clock a. m., eastward course When leaving the forest crossed a small running stream (not very small either) running from north to south; it is said to be "La Trinidad" (the Trinity); thence entered an immense plain and went into camp at 5 o'clock p. m. at a spring which I called El Benado (Deer Spring) Seven leagues.

August 1.—Started at 6 o'clock a. m., same course over said plains, but was soon compelled to halt by rain. Two leagues.

August 3.—Started at 6 o'clock a. m., same course Traveled over heavily-timbered plains, well watered, grass and fuel, but no stones. Halted at 2 o'clock p. m. Crossed to-day two small running streams. Four leagues.

August 4.—Started at 7 o'clock a. m., easterly course over heavily-timbered plains and creeks; found plum and other trees. Three leagues.

August 5.—Started at 6 o'clock a. m., same course, over treeless plains; creeks alone are timbered. No mountain or hill within sight, in any direction. I camped without water, at the outskirts of an oak forest a quarter of a league wide, but how long is not known. I halted at 4 o'clock p. m. Eight leagues.

August 6.—Started at 7 o'clock a. m., same course, over plains and good lands; small creeks. Entered the Natchitoches forest, and halted at 6 o'clock p. m., on a running creek. Eight leagues.

August 7.—Started at 6 o'clock; course southward through the forest, the soil of which is thickly covered with brush, and on so narrow a trail that we sometimes lost it. There are many running streams. Camped at 6 o'clock p. m., on a running creek. Eight leagues.

August 8.—Started at about 9 o'clock; same course and same forest; passed the Ramos Swamp, and camped at 6 o'clock p. m., on a running stream called "De la Piedra de Amolar" (Whetstone Creek), because some excellent such stones are found on the banks of the stream. Four leagues.

August 9.—Started at 7 o'clock; same course and same forest. Found to-day two very large streams, in which we saw alligators. Camped on the Sabine River. Four leagues.

B.

The third article is a very interesting paper, now, we believe, first published in the English language, and which appears to have escaped the diligent and patient researches of Baron von Humboldt and of all subsequent geographers. It forms a valuable contribution to the literature which has been accumulated on this subject. It is an itinerary, diary, etc., of a journey of discovery from the province of New Mexico to Natchitoches by Francisco Xavier Fragoso in 1788.

By platting this itnerary it will be seen that he struck the sources of the main fork, and followed down the Red River for 105 leagues, which brought him to the neighborhood of the Cross Timbers and the Trinity River. Besides these landmarks he also mentions the Sabine River, which he touched before reaching Natchitoches. The accuracy with which the Rio Blanco coincides with the true position of the Red River, including the main or Prairie Dog Town Fork, is quite remarkable when we consider the lack of means at his disposal for determining his position. The location of the Cross Timbers and of the Trinity and Sabine Rivers coincides very nearly with the results of modern surveys.

C.

It distinctly appears in evidence that Red River flows through red clay formation while Prairie Dog Town River flows through a whitish soil worked up by prairie dogs, the one causing red water, the other whitish; Red River the name of one, Prairie Dog Town River the other. Fragoso, in his expedition down Prairie Dog Town River in 1788, named it Rio Blanco, or White River, no doubt for the same reasons that the Indians named this river. And Young, in his testimony, says, in his experience of twenty years residence on Red River, he could always tell by looking at the rise in Red River far below the forks from what stream the rise came by the color of the water.

D.

The one hundredth meridian had been mapped by Lieutenant Pike, as will be seen by his map, as much as two degrees to the eastward of the point near the Great Bend of the Arkansas, where he first reached that river in making a survey of that region in 1806.

According to his map of the province of Texas (made and improved after his passage through Texas, and after extensive intercourse with Malgares, a Spanish officer who had been sent to survey that region of country), there was a fort located high up on the Red River of Natchitoches, immediately north of the head of the Trinity River, noted by him as Fort Yawayhays, corresponding in relative position to the head of the Clear Fork of the Trinity River to the old Spanish fort of Pressler's map of Texas, in Montague County (see sketch of Pressler's map), which was evidently the point where Fragoso tarried for six days in making his survey in 1788 (see Fragoso's Diary, Ev. of

Texas Com., Exhibit A, p. 15), and which he called the "Tagnayase Villages."

E.

It will be noticed from Fragoso's estimate that it was 201 leagues to the Sabine from the head of the Blanco. But he traveled by a direct course, leaving Red River at the Tahuayase Villages (Fort Yawayhays of Pike's map), estimating therefor 32 leagues for the sinuosities of the river, the distance named, 233 leagues, would about reach the Sabine.

It would not seem at all reasonable to suppose that Malgares neglected the important object of intercepting the expedition of Sparks and Freeman, which was coming up Lower Red River, and it is reasonable to suppose, according to the Pawnee hunters' story, that a detachment of three hundred men was sent down the river from the Comanche country for that purpose, while Malgares (perhaps on the same "very extensive plains" south of the Wichita Mountains, over which Fragoso's Comanche guide had led him) (see Exhibit A, page 14) was entertaining the Comanches by the imposing pageant which he described to Lieutenant Pike in the following words: * *

F.

(2) Humboldt delineates but one stream with a few "stations des muletiers" upon it. These stations, however, extend only as far as the country of the Taouaizes, who lived in the vicinity of the cross timbers and far below the junction of the forks. The course of the river is drawn with the view that it is the same as the Pecos and rises near Santa Fé. Humboldt's delineation, copied from Lafond, was erased by Melish to make it correspond

with that of Darby and Bringier, who gave a different direction to its middle course, but maintain the source near Santa Fé.

No. 70. American State Papers, Indian Affairs, vol. 1, page 721, &c.

Historical sketches of the several Indian tribes in Louisiana, south of the Arkansas River, and between the Mississippi and river Grande.

CADDOQUES.—Live about thirty-five miles west of the main branch of Red river, on a bayou, or creek, called by them Sodo, which is navigable, for pirogues only, within about six miles of their village, and that only in the rainy season. They are distant from Natchitoches only about 120 miles, the nearest route by land, and in nearly a northwest direction. They have lived where they now do only five years. The first year they moved there the small pox got amongst them and destroyed nearly one-half of them; it was in the winter season, and they practiced plunging into the creek, on the first appearance of the irruption, and died in a few hours. Two years ago they had the measles, of which several more of them died. They formerly lived on the south bank of the river, by the course of the river, 375 miles higher up, at a beautiful prairie, which has a clear lake of good water in the middle of it, surrounded by a pleasant and fertile country, which had been the residence of their ancestors from time immemorial. * *

The whole number of what they call warriors of the ancient Caddo nation is now reduced to about one hundred, who are looked upon, like Knights of Malta, or some distinguished military order. They are brave, despise danger, or death, and boast that they have never shed

white men's blood. Besides these there are, of old men and strangers who live amongst them, nearly the same number; but there are forty or fifty more women than men. This nation has great influence over the Yatasses, Naudakoes, Nabadaches, Inies or Tachies, Nacogdoches, Keychies, Adaize and Natchitoches, who all speak the Caddo language, look up to them as their fathers, visit and intermarry among them, and join them in all their wars. * *

YATTASSEES.—Live on Bayou river (or Stony creek) which falls into Red river, western division, about fifty miles above Natchitoches. * *

KEYES OR KEYCHIES.—Live on the east bank of Trinity river, a small distance above where the road from Natchitoches to St. Antoine crosses it. There are of them sixty men; have their peculiar native language, but mostly now speak Caddo, intermarry with them, and live together in much harmony, formerly having lived near them, on the headwaters of the Sabine. They plant corn and some other vegetables. * *

INIES OR TACHIES (called indifferently by both names).—From the latter name the province of Tachus or Texas is derived. The Inies live about twenty-five miles west of Natchitoches, on a small river, a branch of the Sabine, called the Natchez; they are, like all their neighbors, diminishing, but have now eighty men. Their ancestors, for a long time, lived where they now do. Their language the same as that of the Caddoes, with whom they are in great amity. These Indians have a good character, live on excellent land, and raise corn to sell. * *

TAWAKENOES, OR THREE CANES.—They are called by both names indifferently, live on the west side of the Braces, but are often, for months, at a time, lower down than their usual place of residence, in the great plain on the

Tortuga or Turtle, called so from its being a hill in the prairie, which, at a distance, appears in the form of a Turtle, upon which there are some remarkable springs of water. Their usual residence is about two hundred miles to the westward of Nacogdoches, towards Santa Fe. They are estimated at two hundred men; are good hunters; have guns, but hunt principally with the bow; are supplied with goods from Nacogdoches, and pay for them in rugs, tongues, tallow and skins.

They speak the same language of the Panis, or Towiaches, and pretend to have descended from the same ancestors. * *

Panis or Towiaches.—The French call them Panis, and the Spaniards Towiaches; the latter is the proper Indian name. They live on the south bank of the Red river, by the course of the river upwards of eight hundred miles above Natchitoches, and by land, by the nearest path, is estimated at about three hundred and forty. They have two towns near together; the lower town, where the chief lives, is called Witchita and the other is called Towaahack. They call their present chief the Great Bear; they are at war with the Spaniards, but friendly to those French and American hunters who have lately been among them; they are likewise at war with the Osages, as is every other nation. For many hundreds of miles around them the country is rich prairie, covered with luxuriant grass, which is green summer and winter, with skirts of wood on the river bank, by the springs and creeks. * * They have but few guns and very little ammunition; what they have they keep for war, and hunt with the bow; their meat is principally buffalo; seldom kill deer, though they are so plenty they come into their villages and about their houses like a domestic animal. Elk, bear, wolves, and wild hogs are plenty within their country, and white

rabbits, or hares, as well as the common rabbit; white bears sometimes come down among them and wolves of all colors. The men go entirely naked, and the women nearly so, only wearing a small flap of a piece of skin. They have a number of Spaniards among them, of a fair complexion, taken from the settlement of Santa Fe, when they were children, who live as they do, and have no knowledge of where they came from. Their language differs from that of any other nation, the Tawakenoes excepted. * *

HEITANS, OR COMANCHES.—* They are strong and athletic, and the elderly men as fat as though they had lived upon English beef and porter. * * They are, for savages, uncommonly cleanly in their persons; the dress of the women is a long, loose robe, that reaches from their chin to the ground, tied round with a fancy sash, or girdle, all made of neatly dressed leather, on which they paint figures of different colors and significations. The dress of the men is close leather pantaloons and hunting shirt, or frock, of the same. * * They alternately occupy the immense space of country, from the Trinity and Braces, crossing the Red river, to the heads of Arkansas and Missouri, to river Grande, and beyond it, about Santa Fe, and over the dividing ridge, on the waters of the western ocean, where, they say, they have seen large pirogues, with masts to them, in describing which they make a drawing of a ship, with all its sails and rigging. * *

The forementioned are all the Indian tribes that I have any knowledge of, or can obtain an account of, in Louisiana, south of the river Arkansas, between the Mississippi and the river Grande. * *

I am, sir, &c., &c.,

JOHN SIBLEY.

NATCHITOCHES, *April* 5, 1805.

General H. DEARBORN.

No. 71. In 1834, fifty-six years after De Messieres visited the Taovaiase village, and 75 years after Parilla's defeat, Col. Henry Dodge, of the United States Dragoons, marched, with his regiment, from Fort Gibson to a village, which he calls the "*Toyash* village."

The Journal of this expedition contains the following statements, quoted on pages 853, 854, of the record in United States *v.* Texas:

"July 15th. Comanches, Kiowas and the band called by us *Pawnee Picts*, but correctly termed the *Toyash*, are friends and to a certain extent allies. The Comanches are, we learn, the largest band, the proudest and boldest; therefore the Colonel has resolved to visit them first; thence to the *Toyash* village.

July 16th. * * The Comanche captains informed us that it is but a short distance to their camp. * * Two or three miles brought us in sight of their camp situated in a valley. * * The Comanches have hoisted an American flag over their camp. * * We are now in sight of a chain of peaks, so-called mountains, bearing south and west. Behind these are the *Toyash* villages. Some of these hills cannot be less than 2,000 feet above the prairie at their base.

July 19th. Marched for the *Toyash* village twenty-three miles southwest. * *

July 20th. The command moved. * * West * * thirty-seven miles; road literally of granite rock for miles. We encamped five miles from the *Toyash* village, which is situated on a branch of the Red River. Width of the branch of Red River about five hundred feet from bank to bank.

July 21st. The command marched for the *Toyash* village; proceeded a mile or two, when we met about sixty Indians, who came out to meet us. * * We soon

reached the village, which is situated *immediately under mountains of granite some six hundred feet in height. In front of the village runs the river.* * *

July 26th. * * From conversation to-day with one of the Indians (Ski-sa-so-ka, an intelligent *Toyash*) we learn that *their nation lived formerly south; that their oldest men were born there.* * * " Record U. S. *v.* Texas, pp. 853, 854.

No. 72. Colonel Dodge, on July 22, 1834, made the following address to the Toyash chiefs and warriors:

We are the first American officers who have ever come to see the Pawnees; we meet you as friends, not as enemies, to make peace with you, to shake hands with you. The great American Captain is at peace with all the white men in the world. We have been sent here to view this country, and to invite you to go to Washington, where the great American chief lives, to make a treaty with you, that you may learn how he wishes to send among you traders, who will bring you guns and blankets and everything that you want. The great American chief wishes also to make peace between you and the Osages; you have been at war with the Osages; and to secure peace between you and the Cherokees, Senecas, Delawares and Choctaws and all other red men, that you may all meet together as friends, and not shed each other's blood, as you have done. On our way to your village we met a party of Comanches. We showed to them a white flag, which said to them, "we wish to be friends." Their principal men were gone to hunt; we treated their old men, women and children with kindness; we gave them presents; they had many horses; we could have taken their horses from them, but did not; we showed to them

that we wanted to be at peace with them; they told us that you were their friends; we were glad to hear it; we have come to your town and found you as defenceless as the Comanches; we have treated you as we treated them; the American people show their kindness by actions, and not by words alone, etc. Doc. 2, 23d Cong., 2d Sess., p. 79.

And on the 23d of July, 1834, he made the following address to the Comanches:

The great American Captain has sent me to view this country, and to offer the hand of friendship to all the red men who are here. He wishes to see you all at peace with each other. He desires you to come and see him that he may fix a permanent peace with your tribes. He will make you presents and he will send traders among you who will serve you with a great many things that you want to make you happy. The President, who is a good father to you, wishes to see you at peace with the Osages, Cherokees, Delawares and all red men. We have endeavored to give you evidence of our friendship. We did so when we passed your camp. You were not at home. Your women and children were defenceless. We treated them kindly. We confided in you, too, etc.

You say that the Indians over Red River are your enemies. They kill you when you meet. These are Mexican Indians and do not make treaties with our great father, the President. But he will protect you when you make peace with the Osages and other tribes that have been at war against you. Id., p. 83.

No. 73. In the same document will be found the report of Major-General Macomb (p. 44), in which, in giving an account of Colonel Dodge's expedition, he says:

Colonel Dodge, accordingly, out of the effective force,

formed six companies, each 42 strong, and under instructions from General Leavenworth continued his march to the Pawnee village, situated on a branch of the Red River. Here Colonel Dodge held a council with the Comanches and Pawnees (or Toyaslas), the Kiowas, and the deputation of Indians which accompanied him, amounting in all to about two thousand persons. He explained the object of the expedition, and was instrumental in bringing about a friendly intercourse between several hostile tribes. He also obtained the surrender of the son of a Mr. Martin, an American citizen who had been murdered by the Indians, and of the black boy captured by them. A more particular account of the interview between Colonel Dodge and the remote tribes will be found in the journal of the expedition annexed to this report.

No. 74. In the same document (pp. 33 and 34) will be found the report of the Secretary of War, in which he uses this language:

It is known to you that some of the western tribes of Indians, roaming through the extensive prairies west of Arkansas and Missouri, particularly the Comanches and Kiowas, have for some years interrupted the peace of that quarter by predatory attacks upon our citizens, and upon the indigenous and emigrant Indians whom we are under obligations to protect. Their war parties have annoyed our citizens in their intercourse with the Mexican States, and have rendered communication difficult and hazardous. It became necessary to put a stop to this state of things either by amicable representations or by force. Those remote tribes have little knowledge of the strength of the United States or of their own relative weakness; and it was hoped that the display of a respect-

able military force for the first time in their country would satisfy them that further hostilities would lead to their destruction. The dragoons being peculiarly adapted to this service were ordered to penetrate into this region and to endeavor, by peaceable remonstrances, to establish permanent tranquillity; and if this should fail, to repel any hostile demonstrations which might be made. Fortunately, the efforts to introduce amicable relations were successful, and the object of the expedition was obtained without a single act of hostility. Colonel Dodge, who led the expedition, and his whole command appeared to have performed their duties in the most satisfactory manner; and they encountered with firmness the privations incident to the harassing service upon which they were ordered.

No. 75. And in the same document (p. 17) the President of the United States in his message uses the following language:

No event has occurred since your last session rendering necessary any movement of the army, with the exception of the expedition of the regiment of dragoons into the territory of the wandering and predatory tribes inhabiting the western frontier and living adjacent to the Mexican boundary. These tribes have been heretofore known to us principally by their attacks upon our own citizens and upon other Indians entitled to the protection of the United States. It becomes necessary for the peace of the frontiers to check these habitual inroads, and I am happy to inform you that the object has been effected without the commission of any act of hostility. Colonel Dodge and the troops under his command have acted with equal firmness and humanity, and an arrange-

ment has been made with those Indians which it is hoped will assure their permanent pacific relations with the United States, and the other tribes of Indians upon that border.

No. 76.

48TH CONGRESS, 1st Session. SENATE. EX. DOC. No. 13.

MESSAGE

FROM THE

PRESIDENT OF THE UNITED STATES

TRANSMITTING

A communication from the Secretary of the Interior of the 4th instant submitting draft of bill "to confirm the title to certain land in the Indian Territory to the Cheyennes and Arapahoes, and the Wichitas and affiliated bands, to provide for the issuance of patents therefor."

DECEMBER 19, 1883.—Read and referred to the Committee on Indian Affairs and ordered to be printed.

To the Senate and House of Representatives:

I transmit herewith a communication from the Secretary of the Interior of the 4th instant, with accompanying papers, submitting a draft of a bill "to confirm the title to certain land in the Indian Territory to the Cheyennes and Arapahoes, and the Wichitas and affiliated bands, to provide for the issuance of patents therefor, and for other purposes."

The subject is presented for the consideration of Congress.

CHESTER A. ARTHUR

EXECUTIVE MANSION,
December 17, 1883.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *December* 4, 1883

SIR: I have the honor to submit herewith for your consideration the draft of a bill prepared by the Commissioner of Indian Affairs entitled "A bill to confirm certain lands in the Indian Territory to the Cheyennes and Arapahoes and the Wichitas and affiliated bands, to provide for the issuance of patents therefor, and for other purposes."

I also submit copy of the report of the Commissioner of Indian Affairs on the subject, together with the inclosures mentioned therein.

The measure has my approval, and I respectfully request that it may be transmitted for the consideration of the Congress.

I have the honor to be, very respectfully, your obedient servant,

H. M. TELLER,
Secretary.

THE PRESIDENT.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *October* 9, 1883.

SIR: In office report dated March 27, 1882, it was recommended that the reservation set apart for the Cheyenne and Arapaho Indians in the Indian Territory, by the Executive order of August 10, 1869, in lieu of the

reservation established by the treaty of October 28, 1867, be confirmed to the said Indians and a draft of a bill for that purpose was submitted.

It having been subsequently represented on behalf of the Wichitas, Caddoes, and affiliated bands, that the proposed reservation included lands which by right belonged to them, embracing even the reservation set apart for these Indians out of a portion of their lands by the so-called unratified agreement of October 19, 1872, which the Government of the United States recognize as their home, I recommended in office report dated May 6, 1882, that Congress be asked to withhold action on the bill until the wishes of the Indians were definitely understood.

The circumstances attending the establishment of the Cheyenne and Arapaho Reservation are set out in office report of March 27, 1882, but for convenience they are here repeated.

By the provisions of the second article of the treaty of October 28, 1867 (15 Stat., 594), the United States set apart for the absolute and undisturbed use and occupation of the Indians parties to said treaty, and for such other friendly Indians as they might be willing, with the consent of the United States, to admit among them, a tract of country west of the ninety-sixth degree, bounded by the Arkansas River on the east, the thirty-seventh parallel of north latitude, being the southern boundary line of the State of Kansas, on the north, and the Cimarron or Red Fork of the Arkansas River on the west and south, in which boundaries are included 4,292,661.15 acres of Cherokee lands west of the Arkansas River.

The Cheyennes and Arapahoes claimed that they did not understand the location of the land set apart by the treaty of 1867; and, as they desired a reservation on the North Fork of the Canadian River, some 60 miles below

Camp Supply, the President of the United States, upon the recommendation of this office, approved by the Secretary of the Interior, by Executive order, dated August 10, 1869, set apart for their use a tract of land lying south of the Cherokee country, as described therein, containing 4,297,711 acres.

The sixth section of the Indian appropriation act of May 29, 1872 (17 Stat., 190), authorized the President of the United States and the Secretary of the Interior—

"To make an appraisement of the Cherokee lands lying west of the ninety-sixth meridian of west longitude, and west of the land of the Osage Indians in the Indian Territory, and south of the southern line of the State of Kansas, ceded to the United States by the Cherokee Indians under their treaty of July 10, 1866, for the settlement of friendly Indians, and report the same to Congress: *Provided*, That the Secretary of the Interior be, and he hereby is, authorized to negotiate with the Southern Cheyennes and Arapahoes for the relinquishment of their claims to the land ceded to them by the second article of the treaty of October 28, 1867, out of the cession made by the Cherokees in the treaty of July 19, 1866; such relinquishment, if obtained, to be in consideration of a sufficient and permanent location for said Cheyennes and Arapahoes upon the lands ceded to the United States by the Creeks and Seminoles in the treaties of March 21 and June 14, 1866, and that the Secretary report the action taken by him under this provision to Congress at its next session."

Agreements were entered into under the provision above quoted, and were submitted to Congress by the Department December 16, 1872, upon which no final action appears to have been taken by that body. (See House Ex. Doc. No. 43, Forty-second Congress, third session; also

Senate Ex. Doc. No. 69, Forty-fifth Congress, second session.) Agreements were also entered into on the 18th of November, 1873.

None of these agreements were ever ratified, and the Cheyennes and Arapahoes still remain on the reservation set apart for them by Executive order of August 10, 1869.

A part of the treaty lands, however, have been conveyed by the Cherokee Nation to the United States in trust for the Pawnees, Poncas, Otoes and Missourias, and Nez Percés, under the provisions of the act of Congress approved March 23, 1883 (22 Stat., 624), and are now occupied by them. These lands also include a portion of those covered by the agreements of November 18, 1873. It would therefore be impossible to locate the Cheyennes and Arapahoes upon their original reservation, without further negotiations, even if it be held that they have not forfeited their right to the same by refusing to locate thereon, and accepting other lands in lieu thereof; nor could the agreements be confirmed unless modified with the consent of the tribes.

The Wichitas, Caddoes, and affiliated bands occupy their present reservation by virtue of an agreement entered into at Washington, October 19, 1872, by the terms of which the United States granted to the said bands of Indians for a home the tract of country bounded as follows, to wit:

"Commencing at a point in the middle of the main channel of the Washita River, where the ninety-eighth meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the line of 98° 40′ west longitude, thence on said line of 98° 40′ due north to the middle of the main channel of the main Canadian River, thence down the middle of said main

Canadian River to where it crosses the ninety-eighth meridian, thence due south to the place of beginning."

In consideration of which, the said Indians ceded and relinquished to the United States all right, title, interest or claim of any nature whatsoever to any lands in Texas, Louisiana, Indian Territory, or elsewhere within the limits of the United States.

This tract of country thus reserved is wholly within the Cheyenne and Arapaho Reservation as established by the Executive order of August 10, 1869.

This agreement was signed in this city by nine chiefs and delegates of the Wichitas and affiliated bands, and although it has never been ratified by Congress, the Indians continue to occupy the reservation.

In a protest against the passage of the proposed bill to confirm to the Cheyennes and Arapahoes the reservation established by the Executive order of August 10, 1869, Niastor, chief of the Wichitas, and Big Man, chief of the Caddoes, with one Joseph Leonard, claiming to be a delegate for these Indians, stated that

"The Wichita, Caddo, and affiliated bands have never authorized their chiefs and delegates to enter into any agreement or treaty with the Government disposing of the lands belonging to said Indians, or to receive any consideration therefor, but said Indians have condemned and repudiated the so-called agreement of October 19, 1872, when they obtained knowledge of its existence, as unauthorized, and as deceptive and fraudulent in character, for the consideration mentioned therein the said Indians already possessed in their own right."

They denied that the Cheyennes and Arapahoes refused to locate upon or accept the lands given them by the treaty of October 28, 1867, and claimed that they want the land assigned them by the treaty, with the addition of that lying

between the Canadian and Cimarron Rivers, and that the Cheyennes and Arapahoes admit that the lands south of the Canadian belong to the Wichitas.

In a communication dated July 12, 1882, Joseph Leonard asked as a reserve for the Wichitas and affiliated bands all that part of the Indian Territory west of the ninety-eighth degree of west longitude, and south of the Canadian River, except the Kiowa and Comanche Reservation.

In view of these conflicting claims and the fact that the occupants of neither of these reservations had any permanent title, Special Agent Townsend was instructed, under date of January 20, 1883, to visit the two reservations for the purpose of ascertaining the wishes of the several tribes, their needs and requirements, so that an intelligent recommendation might be made to Congress, for the purpose of securing the necessary legislation to confirm to them reservation which would be sufficient for their wants and located as near as might be in accordance with their wishes.

Various communications have been received both before and since the date of Special Agent Townsend's instructions from General Albert Pike, Luther H. Pike, General W. B. Hazen, and others in support of the claims of the Wichitas to the country south of the Canadian.

Luther H. Pike, as counsel for Joseph Leonard, alleged delegate, submitted a printed brief of thirty-one pages, in which the history and claims of this tribe are fully set forth.

(It may be remarked that Joseph Leonard has failed to furnish any evidence that he is authorized to represent these Indians, although repeatedly requested to do so.)

In this brief Mr. Pike claims that the Wichitas, prior to 1867, and from time whereof the memory of man runneth not to the contrary, were in actual occupation of the country round about the Wichita Mountains, their oc-

cupation and use thereof extending north and south from Red River to the Canadian, and east and west from the ninety-eighth to the one hundredth degree of west longitude.

The title of the United States to this tract of country was originally acquired from the Quapaws by treaty of August 24, 1818. (7 Stat., 176.) It was ceded to the Choctaws by the treaty of October 18, 1820 (7 Stat., 277); made the common property of the Choctaws and Chickasaws by the treaty of June 22, 1855 (11 Stat., 611), by whom it was leased to the United States under the same treaty; and was ceded to the United States by the treaty of April 28, 1866. (14 Stat., 769.) This cession, Mr. Pike claims, was void, for the reason that the Quapaws, a branch or band of the Osage Nation, were not at the time, nor ever had been, occupants of the country, and that all subsequent transfers and repurchases, being based upon this cession, were null and void.

He also claims that at a council held at Fort Arbuckle July 1, 1859, the Wichitas, Caddoes, and the Texas Reserve Indians were promised this country by Superintendents Rector and Neighbors. He says Superintendent Rector—

"Described to each band the particular country selected for it. He informed them of the determination of the United States to establish a military post near their selected reservations, and with personal promise that he would use every effort in his power to see justice done them, he, in the name, and on behalf of the United States, guaranteed them protection from all harm by the United States; and that none would be permitted to intrude upon them, and that they and their children would be permitted to remain on the particular reservations selected for them, and have all the other country as a common hunting-ground and a range for their cattle as long as the waters should run."

He asks on behalf of these Indians that—

"The United States forthwith rescind and amend the Executive order of August 10, 1869, in so far as it embraces the country south of the main Canadian, that conferring with them, proper steps be taken by the United States to establish and make known in conformity with their agreement of July 1, 1859, the boundaries of their country by means of a patent or grant under the third section of the act of May 28, 1830 (4 Stat., 412), to the end that the lawless and rapacious may be deterred from troubling them, and they having their country secured to them by unquestionable title, may live there undisturbed and continue to walk in peaceful ways and be friends of the whites."

That these things being done, the United States shall in all other respects carry out the promises given at Fort Arbuckle; that there be not made for them some small reservation, thereby making improvements and development an impossibility; and that they be permitted to establish their right to the portion of their country claimed by the State of Texas; also their claims for the losses they have been made to suffer, and for compensation for that portion of their country allotted to the Comanches, Kiowas, and Apaches, and that what is justly due them on these accounts and under treaty stipulations be promptly paid to them.

In a communication dated April 14, 1883, received by Department reference, General W. B. Hazen calls attention to the subject of these Indians, and states that he feels specially interested in the question, having been their superintendent, and having without any intention aided in bringing about what he now desires to see corrected. He recites the action which led to the Executive order of August 10, 1869, which took away from the

Wichitas and affiliated bands all of the lands claimed by them not previously assigned to other tribes, and states that neither Superintendent Hoag nor himself could knowingly have recommended that the southern boundary of the Cheyenne and Arapahoe Reservation should have come south of the main Canadian. He most earnestly recommends that there be set aside, for a permanent reservation and home for these Indians, a tract of country between the Canadian, the Red River, and the Kiowa and Comanche Reservation, and between the 98th and 100th degrees of west longitude, and states that it would restore to them the reservation given them by Superintendent Neighbors in treaty, and confirmed by the Government in 1859.

From these statements and arguments it appears that the Wichitas found their claim to the country south of the Canadian, first, upon occupancy from "a time whereof the memory of man runneth not to the contrary," and, second, upon the promises made by Superintendents Rector and Neighbors at Fort Arbuckle on the 1st of July, 1859.

As to the first point, I quote from Special Agent Townsend's report, submitted July 26, 1883, as follows:

"Niastor, the present chief, related to me in open council the story of their migration as he had been taught it by his mother. Utstutskins, one of the oldest and best men in his tribe (now dead), related the same story to his agent in open council last January. The Wichitas are often referred to as Pawnee Picques, and they are proud of the evidence and proof of it in the tatooed marks upon their persons.

"It is a well known fact that the Pawnees were once a large and powerful and warlike people. It is also a well-known fact that they were driven by internecine wars from the upper waters of the Missouri, and migrated southward.

This part of their history dates back two hundred years, and is contemporaneous with the early history of the Wichitas."

He states that the Wichitas are an offshoot from the Pawnees, which gives a clew to their early history, which is substantially the same as that given by Utstutskins and Niastor, and is to this effect:

"That originally they were living upon the Missouri River; that warlike and hostile tribes came down the river and, greatly outnumbering them, drove them south and west from the Missouri River into the country at present occupied by the Osage Agency. They remained there and planted fields for a number of years, until at last that country became crowded, and the Wichitas sent out an exploring party west and south to look up a new location and home for them. This party returned and reported having found a beautiful country, when all the Wichitas pulled up stakes and started. They walked, as this was before they had seen any horses. They stopped at a big bend in the river, among sand hills, on the North Fork of the Canadian.

"They remained here about ——— years, when a party started off and located at the mouth of Otter Creek. They were also over in Texas—then Mexico. Most of their oldest men now living remember being on the Brazos River and at the mouth of the Little Wichita, many of them being born at the latter place. They were broken up in scattered bands, and when the old chief with the band on the Brazos died his band joined the band at the mouth of the Little Wichita, on the south side of the Red River in Texas.

"After remaining here for some years they crossed Red River again and went forth and located at Rush Spring, or on Rush Creek, in what is now the Indian Territory,

and joined other bands of their people who during these years had remained in and about that part of the country (*i. e.*, in and through and about the Wichita Mountains), never staying more than a few years in one location, which fact was due partly to their migratory habits and disposition and partly to the depredations of their hostile neighbors. Instead of the Wacos and Towaconies being separate Indians, or Texas or Plains Indians, as they are generally recognized and spoken of, they are Wichita Indians, offshoots from the parent stock which migrated south from where the present Osage Reservation is. * * *"

He concludes that they have no more foundation in fact for the claim to original occupancy of the tract claimed by them than they have to certain tracts or districts in Kansas, New Mexico, or Texas through which they may have roamed and where they may have sojourned temporarily.

This conclusion appears to be correct. The nature of the occupancy of the country by these Indians is not such as to impeach the title derived from the Quapaws, which has been recognized by subsequent treaties with the Choctaws and others.

It is true, as claimed, that the character and geographical situation of this country were but little understood at the time of the Quapaw cession, and it is possible that the title of the latter Indians was not much higher than that of the Wichitas. It has been recognized by the Government, however, and the evidence in favor of the Wichitas is not strong enough to invalidate it even if their claim had never been released.

In the second place the Wichitas based their claim to the country south of the Canadian upon the promises made by Major Neighbors and Superintendent Rector at Fort Arbuckle.

At a general council of the Wichita and other affiliated tribes convened at the Wichita Agency January 22, 1883, as certified to by William Shirley, interpreter, it was claimed by the various chiefs of the different bands that at the council at Arbuckle the Indians were promised the country extending from Red River to the Canadian and from the Chickasaw country (or the ninety-eighth degree of west longitude) to the Antelope Hills (near the one hundredth degree), and this is the claim made on their behalf by Mr. Pike and others. Reference to the contemporary correspondence concerning the council at Fort Arbuckle does not bear out this construction.

In a letter dated February 1, 1855, Superintendent Neighbors suggested the propriety of negotiating with the Choctaw delegation, then in Washington, for a tract of land lying on the east side of Red River (known as Cache Creek) near the Wichita Mountains, for the colonization of the Wichita Indians and such other Prairie Indians as might be convenient to that location. (This recommendation is a recognition of the fact that the Choctaws and not the Wichitas had the title to the country in question.) It is presumed that this suggestion ultimately led to the council at Arbuckle.

Troubles having arisen between the various tribes located in Texas and the frontiersmen of that State, it was determined to colonize these tribes in the Indian Territory, upon the lands leased from the Choctaws (the country now claimed by the Wichitas); Superintendent Neighbors was charged with this duty.

On the 30th of March, 1859, Superintendent Rector was informed that the want of a military post with an adequate force at the proper point had necessarily delayed the commencement of operations for colonizing the Indians in the leased country, including the Wichitas,

but that the War Department had determined to establish the post. He was therefore instructed to select a proper site for the agency in the same vicinity, and at the same time to fix upon a suitable location for the Wichitas and make such an examination of the country as would enable him to determine upon the proper place for locating and colonizing the Texas and other Indians, which it was intended to place within the leased district. In carrying out this policy the different bands were to be located upon distinct reservations, to be divided in severalty.

On the 2d of July, 1859, Superintendent Rector submitted his report in which he gives an account of his travels in search of suitable locations, describes those selected for the Delawares and Caddoes, Wichitas and others, and states that on the 30th of June he met Major Neighbors, who had arrived with the headmen of the Comanches, Huecos, Tanques, Tawacarros, Caddoes and Anadaghcos; that after Mr. Neighbors and himself had fully conferred together, the headmen of all the bands of those there, and of those in Texas, met in council, and were informed by them of the selections which had been made for their future homes; that they explained to the Indians the great pain and regret felt by the Government at being compelled so hastily to remove those in Texas to another country, but assured them that they would be paid for all losses thus incurred, and that after removal they would occupy a country belonging to the United States and not within any State, where none could intrude upon them, and they would remain, they and their children, as long as waters should run, protected from all harm by the United States; that to the Wichitas they also promised to endeavor to obtain remuneration for their losses, incurred in consequence of the hostility of the Comanches, provoked by the slaying of their people

encamped with peaceful intentions by the troops of the United States; and that the Indians expressed themselves entirely satisfied with the country selected for them.

It will be observed that the country selected was spoken of by these superintendents, who were well acquainted with both it and the Indians, as belonging to the United States and not to the Wichitas, they being present and expressing themselves as satisfied with the selection. They reported that the Indians were not prepared to take lands in severalty, and that such action would result disastrously. He states that the country around the Wichita Mountains should be reserved as common hunting ground.

On the 14th of July, 1859, Superintendent Neighbors submitted his report concurring in that of Mr. Rector. On the 18th of July, 1859, Superintendent Rector transmitted a sketch of the country then recently visited by him, showing the selections made for the Wichitas and Kichais, Delawares and Caddoes, and the several bands to be removed from Texas, which he says is a very accurate one.

This sketch shows the reservation selected for the Wichitas and Kichais to be immediately south of 35° 30′, north latitude and immediately west of the ninety-eighth degree of west longitude, being 13½ miles in length and 8 in width, and containing by calculation 69,120 acres.

The reservation selected for the Caddoes, Delawares, and Texas Indians is a few miles southwest of the Wichita selection, being 19 miles long and 7 miles wide, containing 85,120 acres; total, 154,240 acres. Both these reservations are within the reservation at present occupied by the Wichitas.

S. A. Blain, agent for the Wichitas, in a report dated January 15, 1859, advocates bringing the Shawnees and

Kickapoos to that agency, and states that he had invited the chiefs of the Kickapoos to bring their people to his camp and settle upon the same terms granted to the Wichitas and others. He also says that—

"The extent of the country, its fertility, its capability of sustaining a dense population, contradicts the position assumed that it was intended alone for the Wichitas, Keechies, and a few other trifling bands, all of whom collected and settled as contemplated will not make up a population of more than 4,000."

From these reports there does not appear to be any foundation for the claim that the agreement at Arbuckle gave the country south of the Canadian to the Wichitas. On the contrary, their reservation was exactly defined, it being suggested that the country around the Wichita Mountains be reserved as "common hunting ground."

Mr. Pike says that Superintendent Rector promised the Indians "that they and their children would be permitted to remain on the particular reservations selected for them, and have all the other country as a common hunting ground and range for their cattle as long as the waters should run." This statement is true as to the particular reservations only. Superintendent Rector does not state that he promised the country (except the reservations) to the Indians for any purpose, but says the country around the Wichita Mountains "ought to be reserved as common hunting grounds, for which alone nearly the whole of it is fitted." Not a word is said of a range for cattle.

In the absence of any agreement ceding their lands, therefore, it is believed that the claims of the Wichitas cannot be sustained, but unless the agreement entered into October 19, 1872, can be successfully impeached, they have parted with whatever rights they may have possessed prior to that time.

It will be observed that Mr. Pike in his printed brief is silent upon this point. Mr. Leonard, however, as before stated, claims that said agreement was unauthorized, deceptive, and fraudulent in character.

At the council before referred to, purporting to have been held January 22, 1883, the several chiefs stated that their people had never consented to give any part of their country away. To the proceedings of the council is appended the affidavit of Philip McCusker, interpreter, to the effect that he was in Washington with the delegation from the Wichitas and affiliated bands in 1872; that Commissioner Walker told them that he wanted to fix the western boundary of the reservation: that he had decided to establish it 10 miles west of Fort Cobb, but none of the Indians were willing to consent to this, as they claimed to the 100th meridian, or, as they stated it, about 6 miles west of Antelope Hills; that the Commissioner refused to take any further action; and that the Indians, without consenting to the line fixed by the Commissioner, returned to their homes.

J. J. Sturm, in an affidavit taken at the same time, deposes that he accompanied the delegation to Washington; that the Commissioner told them that he had brought them to Washington to tell them where the boundaries of their reservation would be fixed, and first spoke of making Cobb Creek the western boundary, to which all of the Indians wanted to protest, but the Commissioner would not permit them to talk; that the Commissioner finally said that he would fix the boundary so as to take in the headwaters and tributaries of Cobb Creek, which was substantially the same as had been determined on by the Commissioner, and to which the Indians were unwilling to consent, although they finally signed a paper to that effect under protest, which has never been ratified by the

tribes; and that when they returned home they were abused by their people because they had signed such a paper.

William Shirley, interpreter, also testified to the same effect, stating that the delegation alleged that they had not been delegated by their people to cede any part of their country, or to relinquish any rights they might possess. These interpreters also testify that as the agreement has never been ratified either by the tribes or by Congress the Indians regarded it as void.

Special Agent Townsend reports that the Indians repudiate and reject the unratified agreement, and claim that they were coerced into signing it; that all but three of the signers are dead; that from two of them he could gain but little satisfaction, but that George Washington, a very reliable and intelligent man, and one of the signers, told him that at the time of the signing of that agreement the Indians did fully understand the conditions and terms of the papers they were signing; that at first Commissioner Walker proposed to run the western boundary near old Fort Cobb, but upon the Indians objecting, the lines were carried beyond the timber farther west, and then they, the Indians, were satisfied; that this is corroborated by the statements of others; and from the fact that by this agreement they obtained 589,517.19 acres more than was originally assigned them by the promises made at Fort Arbuckle, it is fair to presume that they were satisfied.

That this agreement was signed by all of the delegates from the different bands present in Washington, nine in number, does not admit of question. As to their authority to make such an agreement, the report made October 10, 1872, by Special Commissioner Henry E. Alvord, under whose charge they were brought to Washington, furnishes important information. He says:

"The Caddoes, Wichitas, and affiliated bands have yet no country which they can call their own; and it is very important that they should be satisfied in this respect. Most of the Indians of their agency are on the north side of the Washita River and south of the Canadian, but some are in the Eureka Valley and below, on the Comanche Reservation. To allow their occupation of any part of a reservation already set apart formally for other tribes will cause confusion and difficulties. There is a fine country between the Canadian and Washita Rivers never yet specially assigned, and abundant for these people. Every tribe and band of them are represented by chiefs or headmen in the delegation, prepared to discuss and settle their reservation question at the present visit, and I trust the matter will be fixed before they return to their people. After a careful consideration of this subject, extending through the past five years, and thorough discussion of it with the Indians interested, I recommend that the country between the main channels of the Canadian and Washita Rivers, from west longitude 98 to 98.30, be set apart for a permanent reservation for the Caddoes, Wichitas, and affiliated bands." (Annual Report, 1872, p. 140.)

This is the tract of country included in the agreement, except that the latter extends some ten miles farther west. Of the Caddoes he says: "The most important matter for this tribe is the final adjustment of their reservation question" (page 139). Of the Wichitas and their affiliated bands he says: "These tribes are interested, like the Caddoes, in the settlement of their reservation question are prepared by their delegates to fix the matter during this visit."

The Commissioner of Indian Affairs, Hon. Francis A Walker, in his annual report for 1872, referring to the Wichita Agency, says:

"A permanent reservation should be set aside for this agency. * * * In the chapter of this report containing specific recommendations for legislation to be had by Congress at its approaching session will be found the text of an agreement between these bands and the Commissioner of Indian Affairs, by which the Indians relinquished all their claims on account of lands formerly held by them, and of which they were dispossessed without their consent, and the Government on its part confirms to them the tract now in fact occupied by them. Effect should be given to this agreement by Congress at as early date as practicable. The claims relinquished have been long before Congress, and may or may not have merit, a question not here considered; but it is equally for the interest of the Government and of the Indians that these bands should be put as early as practicable in the way of self-support, a result which will be greatly forwarded by confirming to them a permanent home." (Page 44.)

These extracts show that this delegation had authority to make the agreement. They also show that the consideration for the relinquishment of their claims to land was the fact that by such relinquishment they secured undisputed title to a large tract of country, their right to which had theretofore been questioned.

There is no question in my mind but that the Wichitas and affiliated bands, by the agreement of October 19, 1872, relinquished all claims which they might have had before that date to any and all lands within the United States, except the reservation now occupied by them; and had the agreement been confirmed by Congress at the time, as it should have been, its validity would never have been disputed or questioned.

It is also claimed on behalf of the Wichitas that they were promised remuneration for their losses incurred in

consequence of the hostility of the Comanches, provoked by the slaying of so many of their people by the troops of the United States, and the consumption of their fields of corn by those troops, and on behalf of the Texas Indians that they were assured that they would be paid for all losses incurred by reason of their hasty removal.

As to the claim of the latter Indians, Superintendent Neighbors reported, under date of September 3, 1859, that on the 1st of that month he turned over to Superintendent Rector all the Indians and Government property, after returning to the Indians all their property of every name and nature.

Superintendent Rector submitted an estimate of funds required for the Wichitas and affiliated bands and for the "Texan Indians" for the fiscal year ending June 30, 1861, aggregating $137,667.50, including an item of $10,000 for building houses in lieu of those abandoned in Texas.

An aggregate appropriation was made of $121,260 for these Indians, one of the purposes named being "for building houses in lieu of those abandoned in Texas" (12 Stat., 56), and this phrase is repeated in the appropriation bills for the succeeding years up to and including the year 1864, the amount appropriated for the Texas Indians being $22,825, and for the Wichitas $37,800, annually. The same amount was also appropriated for the year ending June 30, 1865, and smaller amounts for succeeding years. For the year ending June 30, 1871, $40,000 was appropriated to promote the civilization, comfort, and improvement of the Wichitas and other affiliated bands and Indians in country leased from the Choctaws; and appropriations varying in amount from $15,000 to $50,000 have been annually made since that year for the same purpose.

These Indians are not entitled to annuities by any treaty

stipulations, and it is believed that the liberal appropriations made by Congress for their benefit during the last twenty-three years have amply discharged any and all obligations, moral or legal, resting upon the Government on account of promises made by its agents at Fort Arbuckle or elsewhere.

I have gone into this question at considerable length because of the extravagant claims made in behalf of the Wichitas, and because of the various and respectable sources from which appeals in their favor have been received, but from a thorough examination of the papers submitted and the records and correspondence on file, I am convinced that the only obligation now resting upon the Government is that of confirming to these Indians by a secure and permanent title the lands now occupied by them. To this end the agreement of October 19, 1872, should be ratified by Congress and the title confirmed by patent.

Special Agent Townsend, in concluding his report as to the Wichitas, says their claims—

"Are of long standing, and their rights should be defined and guaranteed to them by some authority from which there shall be no appeal. Emigration and civilization are pressing upon these people on all sides, and the imperative necessity for prompt action in the premises must be apparent without further argument."

With this conclusion I fully agree; I also believe that security of title is one of the surest safeguards for the Indians, and that such security is absolutely necessary for their improvement and self-support. It is also necessary for the purpose of avoiding troublesome questions in the future. Similar action should be taken regarding a reservation for the Cheyennes and Arapahoes.

It is claimed on behalf of the Wichitas that the Execu-

tive order of August 10, 1869, was only intended as a temporary measure to provide for these Indians until Congress could insure a permanent reservation, and such was undoubtedly the case. It is also claimed that the act of May 29, 1872, limited the Department in the selection of a reservation to the lands ceded by the Creeks and Seminoles, and such construction appears to be warranted by the terms of the act. Negotiations were had, however, and an agreement reported to Congress by which the Cheyennes and Arapahoes relinquished their treaty reservation and accepted one within the Creek and Seminole country, but Congress refused or neglected to ratify the agreement. It is therefore thought that the authority conferred by the act of May 29, 1872, is exhausted, and that the Department is at liberty to make such arrangements, subject to the approval of Congress, as it may deem expedient.

The Wichitas also claim that the Cheyennes and Arapahoes do not desire any portion of the country south of the Canadian, in support of which assertion they forwarded a paper purporting to be signed by eight chiefs of the Cheyennes and Arapahoes. Regarding this paper, Special Agent Townsend reports that the Cheyennes and Arapahoes, in joint council with the Wichitas, in the presence of himself and Agents John D. Miles and P. B. Hunt, repudiated it as false and fraudulent from beginning to end, conceived in malice and obtained through intrigue and deceit.

He further says:

"The Cheyennes and Arapahoes have repeatedly been assured by the authorities in Washington that they should remain upon and be protected in the possession of their present reserve. By recent leases effected with white men for a portion of their country for a period of ten

years, with the knowledge of the Department, they are strengthened and fortified in their possessions and the rights guaranteed them through said Executive order. They appreciate fully the revenues to be derived from these leases, and will under no circumstances relinquish these advantages unless compelled to do so by force. In my judgment any attempt to dispossess them will result in bloodshed and probably lead to a desperate Indian war. The amount of land per capita at present held by the Cheyennes is 583 acres, that of the Wichitas 576 acres, a comparatively small and insignificant difference, while the actual wants and needs of each tribe are about the same."

The area of the present reservation is about the same as that of the one secured by the treaty.

In view of the length of time the Cheyennes and Arapahoes have been permitted to occupy this reservation, and the failure of Congress to act upon the agreements made, I believe that the best and wisest plan is now for the Government to confirm their title to the same, less the Wichita reservation, and to declare the treaty reservation restored to the status it held prior to said treaty.

It is proper to add that the title to that portion of the Cheyenne and Arapahoe Reservation as established by the Executive order of August 10, 1869, not included in the tract claimed by the Wichitas, was acquired from the Creeks and Seminoles by the treaties of June 14, 1866 (14 Stat., 785), and March 21, 1866 (14 Stat., 755), respectively.

In accordance with these views, I have prepared drafts of a bill providing for the issuance of patents to the Wichitas and affiliated bands, and to the Cheyennes and Arapahoes, for the reservations occupied by them, respectively, with the condition that the lands shall revert to the United States if the Indians become extinct or abandon the same.

The western and southern boundaries of the Cheyenne and Arapahoe Reservation are incorrectly described in the Executive order of August 10, 1869, as follows:

"Thence south on the line of said one hundredth degree to the northern boundary of the country set apart for the Kiowas and Comanches by the second article of the treaty concluded October 21, 1867, with said tribes; thence east along said boundary," &c.

The treaty of October 21, 1867, fixes the north boundary of the Kiowa and Comanche Reservation as follows:

"Thence due west to the North Fork of Red River, provided said line strikes said river east of the one hundredth meridian of west longitude; if not, then only to said meridian line," &c.

By actual survey the north line of this reservation was found to strike the North Fork of the Red River some 30 miles east of the one hundredth meridian. Hence a continuation of the west boundary of the Cheyenne and Arapahoe Reservation along the one hundredth meridian would not strike the north boundary of the Kiowa and Comanche Reservation.

I have therefore corrected this inaccuracy by extending the west boundary south on the line of the one hundredth degree of west longitude to the point where it strikes the North Fork of the Red River, thence down said North Fork to the point where it strikes the northwest corner of the Kiowa and Comanche Reservation, thence along the north boundary of said reservation, &c.

I inclose two copies of the proposed bill, and also copies of the correspondence relating to the matter.

Very respectfully, your obedient servant,

H. PRICE,
Commissioner.

The SECRETARY OF THE INTERIOR.

KIOWA, COMANCHE AND WICHITA AGENCY,
ANADARKO, IND. T., *January* 22, 1883.

At a general council of the Wichita Indians and other affiliated tribes, convened this day at the office of the agent for the purpose of presenting their claim to all of the country in the Indian Territory lying west of the ninety-eighth meridian and south of the Canadian River, the following was said in open council, as interpreted by William Shirley:

NIASTOR, chief of the Towa·onies, says:

He remembers well, when he was a boy living with his people on the Brazos River, in Texas, that Major Nabors convened a council of Indians there, and told them that they were to possess that country for a home; that it would not be taken away from them; that there would be a school-house built for them and a teacher furnished them, and other promises were made. We lived there a few years in peace until the white people commenced encroaching upon us and making trouble. It was not long after this when Major Nabors told us if we would consent to give up our homes on the Brazos that we would be given a larger country on the north side of Red River. Soon afterwards our chief men went to Arbuckle, invited there to meet three white chiefs from Washington. This was in 1859. Our chief men heard all the promises that were made by the white chiefs at Arbuckle and then returned to our people on the Brazos.

After returning, our chief men called a council of all the Indians then living on the Brazos. O-chil-las, chief of the Towaconies, then told our people what had been said by the white chiefs at Arbuckle. The white chiefs promised that if we would give up our country on the Brazos

the Great Father at Washington would give us a larger country, extending from Red River to the Canadian and from the Chickasaw country to the Antelope Hills, which country should be ours forever.

General Albert Pike was one of the white chiefs at Arbuckle, and knows what promises were made to our chief men.

It was because of the promises there made that our people, and their friends the Wacoes and others, consented to give up their country on the Brazos, leaving their hogs, chickens, and other property behind, and come north to the country promised them.

Our people, after crossing Red River, traveled north until they met their friends the Wichitas on the south side of the Washita River, near where the commissary building now stands; the Wichitas having come up from near Arbuckle. After arriving here, we were shown the country we were to have for our homes, and were told that, with the Wichitas, we should possess it forever.

ES-QUETCH-CHEE, Wichita (Old Man), says:

He is about 85 years of age; was born on Red River not far from the mouth of the Big Wichita. When I was a boy the chief of the Wichitas was killed, and after that my people moved into the Wichita Mountains, and had many villages. When I became a man I moved with some of my people to Rush Springs, east of where Fort Sill is now, where we made farms and had everything plenty; never wanted for anything. We lived there a great many years, quiet and peaceable, until soldiers came there in search of Comanches who were camped near our village, buying corn and watermelons from us, and who had before coming to our village committed depredations on the frontier in Texas.

The soldiers had first searched through the Wichita Mountains, and were under command of Major Van Dorn. When they came to our village they had Towaconie, Waco, Keechi, and Caddo scouts with them. Some days before they came the Towaconie and Waco scouts had been sent out by Major Van Dorn to look for the Comanches. These scouts came to us as friends and relatives, and we told them that there was a large camp of Comanches on Rush Creek a short distance from our village, and that night the scouts left our village without our knowledge, which made us uneasy.

The next day, soon after daylight, the soldiers came, led by the Towaconie and Waco scouts, and had a fight with the Comanches, killing a great many. My people then became afraid, because the Comanches knew the Wacos and Towaconies were friends of ours and had been to our village the day before, and had returned to Major Van Dorn, and told him where the Comanches were camped. We thought it best to abandon our fields of corn and go and live near Arbuckle, until we knew the Comanches would not molest us.

When arriving at Arbuckle we were destitute, having left everything in the way of food at our village on Rush Creek. We asked the commanding officer for rations, telling him we had nothing to eat. We then had beef issued to us, the first we ever received from the white man. We lived a while on Caddo Creek, but moved near Arbuckle, to a clump of timber, where we received beef.

UTS-TUTS-KINS (Wichita):

The following statement was made by Uts-tuts-kins in the spring of 1882, several months before his decease. He was said to have been the oldest member of the Wichita tribe. His statement was written down at the time, as

follows, viz: Tradition says, my people, the Wichitas, long ago came from a far off country and walked down. They used only bows and arrows. Men came in wagons on Missouri River and issued trinkets, &c., to them. After that our people came south; a party went ahead and struck Comanches who had horses; said they had caught them wild; and Wichitas then did the same, which was the first the tribe had.

Afterwards the young chief concluded would all move to Neosho; after living there some time they moved to Salt Fork, and from there to the Red Hills on the North Fork of the Canadian, where they made corn three years, and then moved to mouth of Otter Creek, on North Fork of Red River, and divided into three parties—one to the mouth of the Little Wichita on main Red River, and one to Clear Fork of Brazos, and the other remained at the mouth of Otter Creek.

The chief at mouth of Otter Creek died, and his people joined those at mouth of Wichita, and in five years the chief died at Clear Fork, and his people joined those at mouth of Wichita, and all were together again and lived there a long time. I (Uts-tuts-kins) was born at the mouth of the Wichita. While we lived there white men came in search of money, had a little fight, and whites left.

Afterwards Wichitas disagreed as to where they should stop, but went to mouth of Cache Creek. I was then young. At Cache Creek had trouble with Osages, and wounded our chief in cheek; and then we had small-pox, and lost more than half our people; from there we moved to mouth of Otter Creek. I was then 11 years old. While at mouth of Otter Creek I concluded to go with some young friends on warpath east, and saw no Indians, but when coming home found long trail made by Indians or whites, but when we got home found soldiers holding

council. Soldiers come with boy they had captured at Coffey's Bend on Red River. Our chief said we would some day have to do as whites do. This was just 48 years ago. Moved from Otter Creek to where Fort Sill is now, and remained 6 years. Our big chief was buried there, and we afterwards moved to Rush Springs. We lived there about 8 years when Van Dorn had fight with Comanches near our place; that was in 1858. We then moved to Caddo Creek, near Fort Arbuckle; found Indians and soldiers and considered them intruders, but did not care to make any trouble with them.

The above and foregoing is a correct translation of statement made by Uts-tuts-kins in the spring or summer of 1882.

WM. SHIRLEY,
U. S. Indian Interpreter.

No. 77. Captain R. B. Marcy's exploration of 1852. Sen. Ex. Doc. No. 54, 32d Cong., 2d sess., pp. 69, 77, 84.

Extract.

The particular district embracing the Witchita mountains has for many years been occupied and (with much justice, as it seems to me) claimed by the Witchita Indians, who have a tradition that their original progenitor issued from the rocks of these mountains, and that the Great Spirit gave him and his posterity the country in the vicinity for a heritage, and here they have continued to live and plant corn for a long time.

Notwithstanding this claim of the Witchitas, which the right of occupancy and possession has guarantied to them, yet the whole of this beautiful country as far as the

100th degree of west longitude is included in the grant made by the United States to the Choctaws who thereby possess the greater part of the lands upon the upper Red river that are really valuable.

The Witchitas are an insignificant tribe in point of numbers, not having more than five hundred souls in the nation, and are not of course prepared to substantiate or enforce their title to this country; and, indeed, I very much doubt if they have any claims upon the consideration or generosity of our government, being the most notorious and inveterate horse thieves upon the borders.

We reached the villages (which were situated upon the banks of Rush creek) and encamped about a half a mile below them in the valley. * There are two villages here occupied by the Witchitas and Wacos, respectively. * The village of the Witchitas has forty-two lodges, each containing two families of about ten persons. * With the exception of a few families that live upon the Canadian, the whole Witchita nation is concentrated at this place; their numbers do not exceed five hundred souls. They have, during the early settlement of Texas, been more trouble to the people upon the northern borders of that state than any other Indians. They have no regard for truth, will steal, and are wholly unworthy of the least confidence, and their vicious propensities are only kept in check now from fear.

The Wacos live about a mile above the Witchitas in a village constructed precisely like the other. There are twenty lodges in this village and about two hundred souls; their habits and customs are similar to the Witchitas, with whom they frequently intermarry and are upon the best and most friendly terms. Both of these tribes subsist for a great portion of the year upon buffalo and deer. * They have a large stock of horses and mules, many of

which are the small Spanish breed with the Mexican brand upon them; * while others are large, well-formed animals, and have undoubtedly been stolen from the border white settlers. *

On emerging from the timbered lands upon Red river into the great plains, we pass through a strip of forest called the Cross Timbers. This extensive belt of woodland, which forms one of the most prominent and anomalous features upon the face of the country, is from five to thirty miles wide and extends from the Arkansas river in a southwesterly direction to the Brazos, some four hundred miles. At six different points where I have passed through it I have found it characterized by the same peculiarities, the trees consisting principally of post oak and black-jack, standing at such intervals that wagons can without difficulty pass between them in any direction.

No. 78. From Journal of Dunbar and Hunter, October, 1804.

From this place they proceeded to the mouth of the Washita, in latitude 35° 37′ 7″ N., and encamped on the evening of the 23d.

This river derives its appellation from the name of an Indian tribe formerly resident on its banks; the remnant of which, it is said, went into the great plains to the westward, and either compose a small tribe themselves, or are incorporated into another nation. Am. St. Papers, Ind. Aff., vol. 1, p. 732.

No. 79. Seventh annual report of the Bureau of Ethnology, Washington, D. C., 1891.

Caddoan Family.

* * * * * *

The Pawnee and Caddo, now known to be of the same linguistic family, were supposed, by Gallatin and many later writers, to be distinct; and accordingly both names appear in the Archæologia Americana as family designations. Both names are unobjectionable; but as the term Caddo has priority, by a few pages, priority is given to it. * * The boundaries of the Caddo family, as at present understood, can best be given under three groups, northern, middle and southern.

Northern Group. This comprises the Arikara or Ree. * The Arikara are the remains of ten different tribes of 'Pancas.' * Fort Berthold Reservation, their present abode, is in the northwest corner of North Dakota.

Middle Group. This includes the four tribes or villages of Pawnee, the Grand, Republican, Tapage and Skidi. Dunbar says: 'The original hunting ground of the Pawnee extended from the Niobrara,' in Nebraska, 'south to the Arkansas; but no definite boundaries can be fixed.' In modern times, their villages have been on the Platte river, west of Columbus, Nebraska. *

Southern Group. This includes the Caddo, Wichita, Kichai and other tribes, or villages, which were formerly in Texas, Louisiana, Arkansas, and Indian Territory. The Caddo and Kichai have undoubtedly been removed from their priscan habitats; but the Wichita, judging from the survival of local names (Washita river, Indian Territory, Wichita Falls, Texas), and the statement of La Harpe, are now in, or near, one of their early abodes. * This duplication of names seems to show that the Wichita migrated, from northwestern Louisiana and southwestern Arkansas, to the Indian Territory. After comparing the statements of Dr. Sibley (as above), respecting the habitats

of the Anadarko, Ioni, Nabadache and Eyish, with those of Schermerhorn, respecting the Kädohadacto, of Le Page du Pratz (1758), concerning the Natchitoches, of Tonti and La Harpe about the Yatasi, of La Harpe (as above), about the Wichita, and of Sibley, concerning the Kichai, we are led to fix upon the following as the approximate boundaries of habitat of the southern group of the Caddoan family: Beginning, on the northwest, with that part of Indian Territory now occupied by the Wichita, Chickasaw, Kiowa and Comanche reservations, and running along the southern border of the Choctaw reservation to the Arkansas line; thence, due east, to the headwaters of the Washita, or Witchita, river, Polk County, Arkansas; thence, through Arkansas and Louisiana, along the western bank of that river, to its mouth; thence, southwest, through Louisiana, striking the Sabine river near Salem and Belgrade; thence, southwest, through Texas, to Towak-onay Creek, and, along that stream, to the Brazos river; thence, following that stream, to Palo Pinto, Texas; thence, northwest, to the mouth of the North Fork of Red river; and thence to the beginning.

No. 80. On the 12th of July, 1820, Secretary Calhoun addressed the following letter to General Jackson:

DEPARTMENT OF WAR, *July* 12, 1820.

DEAR SIR: I have received your letter of the 19th ultimo, and am happy to find that you have consented to serve as a commissioner to hold a treaty with the Choctaw Indians, and I herewith enclose your commission and instructions.

I cannot designate particularly the lands which it would be desirable to give to the Choctaws, in exchange for theirs, not being sufficiently acquainted with the localities

of the country, west of the Mississippi, belonging to the United States. In my general letter of instructions to the commissioners, you will observe that they may be located anywhere on the Quapaw purchase, and I should suppose the farther to the south and west the better.

I have the honor to be, &c.,

J. C. CALHOUN.

General ANDREW JACKSON,

Nashville, Tennessee.

The first meeting of the commissioners and Choctaws, in council, occurred October 10, 1820. Only a few Choctaws were present. The minutes of the council, for that day, are printed on pages 235 to 237 of volume 2, American State Papers, Indian Affairs, commencing as follows:

OCTOBER 10, 1820.

In conformity with an appointment made by the commissioners, they met the chiefs, headmen and warriors of the Choctaw nation, in council, this day. They informed them that, although their runners had not returned, yet they had determined to deliver a talk to those now present. They also observed that the same talk would be given to those who were absent, as soon as they arrived. It was as follows: * *

This "talk" contained no reference to the boundaries of the proposed cession.

The Choctaws next met the commissioners, in council, October 14, 1820. The minutes of the commissioners, for October 13, 1820, contain the following entry. Id. p. 238.

OCTOBER 13, 1820.

Puck-she-nub-bee, a principal chief of the nation, informed the commissioners that some of his headmen and warriors were disposed to go into council, and it was the

wish of others to have a ball-play. He stated that he did not wish to mix his businesss, but to do one thing at a time. The commissioners replied that his view of the duty set was a correct one; that if his headmen and warriors were disposed to indulge themselves in amusement, it might be proper to gratify them, as they had no disposition to hurry them, in their determinations. This chief then remarked that they would proceed, on to-day, with the ball-play, and on to-morrow go into council. In the meantime he expressed a wish that the commissioners would furnish their definitive propositions; which were accordingly submitted to them, in manuscript, late this evening. The following is a copy:

CHOCTAW TREATY GROUND, *October* 13, 1820.

Friends and Brothers:

In order to carry into effect the grand and friendly object, which your father, the president of the United States, has in view, for securing the happiness and protection of all his Choctaw children, he proposes to give you a large country west of the Mississippi river. It will be laid off adjoining your Cherokee brothers, so that each can protect and befriend the other. THE LIMITS WILL EXTEND FROM THE ARKANSAS RIVER, WHERE THE CHEROKEE LINE BEGINS, SOUTH TO THE RED RIVER, AND WEST TO THE HEAD SOURCE OF THE ARKANSAS RIVER. Your father, the president, wishes to collect all his Choctaw children, who have already gone over the Mississippi, as well as those who are straggling about in every direction.

No. 81. Copies of papers in the Indian office, contained in a wrapper marked "Papers relating to council held at Fort Smith, 1865."

ADDRESS OF THE COMMISSIONERS.

BROTHERS: After considering your speeches, made yesterday, the Commissioners have decided to make the following reply and statement of the policy of the government:

Brothers: We are instructed by the President to negotiate a treaty, or treaties, with any, or all, of the nations, tribes, or bands of Indians, in the Indian Territory, Kansas, or of the plains west of the Indian Territory and Kansas.

The following named nations, or tribes, have, by their own acts, by making treaties with the enemies of the United States, at the dates hereafter named, *forfeited all right to annuities, lands, and protection by the United States:*

The different nations and tribes having made treaties with the rebel government are as follows, viz:

The Creek Nation, July 10th, 1861; Choctaws and Chickasaws, July 12th, 1861; Seminoles, August 1st, 1861; Shawnees, Delawares, Witchitaws and affiliated tribes, residing in the leased territory, August 12th, 1861; the Comanches of the Prairie, Aug. 12, 1861; the Great Osages, Oct. 2d, 1861; the Senecas, Senecas and Shawnees (Neosho Agency), Oct. 4th, 1861; the Quapaws, Oct. 4th, 1861; the Cherokees, Oct. 7th, 1861.

By these nations having entered into treaties. with the so-called Confederate States, and the rebellion being now ended, they are left without any treaty whatever, or treaty obligation for protection by the United States.

Under the terms of the treaties with the United States, and the law of congress of July 5th, 1862, all these nations and tribes *forfeited and lost all their rights to annuities and lands;* the President, however, does not desire to

take advantage of, or enforce the penalties for, the unwise actions of these nations.

The President is anxious to renew the relations which existed, at the breaking out of the rebellion.

We, as representatives of the President, are empowered to enter into new treaties with the proper delegates of the tribes located within the so-called Indian Territory, and others above-named, living west and north of the Indian Territory.

Such treaties *must* contain substantially the following stipulations:

1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.

2. Those settled in the Indian Territory must bind themselves, when called upon by the government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the territory, and with the United States.

3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes, on an equal footing with the original members, or suitably provided for.

4th. A stipulation, in the treaties, that slavery or involuntary servitude shall never exist in the tribe, or nation, except in punishment of crime.

5th. A portion of the lands, hitherto owned and occupied by you, *must be set apart for the friendly tribes*, now in Kansas, and elsewhere, on such terms as may be agreed upon by the parties and approved by government, or such as may be fixed by the government.

6th. It is the policy of the government, unless other

arrangements be made, that all the nations and tribes, in the Indian Territory, be formed into one consolidated government, after the plan proposed, by the Senate of the United States, in a bill for organizing the Indian Territory.

7th. No white person, except officers, agents and employes of the government, or of any internal improvement authorized by the government, will be permitted to reside in the territory, unless formally incorporated with some tribe, according to the usages of the band.

Brothers: You have now heard and understand what are the views and wishes of the President; and the Commissioners, as they told you yesterday, will expect definite answers, from each of you, upon the questions submitted.

As we said yesterday, we say again, that, in any event, those who have always been loyal, although their nations may have gone over (to) the enemy, will be liberally provided for and dealt with.

The foregoing address bears the following endorsement:

We propose to renew the treaty stipulations that existed previous to, or at the breaking out of, the rebellion, so far as regards the annuities.

The govmt. will insist on purchasing a portion of their lands, for the settlement of friendly Indians.

No part of any moneys expended by the President, in providing for the relief of destitute Indians, which were reduced to want on account of their friendship to the govmt. will be refunded.

A stipulation of general amnesty must be incorporated, and *no individual shall be proscribed, or any act of confiscation, or forfeiture, passed*, against those who remained friendly to the U. S.; but they shall enjoy equal privileges with the other members of the nations.

REPLY OF THE CHOCTAW AND CHICKASAW COMMISSIONERS.

FORT SMITH, ARK., 19*th Sept.*, 1865.

The committee on the part of the Choctaws and Chickasaws reply to the propositions made, on the part of the United States, as the basis of new treaties,

That we are pleased to learn that you propose to renew your previous relations with us, and we are willing to go into negotiations for the making of a new treaty with the United States, and, as a basis of this new treaty, accept Art. 1st and 7th.

In reference to the requirements of the 2d article, we desire to say that we wish, as far as possible, to avoid coming in conflict with our red brethren, should any of them be so unfortunate as to get into conflict with the United States authorities. We are willing to guaranty our influence in favor of peace, in all its bearings, with our red brethren, and will not object to any of our citizens volunteering for service in any war, in which the United States may become involved, for the aiding of the United States.

We are willing to enter into negotiations for the settlement of all the points contained in the 3d and 4th articles.

On certain terms, on which we can doubtless agree with you, *we are willing to admit the settlement of other tribes* within our territory, as proposed in the 5th article.

We are willing to submit the territorial bill, referred to in the 6th article, for the consideration of our respective councils, and, for this purpose, request a copy of that bill for the principal chief of the Choctaw nation, and for the governor of the Chickasaw nation.

We accept art. 7th, and are willing to have the provisions thereof incorporated into the treaty.

We are also willing to incorporate a provision that no

individual shall be proscribed, or any act of forfeiture, or *confiscation, passed*, against those who remained friendly to the U. S., and that they shall enjoy equal privileges with other members of the nation.

R. M. JONES,
Chairman of the Committee of
Choctaw and Chickasaw Comrs.

FORT SMITH, ARK., *Sept. 16th*, 1865.

The Honorable Commissioners on the part of the United States.

GENTLEMEN: The Southern Seminoles have considered the ultimate propositions, so far laid down by you, and cordially assent to all but the third and sixth.

We know the abolition of slavery to be a fact throughout the United States. We are willing to recognize that fact, by the proper acts of our council.

But the proposition to "incorporate" the freed negro with us, on an "equal footing with the original members" of the Seminole tribe, is presented to us so suddenly that it shocks the lesson we have learned, for long years, from the white man as to the negro's inferiority. We honestly think that both the welfare of the Seminole and the freed negro would be injured, if not destroyed, by such "incorporation." The emancipated black man must, of necessity, be "suitably provided for." Such provision requires time and consultation as to how it shall best be done, and we, consequently, beg the indulgence of further time before we decide. We, however, bind ourselves to agree, in good faith, to any wise plan which shall be deemed just and equitable to all parties.

The proposition touching the consolidation of all the tribes and fragments of tribes, into one government, is

one of so great moment and interest to us that we must request time for its due consideration. The plan proposed by the United Senate may be a good one. We have not seen it, but would like to do so and lay it before our council, so as to enable our people to determine thereupon. We will, however, cheerfully agree to any plan which may be adopted by the other nations of the Indian Territory, and sanctioned by the President of the United States.

Our country is a small one and remote. It will neither bear a location, within its borders, of a numerous or an unruly tribe.

Our course, during the past four years has been what we considered an honest one. We were in earnest, in pursuing it. We shall be equally earnest, in fulfilling all relations which we may enter into, in this convention, or hereafter in others, with the United States; and we here announce to you and the government that you may discover that a once earnest enemy can become a better citizen, a more faithful liege, than those who make pretense to fealty on account of interest.

We beg to assure you that we desire nothing more ardently than peace with the United States, peace with our brother Indians, peace among ourselves.

Very Respectfully, Your Obt. Servts.,

James Factor,	his x mark.
Fooshatchee Cochucme,	his x mark.
George Cloud,	his x mark.
Pa-sucah Yohola,	his x mark.
John Brown,	his x mark.

Seminole Delegates.

We, the delegation on the part of the loyal element of the Choctaw people, came here, with the expectation of

meeting our Southern Brethren here, and to see what sort of a treaty would or could be made with the government of the United States. We are not authorized to make, sign, or enter into any treaty stipulations with the government of the United States, on the part of the Choctaw nation; but were selected by the agent for the Choctaw and Chickasaw Indians, by and with the advice and consent of the loyal portion of the Choctaw people, to represent and show to the commissioners on the part of the United States that there are some loyal Choctaws yet, in order that we might not be forgotten or overlooked by the commissioners, but that we might be properly provided for, &c.

In answer therefore to your propositions to the several tribes of Indians, we say that the 1st, 2d, 3d, 4th, 5th and 6th articles meet our approval. We respectfully suggest that the 7th article may be modified or changed to read thus:

No white person, except officers, agents and employes of the government, or of any internal improvement authorized by the government of the United States, also, no person of African descent, except our former slaves, or free persons of color, who are now, or have been, residents of the Territory, will be permitted to reside in the Territory, unless formally incorporated with some tribe, according to the usages of the band.

WM. S. PATTON.
ROBT. B. PATTON.

No. 82. Draft of treaty submitted by the United States commissioners at Fort Smith. (Not signed.)

Articles of agreement and convention between the United States and the Choctaw and Chickasaw tribes of Indians,

made and concluded at Fort Smith, Arkansas, the — day of September, A. D. 1865, by D. N. Cooley, Elijah Sells, Ely S. Parker, and Thomas Wistar, commissioners on the part of the United States, and the delegates of the Choctaw and Chickasaw tribes of Indians, signing this instrument.

Art. 1. Peace and friendship are hereby firmly established between all the citizens of the United States and all the individuals comprising the aforesaid tribes; and all the friendly relations that existed between them before the rebellion, shall be and the same are hereby renewed.

Art. 2. The Choctaw and Chickasaw tribes of Indians do hereby bind themselves to use their influence, and whenever called upon by the Government to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians of the Territory and with the United States.

Art. 3. The Choctaw and Chickasaw tribes of Indians, hereby admit, that the institution of slavery is abolished, and that slavery or involuntary servitude shall never hereafter exist in either tribe, except in punishment of crime, whereof the party shall have been duly convicted, and they promise and agree that measures shall be immediately taken by their respective national councils, to properly provide for such emancipated slaves as may have belonged to the members of the respective tribes; such provision to be subject to the approval of the President of the United States.

Art. 4. The Choctaw and Chickasaw tribes of Indians, hereby agree to open their country to the settlement of friendly Indians from Kansas and elsewhere, upon such terms as may hereafter be agreed upon by the respective parties and approved by the Government, and the Government may settle such friendly Indians on a portion of said

Territory east of the ninety-eighth degree of west longitude, not necessary for the use of said Choctaw and Chickasaw tribes, as it may desire, not exceeding one-third of the whole remaining Territory, for a fair and equitable consideration, to be fixed by the Government.

Art. 5. The Choctaw and Chickasaw tribes agree to a modification of the 9th article of the treaty concluded at the city of Washington, the 22d day of June, A. D. 1855, by which they agree that all that portion of their common territory west of the ninety-eighth degree of west longitude, leased to the United States, may be used for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate thereon, *without exception or restriction as to the character of the tribes.*

Art. 6. The Choctaw and Chickasaw tribes of Indians promise and agree to submit and recommend, at the first meeting of their respective general councils, the adoption of the plan proposed in the Senate bill 459, 38th Congress, 2d session, to provide for the consolidation of the Indian tribes, and to establish civil government in the Indian Territory; it being understood to be the settled policy of the Government of the United States that all the nations and tribes in the Indian Territory be formed into one consolidated government, after the plan proposed in the bill above referred to, adopted by the United States Senate, 1865, the Government of the United States reserving said right.

Art. 7. The United States, in the event of the adoption by the Choctaw and Chickasaw and other Indian tribes of the government proposed to be established in the Indian Territory, referred to in the preceding article, promise and agree that no white person except officers, agents, and employés of the Government, and of any internal im-

provement authorized by the Government, will be permitted to go into and settle in said Territory, unless formally incorporated and naturalized into one of the resident tribes, according to their laws, customs and usages.

Art. 8. The Choctaw and Chickasaw tribes of Indians, anxious for the restoration and preservation of kind and friendly feelings among themselves, do hereby declare a general amnesty of all past offenses, either against their government or the Government of the United States, and no Indian or Indians shall be proscribed, or any act of forfeiture or confiscation passed against those who may have remained friendly and loyal to the United States, but they shall all enjoy equal privileges with other members of said tribes.

Art. 9. The United States hereby promise and agree to restore the Choctaw and Chickasaw tribes of Indians to all their rights and privileges in lands and annuities, that they were possessed of, and entitled to, and they shall be applicable to the same objects as existed at the breaking out of the rebellion, except such part or parts of annuities and moneys as have been expended by the President in providing for the relief of destitute Indians, who were reduced to want on account of their friendship to the Government of the United States, which shall not be refunded.

Art. 10. It is hereby mutually agreed, that all of the provisions of the treaty of June 22d, 1855, between the United States and the Choctaw and Chickasaw tribes of Indians not inconsistent with the foregoing articles are hereby adopted and made a part of this instrument.

Art. 11. The Choctaw and Chickasaw tribes of Indians expressly agree, that any amendment to this treaty, which the Senate of the United States may make, shall be taken and held as a part of the same, and as binding in every

respect as if it had, after being made, been formally submitted to and ratified by such parties. Laws of the Choctaw Nation, p. 410.

No. 83. The commissioners, who represented the United States at the Fort Smith council, in 1865, were D. N. Cooley, Elijah Sells, Thomas Wistar, W. S. Harney and E. S. Parker. Mr. Cooley was president of the council, and was also, at the time, commissioner of Indian affairs. In his annual report for 1865, he said:

With the Choctaws and Chickasaws a treaty was agreed upon, based on the seven propositions heretofore stated, in addition to which these tribes agreed to a thorough friendly union among their own people and forgetfulness of past doings and *the opening of the leased lands to the settlement of any tribes whom the government of the United States might desire to place thereon.* * * * This treaty, after its approval by the councils of the Choctaws and Chickasaws, *is to be signed, in this city, by three delegates from each nation, to be sent here for that purpose.*

No. 84. Report of Commissioner of Indian Affairs for 1865.

The council assembled at Fort Smith, September 8, and delegates were present in the course of the sittings (though not all in attendance at first), representing the Creeks, Choctaws, Chickasaws, Cherokees, Seminoles, Osages, Senecas, Shawnees, Quapaws, Wyandotts, Wichitas, and Comanches.

Immediately upon the opening of proceedings the tribes were informed generally of the object for which the commission had come to them; that they, for the most part

as tribes, had by violating their treaties, by making treaties with the so-called Confederate States, *forfeited all rights under them*, and must be considered *as at the mercy of the Government;* that there was every disposition to treat them leniently, and above all a determination to recognize in a signal manner the loyalty of those who had fought upon the side of the Government, and endured great sufferings on its behalf. On the next day the delegates were informed that the commissioners were empowered to enter into treaties with the several tribes, upon the basis of the following propositions:

1st. That each tribe must enter into a treaty for permanent peace and amity among themselves, each other as tribes, and with the United States.

2d. The tribes settled in the Indian country to bind themselves, at the call of the United States, to assist in compelling the wild tribes of the plains to keep the peace.

3d. Slavery to be abolished, and measures to be taken to incorporate the slaves into the tribes, with their rights guaranteed.

4th. A general stipulation as to final abolition of slavery.

5th. A part of the Indian country to be set apart, *to be purchased for the use of such Indians* from Kansas or elsewhere, as the Government may desire to colonize thereon.

6th. That the policy of the Government to unite all the Indian tribes of this region into one consolidated government should be accepted.

7th. That no white person, except Government employés, or officers or employés of internal improvement companies, authorized by Government will be permitted to reside in the country, unless incorporated with the several nations. Page 34.

Printed copies of the address of the Commissioners were placed in the hands of the agents, and of members of the tribes, many of whom were educated men. Page 35.

It being certain that no final treaties could be now concluded with the tribes represented, for the reason that, until the differences between the loyal and disloyal portions were healed, there could be no satisfactory representation of most of them, it was determined to prepare for signature by the commission, and by the delegates representing all factions and opinions, a preliminary treaty, pledging anew, on behalf of the Indians, allegiance to the United States, and repudiating all treaties with other parties; and, on the part of the United States, agreeing to re-establish peace and friendship with them. This was considered essential as preliminary to the main business of the commission; to wit; to make peace between the several tribes and negotiations as to purchasing lands, territorial government, &c. This work was diligently pursued until, on the breaking up of the commission on the 13th day, all of the delegates representing the following tribes and sections of tribes, in the order given, had signed treaties (some of them holding out for several days, until they could agree among themselves) Senecas, Senecas and Shawnees, Quapaws, loyal Seminoles, loyal Chickasaws, loyal Creeks, Kansas, Shawnees, (uncalled for, but asking to be permitted again to testify their allegiance) loyal Osages, tribes of the Wichita agency, loyal Cherokees, disloyal Creeks, disloyal Cherokees, disloyal Osages, Comanches, disloyal Choctaws and Chickasaws. Page 35.

With the Choctaws and Chickasaws a treaty was agreed upon upon the basis of the seven propositions heretofore stated, and, in addition to which, those tribes agreed to a thorough and friendly union among their own people, and forgetfulness of past differences; to the opening of the "leased lands" to the settlement of any tribes whom the government of the United States may desire to place thereon; and to the cession of one-third of their remain-

ing area for the same purpose; the United States to restore these tribes to their rights forfeited by the rebellion. This treaty, after its approval by the councils of the Choctaws and Chickasaws, is to be signed in this city by three delegates from each nation sent here for that purpose. Page 36.

No. 85. Fort Smith Council. Original manuscript report. (See No. 81.)

Mr. Cooley, the president of the commission, said to the delegates, or agents, of the Indians:

The agents will be supplied with printed copies of the address, and *are requested to go, with an interpreter, to their respective tribes, for the purpose of fully explaining what is said there.*

The minutes of the council for September 21, 1865, contain the following entry:

At 2 o'clock p. m. the council met, pursuant to adjournment. Called to order by President Cooley. Commissioner Parker stated that the joint committee of the Choctaw and Chickasaw delegations had reported to the committee of the commission certain amendments and modifications of the proposed treaty; that the commission had had the same under consideration, and the commissioners declined to accede to them, or to change, in any respect, the treaty as submitted. The delegations would be furnished with a copy of the treaty, and, whenever they determined to approve it, by notifying the Commissioner of Indian Affairs of the fact, they would be invited to come to Washington to consummate the treaty.

No. 86. Official report of Fort Smith Council.

Brothers: After considering your speeches, made yesterday, the commissioners have decided to make the following reply and statement of the policy of the government.

Brothers: We are instructed, by the President, to negotiate a treaty, or treaties, with any, or all, of the nations, tribes, or bands of Indians, in the Indian Territory, Kansas or the plains west of the Indian Territory and Kansas.

* * * * * *

The President is anxious to renew the relations, which existed at the breaking out of the rebellion.

We, as representatives of the President, are empowered to enter into new treaties, with the proper delegates of the tribes located within the so-called Indian Territory, and others above named, living west and north of the Indian Territory.

Such treaties *must* contain substantially the following stipulations:

1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.

2. Those settled in the Indian Territory must bind themselves, when called upon by the Government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory, and with the United States.

3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes, on an equal footing with the original members, or suitably provided for.

4. A stipulation, in the treaties, that slavery or invol

untary servitude shall never exist, in the tribe, or nati
except in punishment of crime.

5. A portion of the lands, hitherto owned and occupi
by you, *must be set apart for the friendly tribes* now
Kansas and elsewhere, on such terms as may be agre
upon by the parties and approved by government, or su
as may be fixed by the government.

6. It is the policy of the government, unless other a
rangements be made, that all the nations and tribes,
the Indian Territory, be formed into one consolidated go
ernment, after the plan proposed by the senate of t
United States for organizing the Indian Territory.

7. No white person, except officers, agents, and em
ployés of the government, or of any internal improv
ment authorized by the government, will be permitted
reside in the Territory, unless formally incorporated wit
some tribe, according to the usages of the band.

Brothers: You have now heard and understand wh
are the views and wishes of the president; and the com
missioners, as they told you yesterday, *will expect defini
answers* from each of you, upon the questions submitted

This address, in manuscript, in the Indian office, bear
the following indorsement:

We propose to renew the treaty stipulations that ex
isted previous to, or at the breaking out of, the rebellion
so far as regards the annuities.

*The government will insist on purchasing a portion o
their lands for the settlement of friendly Indians.*

No part of any moneys expended by the president, i
providing for the relief of destitute Indians, which wer
reduced to want on account of their friendship for th
government, will be refunded.

A stipulation of general amnesty must be incorporated, *and no individual shall be proscribed, or any act of confiscation, or forfeiture, passed,* against those who remained friendly to the U. S.; but they shall enjoy equal privileges with the other members of the nations.

To this address the Choctaw and Chickasaw delegates made a reply, as follows:

The committee, on the part of the Choctaws and Chickasaws, reply to the propositions made on the part of the United States, as the basis of new treaties that * * On certain terms, on which we can doubtles agree with you, we are willing to admit the settlement of other tribes within our territory, *as proposed in the 5th article.*

The following reply to the address was also made:

We, the delegation on the part of the loyal element of the Choctaw people, came here with the expectation of meeting our southern brethren here, and to see what sort of a treaty would, or could, be made with the government of the United States. * * *

In answer, therefore, to your propositions to the several tribes of Indians, we say that the first, second, third, fourth, *fifth*, and sixth articles meet our approval. We respectfully suggest that the seventh article may be changed to read thus:

"No white person, except officers, agents, and employés of the government or of any internal improvement company authorized by the government of the United States; also no persons of African descent, except our former slaves or free persons of color who are now or have been residents of the territory, will be permitted to reside in the territory, unless formally incorporated with some tribe according to the usages of the band."

Mr. Cooley, the president of the commission, said to the delegates, or agents, of the Indians:

The agents will be supplied with printed copies of the address, and are requested to go, with an interpreter, to their respective tribes, for the purpose of fully explaining what is said there.

The minutes of the council for September 21, 1865, contain the following entry:

At 2 o'clock p. m. the council met, pursuant to adjournment. Called to order by President Cooley. Commissioner Parker stated that the joint committee of the Choctaw and Chickasaw delegations had reported to the committee of the commission certain amendments and modifications of the proposed treaty; that the commission had had the same under consideration, and the commissioners declined to accede to them, or to change, in any respect, the treaty as submitted. The delegations would be furnished with a copy of the treaty, and, whenever they determined to approve it, by notifying the Commissioner of Indian Affairs of the fact, they would be invited to come to Washington to consummate the treaty. In anticipation of the speedy termination of the council, Commissioner Parker, on behalf of the commission, returned thanks to the various delegations then present, for their attendance, and wished them a happy journey home.

After some congratulatory remarks, by Delegate R. M. Jones, R. Field, E. C. Boudinot and Commissioner Cooley, President Cooley adjourned the council and the commission, to meet again, at the call of the secretary of the interior.

CHARLES E. MIX, *Secretary.*

No. 87. Report of the president of the Fort Smith council.

The council was called to order by me as president of the commission; after which the blessing of the Great Spirit over our deliberations was invoked by Rev. Lewis Downing, acting chief of the Cherokee nation. When Mr. Downing had concluded I addressed the council as follows:

Brothers: It is proper that thanks should be returned to the Great Spirit, the creator of us all, that our lives have been preserved to meet on this occasion. * *

Portions of several tribes and nations have attempted to throw off their allegiance to the United States, and have made treaty stipulations with the enemies of the government, and have been in open war with those who remained loyal and true, and at war with the United States. All such have rightfully *forfeited all annuities and interests in lands* in the Indian territory. But, with the return of peace, after subduing and punishing severely, in battle, those who caused the rebellion, the president is willing to hear his erring children *in extenuation of their great crime.* He has authorized us to make new treaties with such nations and tribes as are willing to be at peace among themselves and with the United States. Documents accompanying Commissioner's report for 1865, p. 296.

On the second day (Saturday, September 9,) after council met, I addressed the Indians, in which I stated that the commissioners had considered the talks of the Indians on the preceding day, and had authorized me to submit the following statement and propositions, as the basis on which the United States were prepared to negotiate with them:

Brothers: We are instructed, by the president, to nego-

tiate a treaty, or treaties, with any, or all, of the nations tribes, or bands of Indians, in the Indian Territory Kansas or the plains west of the Indian Territory and Kansas.

The following named nations and tribes have, by their own acts by making treaties with the enemies of the United States, at the dates hereafter named, *forfeited all right to annuities, lands and protection* by the United States. * *

Under the terms of the treaties with the United States, and the law of congress of July 5, 1862, all these nations and tribes *forfeited and lost all their rights* to annuities and lands. The President, however, does not desire to take advantage of or enforce the penalties for the unwise actions of these nations.

The President is anxious to renew the relations, which existed at the breaking out of the rebellion.

We, as representatives of the president, are empowered to enter into new treaties, with the proper delegates of the tribes located within the so-called Indian Territory, and others above named, living west and north of the Indian Territory.

Such treaties *must* contain substantially the following stipulations:

1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.

2. Those settled in the Indian Territory must bind themselves, when called upon by the government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory, and with the United States.

3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and

measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes, on an equal footing with the original members, or suitably provided for.

4. A stipulation, in the treaties, that slavery or involuntary servitude shall never exist, in the tribe, or nation, except in punishment of crime.

5. A portion of the lands, hitherto owned and occupied by you, *must be set apart for the friendly tribes, in Kansas* and elsewhere, on such terms as may be agreed upon by the parties and approved by government, or such as may be fixed by the government.

6. It is the policy of the government, unless other arrangements be made, that all the nations and tribes, in the Indian Territory, be formed into one consolidated government, after the plan proposed by the senate of the United States for organizing the Indian Territory.

7. No white person, except officers, agents, and employés of the government, or of any internal improvement authorized by the government, will be permitted to reside in the territory, unless formally incorporated with some tribe, according to the usages of the band.

Brothers: You have now heard and understand what are the views and wishes of the president; and the commissioners, as they told you yesterday, *will expect definite answers* from each of you, upon the questions submitted. Id., pp. 297, 298, 299.

No. 88. Extract from report of Commissioner of Indian Affairs, Oct. 31, 1865, page 204.

The terms of a treaty were agreed upon with both parties of the Creeks, whereby they cede to the United States, for the use of the friendly Indians from Kansas or else-

where, all of their lands north of the Arkansas river, a
one-half of the remainder lying south of that river, o
terms which I trust will meet the approval of the gover
ment. This treaty is to be signed in this city by delegat
properly accredited by the united Creek Nation. Messag
and Documents, Interior and P. O. Depts. 1865–1866.

No. 89. Extract from the report of Hon. Elijah Sell
Sup't Indian Affairs, southern superintendency, Octobe
16, 1865.

The Wichita and affiliated tribes, numbering not fa
from two thousand eight hundred, or three thousand
have no place they can claim as their rightful home
They have been living upon what is known as the reserva
tion or leased lands in the Indian Territory, situat
between niety-eight and one hundred degrees west longi
tude, and between the Canadian River and the northern
line of Texas, by sufferance of the United States govern
ment. * *

I would recommend that provision be made for remov
ing the refugee Wichita Indians in Kansas to a new home
in the southern portion of the Indian Territory, where
lands may be set apart for their permanent occupation.
Mess. and Doc. Int. and P. O. Dept. 1865–6, pp. 443, 444.

No. 90. Extract from Report of the Secretary of the
Interior of December 4, 1865, page 7.

This state of things continued until the surrender of the
rebel forces west of the Mississippi. Hostilities were
then suspended, and, at the request of the Indians, com-
missioners were sent to negotiate a treaty of peace. Such
preliminary arrangements were made as, it is believed,
will result in the abolition of slavery among them, the

cession within the Indian Territory of lands for the settlement of the civilized Indians now residing on reservations elsewhere, and the ultimate establishment of civil government, subject to the supervision of the United States.

No. 91. The select committee of the Senate, in its report on the removal of the northern Cheyennes, referring to the lands set apart for the Cheyennes and Arapahoes by the executive order of August 10, 1869, say that "it was never intended to be more than a temporary abiding place for these tribes, where they were to stop until the United States could extinguish the claim of the Cherokees to the lands included in the treaties with the Arapahoes and Cheyennes." Sen. Rep. No. 48, 46 Cong., 2d Sess., page 2.

No. 92. The commissioner of Indian affairs, who presided in the negotiation of the treaty of 1866, in his report for 1866, relating to that treaty, said:

Four principal points came up for settlement, to wit: * Cession of lands by the several tribes, to be used for the settlement thereon of Indians whom it is in contemplation to remove from Kansas. * The first tribe, with which arrangements were consummated, were the Seminoles. * The Indians cede the government the entire domain secured to them by the treaty of 1856. * The next treaty, in this series, was made with the confederate nations of Choctaws and Chickasaws. * The Indians cede to the government the whole of that tract of land known as the leased lands. *

No. 93. The secretary of the interior in an official communication dated May 1, 1879, said:

* The title acquired by the government, by the treaties of 1866, was secured in pursuance and furtherance of the same purpose of Indian settlement, which was the foundation of the original scheme. That purpose was the removal of Indian tribes from the limits of the political state and territorial organizations, and their present permanent location upon other lands sufficient for the needs of each tribe. These lands being ample in area for the purpose, it has become a settled policy to locate other tribes thereon, as fast as arrangements can be made; and provision has been constantly made, by treaties, agreements and acts of congress, to effect these objects.

That purpose is expressly declared in the said treaties. The cessions of the Creeks and Seminoles are stated to have been made, "in compliance with the desire of the United States to locate other Indians and freedmen thereon." These words must be held to create a trust equivalent to what would have been imposed had the language been, "for the purpose of locating Indians and freedmen thereon."

The lands ceded by the Choctaws and Chickasaws were, by article 9 of the treaty of June 22, 1855, "leased to the United States, * for the permanent settlement of the Wichita and such other tribes, or bands, of Indians, as the government may desire to locate therein." *The treaty of* 1866 *substituted a direct purchase for the lease, but did not extinguish or alter the trust.*

No. 94. In the president's proclamation of February 12 1880, relating to the Indian Territory, he says:

Which territory is designated, recognized, and described by the treaties and laws of the United States,

and by the executive authorities, as Indian country, and, as such, *is subject only to occupation by Indian tribes*, officers of the Indian department, military posts, and such persons as may be privileged to reside and trade therein, under the intercourse law of the United States

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No. 95. A report of the acting commissioner of Indian affairs, dated April 25, 1881, contains the following statement:

The Choctaw and Chickasaw cession of April 28 1866, (14 Stats. 769) was, by the tenth section thereof, made subject to the conditions of the compact of June 22, 1855, (11 Stats. 613) by the ninth article of which it is stipulated that the land should be appropriated for the permanent *settlement of such tribes or bands of Indians* as the United States might desire to locate thereon.

The title of the United States to lands in the Indian territory is, as heretofore shown, subject to a specific trust; and it is not within the lawful power of either the legislative, or executive, department of the government to annihilate such trust, or to avoid the obligations arising therefrom. Sen. Ex. Doc. No. 111, 47 Cong., 1st Sess.

No. 96. The report of the Indian office, transmitted by the secretary of the Interior to the president, February 17, 1882, contains the following statements:

The lands to which the United States holds the legal title, within the Indian Territory, are reserved, by treaty stipulation and acts of congress, and are not, and never have been, public lands subject to general occupation.

The treaties, by which the United States acquired title to any of the lands in the Indian Territory, or obtained the conditional right to control the disposal of any

of said lands, were the treaties with the Seminoles of March 21, 1866, with the Choctaws and Chickasaws of April 28, 1866, with the Creeks of June 14, 1866, and with the Cherokees of July 19, 1866.

The lands reconveyed to the United States by the foregoing treaties are, therefore, held subject to the trust named. They can be appropriated only to the uses specified, and to those only by the United States, and then only in the manner provided by law. Miscellaneous immigration, even by the intended beneficiaries, would be unauthorized and illegal.

The Choctaw and Chickasaw cession of April 28, 1866 (14 Stats. 769), was by the tenth section thereof made subject to the conditions of the compact of June 22, 1855 (11 Stats. 613), by the ninth article of which it was stipulated that the lands should be appropriated for the permanent *settlement of such tribes, or bands, of Indians* as the United States might desire to locate thereon.

The title of the United States to lands in the Indian Territory is, as heretofore shown, subject to specific trusts, and it is not within the lawful power of either the legislative, or executive, departments of the government, to annihilate such trusts, or to avoid the obligation arising thereunder. Such trusts are for the benefit of Indian tribes and Indian freedmen.

No. 97. A report of the Indian office, dated January 31, 1884, transmitted by the secretary of the interior to the senate, contains the following statement relating to the Indian Territory:

No part of said territory remains free from appropriation either to a direct trust, assumed by treaty, or by reservations for tribes thereon under executive order, except that portion still claimed by the state of Texas, and lying between Red river and the north fork of the same.

No. 98. On the 14th of February, 1884, the secretary of the interior, in response to a resolution of inquiry adopted by the senate, said :

These lands were acquired by treaties with the various Indian nations or tribes in that territory in 1866, to be held for Indian purposes, and to some extent for the settlement of the former slaves of some of said nations, or portions thereof. Such are the purposes for which said lands are now being used or held according to the common understanding of the objects of the treaties by which they were acquired, and from these arise the necessity for, or obligation to keep said lands in their present condition of occupancy or otherwise.

No. 99. A proclamation of the president, dated July 1, 1884, relating to the Indian Territory, contains the following statement :

Which territory is designated, recognized, and described by the treaties and laws of the United States and by the executive authorities as Indian country, and as such is subject to Indian occupation only.

No. 100. An official report of the Indian office, dated January 26, 1885, contains the following :

The title acquired by the government, by the treaties of 1866, was secured in pursuance and furtherance of the same purpose of Indian settlement which was the foundation of the original scheme. That purpose was the removal of Indian tribes from the limits of the political state and territorial organizations, and their permanent location upon other lands sufficient for the needs of each tribe.

These lands being ample in area for the purpose, it

has become a settled policy to locate other tribes thereon, as fast as arrangements can be made, and provisions have been constantly made, by treaties, agreements, and acts of congress, to effect these objects.

No. 101. In an official communication from the secretary of the interior to the president relating to the Indian Territory, dated January 26, 1885, the secretary refers to a former decision, "that no part of said territory remains free from appropriation, either to a direct trust assumed by treaty, or by reservations for tribes thereon under executive order, except that portion still claimed by the state of Texas and lying between Red river and the North fork of the same," and says:

This status of the land, as thus determined, has been adhered to by this department; and on April 26, 1879, February 12, 1880, and in July, 1884, proclamations were issued by the president, warning unauthorized persons against going upon these lands.

Objection will be made to the occupation of any part of the Indian Territory by other than Indians, on the ground that the government set apart the territory for the exclusive use of the Indians and covenanted that no others should reside therein. It is not denied that the treaties so provide. It is, however, within the power of the government, with the consent of the Indians interested, to change this provision of the treaties so that these desirable unoccupied lands may be placed within the lawful reach of the settlers.

No. 102. A communication from the Indian office to the committee on Indian affairs of the house of representatives, dated September 13, 1890, contained the following statement:

It is possible that the commission, when it came to negotiate with the Choctaws and Chickasaws, may have omitted from the treaty with those Indians a similar condition and reservation regarding the purposes for which the lands were to be used, because of the fact that the United States had secured by a prior treaty a lease, which amounted to a permanent lease, of the lands in question for Indian purposes, for which, together with other considerations, it had paid the sum of $800,000. Considering this fact, the commission negotiating the treaty may have considered the payment of the $300,000 additional, as provided for in the treaty of 1866, a sufficient compensation for an absolue cession of all right, title, and interest that the Choctaws and Chickasaws had in and to the said "leased district." This conclusion, however, cannot be fairly reached, when the record of the negotiations is fully considered; for we have already seen that these Indians accepted the terms proposed by the commission, upon which the treaties would be negotiated; and these very terms indicate the purpose for which the ceded lands were to be used. And it shows quite clearly that the Indians understood that they were parting with whatever right, title, and interest remained to them in the "leased district" to the United States, to be used for the location and settlement of other Indians thereon.

The negotiations made about that time by the United States with Indian tribes show very conclusively that a policy had been carefully mapped out for the acquisition by the United States of the right to locate other Indians upon portions of the lands owned and occupied by the five civilized tribes in the Indian territory.

I am inclined, therefore, to the opinion that the Choctaw and Chickasaw Indians have good ground for the claim that the United States took the land ceded by them

upon the trust to settle other Indians and freedme thereon, as the policy upon which the negotiations wer made clearly indicated its desire and purpose to do.

While there are clearly no words of limitation in th treaty of 1866 as to the use to which the ceded land should be put by the United States, the history of th negotiation preceding and resulting in that treaty and th subsequent treatment of the subject quite clearly indicat that the Choctaws and Chickasaws have good ground fo claiming that they understood that the lands were to b used for the location of other Indians and freedme thereon.

No. 103. On the fourth of June, 1891, an agreement wa made between the United States and the Wichita an affiliated bands of Indians, in which the lands in contro versy were described as follows:

Commencing at a point in the middle of the mai channel of the Washita river, where the ninety-eight meridian of west longitude crosses the same, thence u the middle of the main channel of said river to the line o 98° 40′ west longitude, thence on said line of 98° 40′ du north to the middle of the channel of the main Canadia river, thence down the middle of said main Canadian rive to where it crosses the ninety-eighth meridian, thence du south to the place of beginning.

The lands so described are situated in the northern par of the leased district.

No. 104. Extracts from the journal of the commissioner who negotiated the treaty of August 24, 1835. Now o file in Indian office.

FORT GIBSON, *May 7th*, 1835.

The board met. Present M. Stokes, M. Arbuckle.

Appointed Col. A. A. Chouteau interpreter of the Osage language, and sent an express, with the request that he bring us, from Clermont's (Osage chief's) town, the two Towee-ash and one Wacho Indians, together with the Towee-ash woman, to be used as an interpreter.

FORT GIBSON, *May 10th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle.

Col. Chouteau arrived, with the three Indians, from the Towee-ash and Wacho villages, and the Towee-ash woman.

FORT GIBSON, *May 11th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle.

Held a talk with the three Western Indians, on the subject of the proposed treaty with the Comanches and other tribes. The Osage second chiefs, Black Dog and Tally, were present.

FORT GIBSON, *May 12th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle.

Held a council with the three Western Indians, in presence of Black Dog, Tally, and others of the Osage nation. Explained to the Indians the views of the government of the United States, in proposing a treaty with the Comanche and other wandering nations and tribes, on the western frontier.

FORT GIBSON, *May 13th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle, F. W. Armstrong.

Held a further council with the three Western Indians, in presence of, and assisted by, Black Dog, Tally, and other Osages.

FORT GIBSON, *May* 14*th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle, F. W. Armstrong.

Held a further council with the three Western Indians and the principal Indians present of the Osages. Considered it proper that Maj. Mason, with a party of dragoons, should proceed to the head of Little River of the Canadian, and select a suitable place for having an interview with the chiefs of the Comanches and other tribes of the western frontier. Determined to send the three western Indians, Col. Chouteau, the Towee-ash woman and three Osage Indians with Maj. Mason. Engaged Tally for this purpose. Engaged the three Towee-ash and Wacho Indians, to assist in bringing in the chiefs of the Comanche tribes to Fort Gibson, for the purpose of making the proposed treaty. Wrote a letter to the secretary of war, informing him of these arrangements.

FORT GIBSON, *May* 15*th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle, F. W. Armstrong.

Held a further council with the three western Indians and a number of the Osages. * *

FORT GIBSON, *May* 16*th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle.

Made arrangements for the departure of the western Indians with the Towee-ash woman. * *

FORT GIBSON, *May* 20*th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle.

This day dispatched Col. Chouteau, with Nack, the principal Towee-ash, and his two companions, with the Towee-ash woman Ascinka, who crossed the Arkansas river, and joined Maj. Mason on the western expedition.

FORT GIBSON, *July 11th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle, commissioners.

* * The board appointed the 20th of August, for holding the treaty with the western Indians, at Camp Holmes, near western borders of the Cross Timbers, in the Creek nation, and requested Genl. Arbuckle to direct Maj. Mason to notify the Prairie Indians to attend there, at that time.

FORT GIBSON, *August 6th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

The board agreed on leaving Fort Gibson, this day, for the treaty ground, at Camp Holmes.

CAMP HOLMES, *August 19th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

The commissioners reached Camp Holmes this day, and assembled the Comanche and Witchita chiefs. * * *

CAMP HOLMES, *August 24th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

The board was this day occupied in obtaining the signatures of the chiefs and representatives of the Comanche, Witchita, Cherokee, Muskogee, Choctaw, Osage, Seneca, and Quapaw nations or tribes of Indians.

No. 105. In answer to questions proposed by President Jackson, Attorney General Taney on the 1st of November, 1831, said:

The language of that clause in the treaty, which gives the president the power to pay fifty cents, an acre, for

reservations, would, according to its strict and literal interpretation, seem to imply that the reservations for the chiefs, and others named in the treaty, were not embraced in this provision. But it is manifestly for the interest of the Choctaws, that this power of purchase, by the government, should exist as to all the reservations; because, if the persons entitled are unable to sell before their removal, and prefer accepting the fifty cents, per acre, rather than wait for an individual purchaser, it enables the government to give them this compensation, as soon as they arrive at their new homes, when, for the most part, it would be very convenient for them to receive it.

In an instrument of this sort, and made with such persons as the Choctaws, I do not think that strict and technical rules of construction should be applied to it. It ought to be expounded liberally according to its spirit, so as to give the Indians all the advantages and facilities, in their removal, which appear to have been contemplated by the general scope and spirit of the treaty. And this rule of construction is sanctioned by the clause, at the end of the 8th article, which stipulates that, whenever well founded doubts shall arise, it shall be construed most favorably towards the Choctaws. And, regarding the subject in this light, and looking to the objects of the treaty, I think that, according to a fair and liberal interpretation of its terms and provisions, the president has the power to accept, from any of the chiefs named, a relinquishment of his title, and to direct him to be paid fifty cents per acre for it. 2 Opin. Atty. Genl. 467.

No. 106. In their memorial to the senate and house of representatives of the United States, presented in the senate March 19, 1890, the Chickasaws said:

And the Chickasaws, finding that these people were likely to outnumber the Chickasaws, and, if made citizens, to take possession of their government, were compelled to refuse and did refuse to confer upon them Chickasaw citizenship, and therefore failed to earn, or receive, any part of the stipulated sum of $300,000. On the contrary, a part of that sum, which was loaned to the Chickasaws, in 1866, in pursuance of article 46 of the treaty has been reported, and correctly reported, by the Indian office, as a charge against the trust fund of the Chickasaw nation.

No. 107. Senate Report 1st Session 30th Congress, page 35.

WASHINGTON CITY, D. C.,
August 8, 1846.

SIR: * * The other little bands, viz: Witchataws, Towzash, Toneconies, Keechies and Wacoes are inconsiderable in number, and degenerate in character. * * The Witchataws and Towzash live on the north side of Red River, in the Witchataw mountains. The other three tribes reside upon the Brazos, about one hundred miles above the Comanche Peak. They informed us they had lost their numbers, by the small pox and repeated wars with the Texans. They have the reputation of being the best horse thieves in the prairie. * *

P. M. BUTLER,
Indian Commissioner.
M. G. LEWIS,
Indian Commissioner.

HON. W. MEDILL,
Commissioner of Indian Affairs, Washington, D. C.

Senate Report No. 171, 1st Session, 30th Congress, page 47.

BUREAU OF INDIAN AFFAIRS,
CITY OF HOUSTON, *November* 3, 1838.

SIR: * * The Pawnee Picts, or Toweashes, reside on Red River; they are sometimes in the United States and sometimes in Texas. The portion of the tribe which visits this country amounts to about 300 souls, with 60 or 75 warriors. They are in alliance with the Wacoes and Caddoes, and their depredations are generally confined to the Upper Brazos county. * *

I have the honor to be,
Very Respectfully,
Your Obedient Servant,
GEORGE W. BONNELL,
Commissioner Indian Affairs.

To the Hon. SECRETARY OF WAR
of the Republic of Texas.

No. 108. On the 17th of February, 1882, the Secretary of the Interior communicated to the Senate of the United States a decision of the Commissioner of the General Land Office, containing the following statement:

The Choctaw and Chickasaw cession of April 28, 1866 (14 Stat. 769), was, by the tenth section thereof, made subject to the conditions of the compact of June 22, 1855 (11 Stat. 613), by the ninth article of which it was stipulated that the land should be appropriated for the permanent settlement of such tribes or bands of Indians as the United States might desire to locate thereon. The lands embraced in the Choctaw and Chickasaw cession were also included in a definite district, established by the stipulations of the treaty of 1855, pursuant to the act of Congress of May 28, 1830, the United States reëngaging, by the seventh article of the said treaty, to remove and keep out from that district all intruders.

In pursuance of the stipulations of the foregoing compacts, and in the exercise of the trusts assumed by the United States, under the several treaties, and in accordance with specific provisions of law and the lawful orders of the President, all the lands in the Indian Territory to which the United States has title have been permanently appropriated or definitely reserved for the uses and purposes named. The title of the United States to lands in the Indian Territory is, as heretofore shown, subject to specific trusts, and it is not within the lawful power of either the legislative or executive departments of the Government to annihilate such trusts, or to avoid the obligations arising thereunder. Such trusts are for the benefit of Indian tribes and Indian freedmen. Senate Rep. No. 552, 52d Cong., 1st Sess., pp. 13, 14.

No. 109. In response to a Senate resolution of January 23, 1884, the Secretary of the Interior transmitted to the President of the Senate the following communication:

SIR: I have the honor to acknowledge receipt of Senate resolution of January 23 last, directing the Secretary of the Interior—

"To advise the Senate of the present status of lands in the Indian Territory, other than those claimed and occupied by the five civilized tribes, the extent of each tract separately, the necessity for or obligation to keep said lands in their present condition of occupancy or otherwise, and as to whether any portion of said lands, and if so, what portion, are subject to entry under the land laws of the United States, and as to what portion, if any, could be made so subject to entry by the action of the Executive."

These lands were acquired by treaties with the various Indian nations or tribes in that Territory in 1866, to be

held for Indian purposes and to some extent for the settlement of the former slaves of some of said nations, or portions thereof.

Such are the purposes for which said lands are now being used or held, according to the common understanding of the objects of treaties by which they were acquired; and from these arise the necessity for or obligation to keep said lands in their present condition of occupancy or otherwise. Senate Rep. No. 552, 52d Cong., 1st sess., p. 14.

No. 110. Communication of Commissioner of Indian Affairs to Secretary of Interior, January 31, 1884.

This being the condition of things, it is clear that no authorized settlement could be made by any persons in the Territory, except under the provisions of the intercourse laws, such persons having first obtained the permission provided for in those statutes. It may be further stated that no part of said Territory remains free from appropriation either to a direct trust assumed by treaty or by reservations for tribes thereon under executive order, except that portion still claimed by the state of Texas and lying between the Red River and the North Fork of the same. House Rep. No. 3147, 51st Cong., 1st Sess., p. 24.

No. 111. Communication from Secretary of Interior to United States Senate, Feb. 14, 1884.

These lands were acquired by treaties with the various Indian nations or tribes in that Territory in 1866, to be held for Indian purposes, and to some extent for the settlement of the former slaves of some of said nations, or portions thereof. Such are the purposes for which said lands are now being used or held according to the

common understanding of the objects of the treaties by which they were acquired, and from these arise the necessity for, or obligation to keep said lands in their present condition of occupancy or otherwise. Sen. Ex. Doc. 109, 48th Cong., 1st ses.

No. 112. The following is taken from a report made to Congress in this case by the Indian Office September 13, 1890:

The records of this office show that in 1865 a commission was appointed to negotiate with the Indians of the then Southern Superintendency, among them the Choctaws, Chickasaws, Creeks, Seminoles, and Cherokees. * * * A council was held between this commission and representatives of the Southern Indians at Fort Smith, Ark., in September, beginning on the 8th and ending on the 21st day of that month. On the 9th of September, 1865, the president of the commission, Hon. D. N. Cooley, who was also at that time Commissioner of Indian Affairs, addressed the council, * * * and declared * * * that, as the representatives of the President of the United States, the commission, for which he spoke, was empowered to enter into new treaties with the proper delegates of the tribes located within the Indian Territory and others above named living west and north of Indian Territory; that such treaties must contain substantially the following stipulations, viz:

* * * * * *

"Fifth. A part of the Indian country to be set apart to be purchased for the use of such Indians from Kansas and elsewhere as the Government may desire to colonize therein.

"Sixth. That the policy of the Government to unite all

the tribes of this region into one consolidated government should be accepted.

"Seventh. No *white person*, except officers, agents, and employés of the Government, or of any internal improvement company authorized by the Government, will be permitted to reside in the Territory, unless formally incorporated with some tribe according to the usage of the band."

On September 11, 1865, in a letter addressed to the commissioners of the United States, the Choctaw delegates said: "In answer, therefore, to your propositions to the several tribes of Indians, we say that the first, second, third, fourth, fifth, and sixth articles meet our approval;" and submitted in lieu of the seventh proposition a proposition which provided that "no white person, except officers, agents, employés of the Government, or of any internal improvement company authorized by the Government of the United States; also, no person of African descent, except our former slaves, or free persons of color who are now or have been residents of the Territory, will be permitted to reside in the Territory unless formally incorporated with some tribe according to the usages of the band."

Later, in the progress of the council, about the 18th of September, the commissioners of the southern factions of the Choctaw and Chickasaw tribes accepted the propositions suggested by the commissioners, and before the final adjournment of that council, the 21st of September, all of the delegates of the tribes represented signed a treaty of peace between themselves and the United States. (These proceedings will be found in the Annual Report of the Indian Bureau, 1865, p. 105, etc.)

It will be observed that in each of the treaties made with each of the other civilized tribes, extracts from which

are above given, the purpose for which the land was being ceded to the United States is specifically stated. No such purpose is stated in the treaty made about the same time with the Choctaws and Chickasaws.

It is possible that the commission, when it came to negotiate with the Choctaws and Chickasaws, may have omitted from the treaty with those Indians a similar condition and reservation regarding the purposes for which the lands were to be used, because of the fact that the United States had secured by a prior treaty a lease, which amounted to a permanent lease, of the lands in question for Indian purposes, for which, together with other considerations, it had paid the sum of $800,000. Considering this fact, the commission negotiating the treaty may have considered the payment of the $300,000 additional, as provided for in the treaty of 1866, a sufficient compensation for an absolute cession of all right, title, and interest that the Choctaws and Chickasaws had in and to the said "leased district." This conclusion, however, can not be fairly reached, when the record of the negotiations is fully considered; for we have already seen that these Indians accepted the terms proposed by the commission, upon which the treaties would be negotiated; and these very terms indicate the purpose for which the ceded lands were to be used. And it shows quite clearly that the Indians understood that they were parting with whatever right, title, and interest remained to them in the "leased district" to the United States, to be used for the location and settlement of other Indians thereon.

The negotiations made about that time by the United States with Indian tribes show very conclusively that a policy had been carefully mapped out for the acquisition by the United States of the right to locate other Indians upon portions of the lands owned and occupied by the five civilized tribes in the Indian Territory.

I am inclined, therefore, to the opinion that the Choctaw and Chickasaw Indians have good ground for the claim that the United States took the land ceded by them upon the trust to settle other Indians and freedmen thereon, as the policy upon which the negotiations were made clearly indicated its desire and purpose to do.

While there are clearly no words of limitation in the treaty of 1866 as to the use to which the ceded lands should be put by the United States, the history of the negotiation preceding and resulting in that treaty and the subsequent treatment of the subject quite clearly indicate that the Choctaws and Chickasaws have good ground for claiming that they understood that the lands were to be used for the location of other Indians and freedmen thereon. Senate Rep. No. 552, 52d Cong., 1st Sess., pp. 12, 13.

No. 113. In an official communication to the President, dated January 26, 1885, the Secretary of the Interior said :

Objection will be made to the occupation of any part of the Indian Territory by other than Indians, on the ground that the Government set apart the Territory for the exclusive use of the Indians and covenanted that no others should reside therein. It is not denied that the treaties so provide. It is, however, within the power of the Government, with the consent of the Indians interested, to change this provision of the treaties so that these desirable unoccupied lands may be placed within the lawful reach of the settlers. Senate Rep. No. 552, 52d Cong., 1st Sess., p. 14.

No. 87.

52D CONGRESS, 1st Session. } SENATE. { REPORT No. 552.

IN THE SENATE OF THE UNITED STATES.

APRIL 13, 1892.—Ordered to be printed.

Mr. JONES, of Arkansas, from the Committee on Indian Affairs, submitted the following

REPORT:

[To accompany S. Mis. Doc. 126.]

The Committee on Indian Affairs, to whom was referred the message of the President relative to the act to pay the Choctaw and Chickasaw Indians for certain lands now occupied by the Cheyenne and Arapahoe Indians, and the memorial of the Chickasaws relating to said message, and the memorial of the Choctaws relating to the same subject, have considered the same, and report as follows:

By an act of the last Congress, approved by the President on March 3, 1891, an appropriation was made to pay the Choctaw and Chickasaw Indians the sum of $2,991,450 "for all the right, title, interest and claim which said nations of Indians may have in and to certain lands now occupied by the Cheyenne and Arapahoe Indians under Executive order." The money so appropriated has not been paid, and the President sent the message under consideration to Congress to explain why it had not been

done, and to make certain suggestions or recommendations in connection therewith.

The President's objections to this measure are in brief as follows, taken in the order in which they are stated in his message:

(1) The agreement on the part of the Choctaws to pay three of their citizens 25 per cent. of the amount appropriated to that nation, and of the Chickasaws to pay 10 per cent. of the amount appropriated to them, as a fee for prosecuting the claims.

(2) That there are charges that the act of the Choctaw council stipulating for the payment of this fee was procured by corrupt means.

(3) That the Choctaws have by law provided for the distribution of this fund per capita amongst Choctaws by blood, excluding white and colored citizens from participation therein.

(4) That he does not believe that these lands were "ceded in trust" by article 3 of the treaty of 1866, but seems to conclude that the Government has an absolute title to them.

Taking these objections up in the order of their importance, the question of title to these lands must first be considered.

The President, in attempting to maintain his position as to the title to the leased district, seems to assume that Spain owned all the country west of 100 degrees west longitude in 1820, and that the $800,000 paid the Choctaws in 1855 must have been mainly paid for the leased district, and not for the failure of title to more than 6,589,440 acres of land west of 100 degrees, and that the United States acquired in 1855 from the Choctaws and Chickasaws the same rights in the leased district that were acquired in 1866 from the Creeks and Seminoles to

their western country; and, further, that in 1866 the Government of the United States acquired an absolute title to the leased district. None of these positions are sustained by the history of those transactions.

By the treaty of June 22, 1855, the Choctaws relinquished to the United States all of their title to the lands west of the one hundredth meridian of west longitude, and the Choctaws and Chickasaws *leased* to the United States, for certain specified uses, their lands west of the ninety-eighth meridian. The aggregate consideration for the relinquishment and lease was fixed in the treaty at $800,000. There was no apportionment of this consideration as between the relinquishment of the lands west of the one hundredth meridian and the lease of the land west of the ninety-eighth meridian. The following are the provisions of the treaty relating to this subject:

"Art. 9. The Choctaw Indians do hereby absolutely and forever quitclaim and relinquish to the United States all their right, title, and interest in and to any and all lands west of the one hundredth degree of west longitude, and the Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein, excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas River and whose permanent locations are north of the Canadian River, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas, which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chicka-

saws, as may from time to time be prescribed by the President for their government: *Provided, however,* That the territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore." (11 Stat., 613.)

"Art. 10. In consideration of the foregoing relinquishment and lease, and as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct." (11 Stat., 613.)

Now, what was the interest in lands west of the one hundredth meridian which the Choctaws by this treaty relinquished to the United States?

The following are the stipulations of the treaty of October 18, 1820:

"Art. 1. To enable the President of the United States to carry into effect the above grand and humane objects, the Mingoes, head men and warriors of the Choctaw Nation, in full council assembled, in behalf of themselves and the said nation, do, by these presents, cede to the United States of America all the land lying and being within the boundaries following, to wit: Beginning on the Choctaw boundary, east of Pearl River, at a point due south of the White Oak Spring, on the old Indian path; thence north to said spring; thence northwardly to a black oak standing on the Natchez road, about forty poles eastwardly from Doake's fence, marked A. J. and blazed, with two large pines and a black oak standing near thereto and marked as pointers; thence a straight line to the head of Black Creek or Bouge Loosa; thence down Black Creek or Bouge Loosa to a small lake; thence a direct course so as to strike the Mississippi one mile below the mouth of the Arkansas River; thence down the Mississippi to

our boundary; thence around and along the same to the beginning." (7 Stat., 211.)

"Art. 2. For and in consideration of the foregoing cession on the part of the Choctaw Nation and in part satisfaction for the same, the commissioners of the United States in behalf of said States do hereby cede to said nation a tract of country west of the Mississippi River situate between the Arkansas and Red river, and bounded as follows: Beginning on the Arkansas River where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian Fork, and up the same to its source; thence due south to the Red River; thence down Red River three miles below the mouth of Little River, which empties itself into Red River on the north side; thence a direct line to the beginning." (7 Stat., 211.)

Here was an exchange of lands between the United States and the Choctaw Nation. The Choctaws ceded to the United States certain lands described by metes and bounds east of the Mississippi River, and the United States ceded to the Choctaws certain lands described by metes and bounds west of the Mississippi. The consideration for which the Choctaws ceded to the United States their lands east of the Mississippi *was not a part of the land* included within the metes and bounds of the western country ceded to them by the United States, *but was the whole of the land* included within those metes and bounds. If it had happened that a part of the land covered by this deed of the United States to the Choctaws was not in fact and in law owned by the United States on the 18th day of October, 1820, when the treaty was signed, the obligation of the United States would have been identical with the obligation incurred by an individual who, being a party to an exchange of farms, should prove not to be the owner of all the land covered by his deed.

In that event it would have become the duty of the United States to do one of four things: Either to acquire a complete title to all the land covered by their deed, and to convey the same to the Choctaws; or to restore to the Choctaws a part of their land east of the Mississippi River; or to rescind the treaty altogether and place the parties *in statu quo;* or, finally, to make just reimbursement in money for the land purchased and paid for by the Choctaws, but not delivered by the United States.

If it had been true that on the 18th day of October, 1820, the date of the exchange of lands between the United States and the Choctaw Nation, the United States had owned no lands between the Red and Canadian rivers west of the one hundredth degree of west longitude, then unless the United States had subsequently acquired and conveyed such lands, or restored to the Choctaws a part of their land east of the Mississippi River, or rescinded the treaty, the United States would have become bound to make just compensation to the Choctaws in money for the lands deeded but not delivered to them. So it would have come to pass that when the Choctaws, on the 22d day of June, 1855, relinquished their interest in the lands west of the one hundredth meridian, the interest so relinquished, as between the Choctaws and the United States, would have been precisely as valuable if the United States had not owned these lands on the 18th of October, 1820, as it would have been if the United States had owned the lands on that day. In one case it would have been the land itself the Choctaws relinquished on the 22d day of June, 1855; in the other case it would have been an indisputable claim for the just value of the lands which the Choctaws relinquished.

But while the reimbursement, to which the Choctaws would have been entitled for the relinquishment of their

interest in these lands west of the one hundredth meridian of longitude in 1855, would have been the same whether the lands did or did not belong to the United States on the 18th day of October, 1820, when the exchange was made, the fact is that on that day these lands did belong to the United States, and while this question in this view of the case may not be material to the issue, your committee think that for a full and complete understanding of the matter it is best to show this fact.

On the 18th day of October, 1820, when the commissioners of the United States and the commissioners of the Choctaw Nation signed the treaty by which the Choctaw Nation ceded to the United States their lands east of the Mississippi River, in exchange for their new country west of the Mississippi, the United States owned all the land which is included between the one hundredth and the one hundred and third meridians of west longitude and the Red and Canadian rivers. This tract of land became a part of the province of Louisiana, upon the original acquisition of that province by France by virtue of the discovery of La Salle in 1683 and the settlement of La Salle on the bay now known as Matagorda Bay in 1685.

It continued to be a part of Louisiana for seventy-seven years from the acquisition of that province by France in 1683 and 1685 until France ceded Louisiana to Spain on the 3d of November, 1762. It was a part of the province of Louisiana that France then ceded to Spain. It continued to be a part of the province of Louisiana during the period of thirty-eight years from the cession by France to Spain in 1762 to the retrocession by Spain to France in 1800 by the treaty of St. Ildefonso. It was a part of the province of Louisiana retroceded to France by that treaty.

It remained a part of Louisiana from the retrocession

by Spain to France in 1800 to the cession by France to the United States in 1803.

And, finally, it continued to be a part of Louisiana from 1803 until the treaty of October 18, 1820, between the United States and the Choctaws, and was ceded by that treaty to the Choctaw Nation. The facts stated above are established by the State papers in the archives of the Government of the United States, by sixteen different maps of Louisiana published in London, Paris, Leyden, St. Petersburg, and Amsterdam, between the year 1702 and the year 1774, and by a map published in Paris in 1820, by M. Barbè-Marbois, who was the French negotiator of the treaty by which Louisiana was ceded to the United States in 1803.

Copies of these State papers and maps are embraced in the appendix to this report.

Now, it happened that there was an inconsistency between the *natural objects* and one of the *courses* specified in the conveyance made by the United States to the Choctaws in the treaty of October 18, 1820. It is a fact that a line drawn *due south* from the *source of the Canadian* will not touch *Red River*, because the source of the Red River is farther eastward than the source of the Canadian.

But Mr. Justice Story, delivering the opinion of the Supreme Court of the United States in Preston's Heirs *vs.* Bowman (6 Wheat., 580) laid it down as "a universal rule that course and distance yield to natural and ascertained objects." And in Newson *vs.* Prior (7 Wheat., 7) Chief-Justice Marshall said:

"The courts of Tennessee, and all other courts by whom cases of this description have been decided, have adopted the same principle and adhered to it. It is that the most material and most certain calls shall control those which

are less material and less certain. A call for a natural object, as a river, or a known stream, a spring, or even a marked tree, shall control both course and distance."

It is unnecessary to cite the numerous, not to say innumerable, authorities by which this principle has been recognized and approved.

Applying these indisputable rules of law to the case under consideration, we find that two of the calls of this conveyance to the Choctaw Nation are for *natural objects;* namely, first, the *source* of the Canadian River; and second, the *Red River;* that a third call is for a *course* connecting the Red River and the source of the Canadian; that this course, being due south from the source of the Canadian, is inconsistent with the other two calls, because the source of the Canadian is further west than that of the Red River, and that this third call is therefore controlled by the other two calls of the description. The result is that the Red River and the source of the Canadian are to be connected by a straight line from the source of the Canadian to the nearest point of the Red River, which nearest point happens to be the source of the Red River.

But on the map accompanying the report of the Commissioner of Indian Affairs for 1888 the source of the Canadian River is located in 104° 30′ west longitude, and 37° north latitude, and the source of the Red River in 103° 30′ west longitude, and 34° 45′ north latitude. A line drawn from the source of the Canadian to the source of the Red River lies wholly west of 103° 30′, and may, therefore, lie within territory which belonged to Spain in 1820. But it is certain that the cession to the Choctaws carried all the land between the one hundredth and one hundred and third meridians and the Red and Canadian rivers. The map No. 18, hereto appended, accurately traced from the map published in the report of the Com-

missioner of Indian Affairs for 1888, shows the dimensions of the lands of the Choctaws west of the one hundredth meridian. It contained 10,296 square miles and 6,589,440 acres.

Your Committee therefore believe that when the Choctaws relinquished their interest in the lands between the Red and the Canadian rivers west of the one hundredth meridian of west longitude, on the 22d day of June, 1855, they were entitled to receive in compensation for that relinquishment the just value of those lands. What, then, was the just value of those lands in 1855? The territory of the Choctaws west of the one hundredth meridian of west longitude contained 286 full townships, excluding fractional townships, amounting to 10,296 square miles or 6,589,440 acres of land. At the price of 12½ cents per acre this land amounted in value to $823,680. But in the treaty of June 22, 1855, the sum of $800,000 was constituted the entire pecuniary consideration, not only for the relinquishment by the Choctaws of their interests west of the one hundredth meridian, but also for the lease by the Choctaws and Chickasaws to the United States of the land between the ninety-eighth and the one hundredth meridians. The sum of $800,000 was not more than sufficient to compensate the Choctaws for the relinquishment of the land west of the one hundredth meridian. Nothing remained, then, to apply on the lease of the land between the ninety-eighth and one hundredth meridians, which amounted to 7,713,239 acres. The rent of the 7,713,239 acres of land between these meridians was, therefore, altogether nominal—it did not amount to $1. For less than $1, then, the United States have held 7,713,239 acres of land from June, 1855, down to March, 1892, a period of more than thirty-six years.

Now, what considerations could possibly have recon-

ciled the Choctaws and Chickasaws to a lease covering 7,713,239 acres of land for a period of thirty-six years at an aggregate rental of less than $1? There were two considerations which reconciled the Choctaws and Chickasaws to this lease. These considerations were the uses to which the lands were devoted. In the first place, by the express terms of the lease, the lands were to be used for a permanent settlement of the Wichitas and other bands or tribes of Indians, entirely satisfactory to the Choctaws and to none other; in the second place, they were to remain open to settlement by the Choctaws and Chickasaws themselves, as before the lease.

But on the 27th day of September, 1830, ten years after the Choctaws had purchased and paid for their western country, including this land west of the one hundredth meridian, the United States caused the following article to be inserted in a new treaty between the United States and the Choctaw Nation:

"Art. 2. The United States, under a grant specially to be made by the President of the United States, shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River in fee-simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it, beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas River; running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red River and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning." (7 Stat., 331.)

In this article the western line of the Choctaws is declared to extend from the "source of the Canadian fork, *if in the limits of the United States*," due south to Red River. But there was no such "if" in the deed by which

the Choctaws acquired this land, on the 18th of October 1820, and under which they had already held it, or claimed to hold it, for ten years.

What is the explanation of this new demarcation of the western boundary of the Choctaw country? And what is its bearing upon the right of the Choctaws for compensation for the relinquishment subsequently made by them in the treaty of June 22, 1855? The explanation of this change of boundary is this: After the United States had sold this land to the Choctaws, and received payment in full therefor, the United States sold the same land, out from under the Choctaws, to the King of Spain. On the 19th day of February, 1821, four months after the purchase of this land by the Choctaws, the Senate of the United States ratified a treaty whereby the United States sold the western part of the province of Louisiana, including the land of the Choctaws west of the one hundredth meridian, to the Spanish King in part payment for the much-coveted province of Florida. This treaty was signed on the 22d of February, 1819; but it had been rejected by the King of Spain. Pending the negotiation of the treaty by which the United States sold this land to the Choctaws, the United States never disclosed to the Choctaws their purpose to sell the land to a foreign power.

The Choctaws were not apprised that a consummation of such a sale to the King of Spain awaited a possible ratification by that King of a treaty which had stood rejected for nearly two years, and its subsequent ratification by the Senate of the United States. And yet this Spanish treaty divested the Choctaws of their legal title to the land west of the one hundredth meridian, which the United States had previously deeded them, and for which they had fully paid. Indeed, when the United States sold this land to the Choctaws, without notifying them of the nego

tiations with Spain, it was far from being certain or even probable in the minds of the legislative and executive officers of the Government of the United States that the exchange of western Louisiana for Florida would be consummated; for not only had the King of Spain rejected the treaty, but a vigorous opposition to the exchange of western Louisiana for Florida had sprung up in the Congress of the United States, based on the ground that the price to be paid for Florida was extravagantly large, and also on the ground that the sale of the territory of the United States to a foreign government by the President and the Senate, in the exercise of the treaty-making power, without the coöperation of the House of Representatives was unconstitutional and void. On the 28th day of March, 1820, Henry Clay, of Kentucky, introduced the following resolutions in the House of Representatives of the United States:

"(1.) *Resolved*, That the Constitution of the United States vests in Congress the power of disposing of the territory belonging to them, and that no treaty purporting to alienate any portion thereof is valid without the concurrence of Congress.

"(2.) *Resolved*, That the equivalent proposed to be given by Spain to the United States, in the treaty concluded between them on the 22d day of February, 1819, for that part of Louisiana lying west of the Sabine, was inadequate, and that it would be inexpedient to make a transfer thereof to any foreign power, or to renew the aforesaid treaty."

On the 3d of April, 1820, Mr. Clay delivered a speech in the House of Representatives in support of these resolutions, in which he is reported as follows:

"The first resolution which he had presented asserted that the Constitution vests in the Congress of the United

States the power to dispose of the territory belonging to them, and that no treaty purporting to alienate any portion thereof is valid without the concurrence of Congress. The proposition which it asserts was, he thought, sufficiently maintained by barely reading the clause in the Constitution on which it rests:

"'The Congress shall have power to dispose of, etc., the territory or other property belonging to the United States.' * * *

"But in the Florida treaty it was not pretended that the object was simply a declaration of where the western limit of Louisiana was. It was, on the contrary, the case of an *avowed cession of territory from the United States to Spain.*" * * *

On the second resolution he said:

"It results, then, that *we have given for Florida, charged and encumbered as it is, first, unencumbered Texas;* second, $5,000,000; third, a surrender of all our claims upon Spain not included in that five millions; and, fourth, if the interpretation of the treaty which he had stated were well founded, about 1,000,000 acres of the best unseated land in the State of Louisiana, worth, perhaps, $10,000,000. The first proposition contained in the second resolution was thus, Mr. C. thought, fully sustained. The next was, it was inexpedient to cede Texas to any foreign power. Mr. C. said he was opposed to the transfer of any part of the territory of the United States to any foreign power. They constituted, in his opinion, a sacred inheritance of posterity which we ought to preserve unimpaired. He wished it was, if it were not, a fundamental and available law of the land that they should be inalienable to any foreign power. * * *

"The last proposition which the second resolution affirms is that it is inexpedient to renew the treaty. If

Spain had promptly ratified it, bad as it is, he would have acquiesced in it. After the protracted negotiation which it terminated, after the irritating and exasperating correspondence which preceded it, he would have taken the treaty as a man who has passed a long and restless night, turning and tossing in his bed, snatches at day an hour's disturbed repose. But she would not ratify it; she would not consent to be bound by it, and she has liberated us from it. * * * Let us put aside the treaty; tell her to grant us our rights to their uttermost extent. And if she still palters, let us assert those rights by whatever measures it is for the interests of our country to adopt." (Ann. Cong., Sixteenth Congress, first session, Vol. 2, pp. 1691, 1724, 1725, 1726, 1729, 1730, and 1731.)

The final ratification of the Spanish treaty extinguished the title of the Choctaws to their land west of the one hundredth meridian, but it did not extinguish their right of reclamation against the United States for this land, which had been sold to the Choctaws by the United States and paid for by the Choctaws, and then sold without the knowledge or consent of the Choctaws to the King of Spain. When the Choctaw treaty of 1830 was signed the United States, being apprehensive that a part of the land sold to the Choctaws by metes and bounds in 1820 would prove to be within the boundaries of the land subsequently sold to Spain, in part payment for Florida, insisted upon such a modification of the boundaries of the Choctaw Nation as should, in effect, make its western line coincident with the eastern line of the land sold to Spain. By the Spanish treaty the eastern boundary of that part of Louisiana which was ceded to Spain in exchange for Florida was fixed as follows:

"Art. 3. The boundary line between the two countries west of the Mississippi shall begin on the Gulf of Mexico,

at the mouth of the river Sabine, in the sea, continuing north along the western bank of that river to the thirty-second degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo of Natchitoches or Red River; then following the course of the Rio Roxo westward to the degree of longitude one hundred west from London and twenty-three from Washington; then crossing the said Red River and running thence by a line due north to the river Arkansas; thence following the course of the southern bank of the Arkansas to its source in latitude forty-two north, and thence by that parallel of latitude to the south sea." (8 Stat., 254.)

The stipulation in the Choctaw treaty of 1830 as to boundaries was a mere recognition of what had been for nine years an accomplished fact. It was only a recognition of the fact that so much of the land sold to the Choctaws on the 18th of October, 1820, as lay west of the one hundredth meridian had been sold to Spain on the 19th of February, 1821, and that the title of the Choctaws thereto had been extinguished by such sale. It was in no sense a stipulation, either express or implied, on the part of the Choctaws to waive their right for reimbursement for the lands which they had bought and paid for and then involuntarily lost. If this land had not been the property of the United States when the United States conveyed it to the Choctaws and received payment therefor from the Choctaws, the right of the Choctaws to reimbursement would have been incontestable. *A fortiori* was the right to reimbursement incontestable when the United States, having sold the land to the Choctaws and received full payment for it, subsequently sold it, without their knowledge or consent, to the King of Spain.

It was with good reason, then, that the United States and the Choctaws stipulated in the treaty of June 22, 1855,

for the relinquishment of the interest of the Choctaws in the land west of the one hundredth meridian. This stipulation was not merely a nominal stipulation for the relinquishment of an intangible, nebulous, imaginary claim, but was a *bona fide* stipulation, entered into for the relinquishment of a substantial right, recognized as such by both parties to the treaty.

The books, documents, and maps showing the interest of the Choctaws and Chickasaws in the lands west of the ninety-eighth meridian, known as the "leased district," have always been readily accessible to the Secretary of the Interior, and yet when, in pursuance of the authority conferred by section 14 of the Indian appropriation act, approved March 2, 1889, a commission was appointed "to negotiate with the Cherokee Indians, and with all other Indians owning or claiming lands lying west of the ninety-sixth degree of longitude, in the Indian Territory, for the cession to the United States of all their title, claim, or interest of every kind or character in and to said lands," the Secretary, in his "compilation concerning the legal status of the Indians and lands in the Indian Territory," issued to the commissioners, informed them that the interest of the Choctaws and Chickasaws in Greer County, which was a part of the "leased district," had been extinguished by the treaty of 1866. This was tantamount to an assertion that the interest of the Choctaws and Chickasaws in the entire "leased district" had been extinguished by the treaty of 1866, and it was the only allusion to the interest of the Choctaws and Chickasaws in the leased district made in that compilation. The Secretary's statement is printed on page 30 of Senate Ex. Doc. No. 78, Fifty-first Congress, first session, as follows:

"*Greer County.*—While that part of the Choctaw and Chickasaw country lying immediately west of the Kiowa

and Comanche and Apache reservations, and between the Red River and the North Fork thereof and the State of Texas (marked No. 31 on the map), is not subject to negotiation, the Indian title thereto having been extinguished by the treaty of 1866 with those Indians, I deem it proper to give its status, as understood by this Department."

On the 19th of December, 1889, the Senate adopted the following resolution:

"*Resolved*, That the Secretary of the Interior be directed to send to the Senate the compilation recently made in the Indian Bureau concerning the legal status of the Indians and lands located in the Indian Territory, and that he also, if not incompatible with the public interest, send to the Senate instructions issued to the Commission recently appointed pursuant to act of Congress to negotiate for the cession to the Government of lands west of the ninety-sixth degree in the Indian Territory."

The Secretary, however, not only declined to send the "instructions," but also declined to send the "compilation." His answer to the resolution of the Senate is printed in Senate Ex. Doc. No. 21, first session, Fifty-first Congress, as follows:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *December* 21, 1889.

SIR: I have the honor to acknowledge the receipt of the following resolution of the Senate, dated 19th instant:

"*Resolved*, That the Secretary of the Interior be directed to send to the Senate the compilation recently made in the Indian Bureau concerning the legal status of the Indians and lands located in the Indian Territory, and that he also, if not incompatible with the public interest, send to the Senate instructions issued to the commission recently appointed pursuant to act of Congress to nego-

tiate for the cession to the Government of lands west of the ninety-sixth degree in the Indian Territory."

In response thereto I have the honor to state that no compilation has been made by the Indian Bureau concerning the legal status of the Indians and lands located in the Indian Territory other than that embodied in the instructions to the Cherokee Commission.

In view of the pending negotiations with these Indians, I deem it incompatible with the public interest that these instructions at this time be made public.

With the final report of the commission a copy of the instructions herewith requested will be furnished.

I have the honor to be, very respectfully,

JOHN W. NOBLE,
Secretary.

The PRESIDENT OF THE SENATE.

Thereupon the Senate, by a resolution adopted March 10, 1890, peremptorily directed the Secretary to send the compilation to the Senate, as follows:

"*Resolved*, That the Secretary of the Interior be directed to send to the Senate the compilation recently made in the Indian Bureau, concerning the legal status of the Indians and lands within the Indian Territory."

The Secretary replied as follows:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *March* 12, 1890.

SIR: I have the honor to acknowledge the receipt of Senate resolution in the following words:

"*Resolved*, That the Secretary of the Interior be directed to send to the Senate the compilation recently made in the Indian Bureau, concerning the legal status of the Indians and lands within the Indian Territory."

In response thereto I transmit herewith the compilation called for, from which has been eliminated the instructions given the Cherokee Commission.

I have the honor to be, very respectfully,

JOHN W. NOBLE,
Secretary.

The PRESIDENT OF THE SENATE.

The Secretary had access to the books, documents, and maps, which showed the interest of the Cheyennes and Arapahoes in the Cimarron tract of more than 5,000,000 acres, as well as in the tract of 2,489,160 acres within the "leased district," when he issued his "instructions" to the commissioners as above stated. Indeed, in this "compilation," on pages 9 and 10 of Senate Ex. Doc. No. 78, first session, Fifty-first Congress, the Secretary, referring to the Cimarron tract, says:

"These lands, it must be conceded, were secured to these tribes by solemn treaty stipulation, and they have made no treaty ceding them, nor agreement of relinquishment that is of any binding force or effect. They have committed no act of forfeiture. Their title stands to-day as it did at the date of the ratification of the treaty of 1867. As between the United States and the Cheyennes and Arapahoes, the title to the lands is in these Indians, and they have a perfect and indisputable right to remove to that reservation and enjoy all the privileges guaranteed to them by the treaty."

The commissioners refused to negotiate with the Choctaws and Chickasaws for their interest in the "leased district;" but they proceeded to negotiate with the Cheyennes and Arapahoes for a cession of their interest in that part of the "leased district" on which they were located by the executive order dated August 10, 1869,

although there can be no pretense that the President had any authority to vest any sort of title to these lands in these Indians.

It seems to be a necessary inference from the facts just stated that the instructions which the Secretary declined to furnish to the Senate required the commissioners to negotiate with the Cheyennes and Arapahoes for their interest in the "leased district," which was, in fact, a mere right of occupancy and in no sense a title to the land, but did not permit them to negotiate with the Choctaws and Chickasaws for their interests therein, thus actually suspending the law, notwithstanding the fact that Congress had explicitly directed the commission, to use the words of the statute, "to negotiate with the Cherokee Indians and with all other Indians owning or claiming lands lying west of the ninety sixth degree of longitude in the Indian Territory, for the cession to the United States of all their title, claim, or interest of every kind and character in and to said lands," which clearly embraced in its terms the claims of the Choctaws and Chickasaws to the "leased district."

The commissioners having, in pursuance, as your committee infer, of the instructions of the Secretary of the Interior, refused to negotiate with the Choctaws and Chickasaws for the relinquishment of their interest in the "leased district," the governor of the Chickasaw Nation it appears sent B. C. Burney and Overton Love, citizens of that nation, to Washington to apply to Congress for protection against the threatened invasion of their rights. Your committee are informed that before making their formal application to Congress the Chickasaw delegates, Messrs. Burney and Love, had an interview with a well-known financier and capitalist, now a distinguished member of the Executive Department of the Government, in

which he said to them that, if they could obtain from Congress authority to sell the lands embraced within the "leased district" at private sale, a syndicate could be organized to purchase them at the price of $5 per acre, at which rate the lands, being in area 7,713,239 acres, would amount to $38,566,190, and at the same time he expressed the opinion that the proposed syndicate would be able to sell the lands for $10 per acre, at which rate the lands would have yielded the syndicate a profit of more than $35,000,000.

If the law as it stands had been executed and the amount appropriated paid to the Choctaws and Chickasaws, and the Cheyenne and Arapahoe agreement had also been ratified and afterwards executed, even though it might be said that the Government had had to "pay twice for these lands," yet it would have bought land worth $5 per acre for $1.31 per acre, and which it proposed to sell to actual settlers at $1.50, which upon a sale of the entire tract would yield, leaving out of the account 96,000 acres given in severalty to the Cheyennes and Arapahoes, a net profit to the Government of $454,700, and to the settlers lands worth $11,965,800 for $3,589,740, or a net profit of $8,376,060.

In the message of the President, transmitted to Congress February 17, 1892, he says:

"After a somewhat careful examination of the question I do not believe that the lands for which this money is to be paid were, to quote the language of section 15 of the Indian appropriation bill already set out, 'ceded in trust by article 3 of treaty between the United States and said Choctaw and Chickasaw nations of Indians, which was concluded April 28, 1866.'"

The President is of the opinion that the lands in question were not ceded in trust to the United States by

this treaty. He thinks that an absolute, unqualified title was conveyed by the treaty, and as he elsewhere says, that the United States paid the Choctaws and Chickasaws therefor the sum of $300,000. On the contrary, your committee believe that the estate conveyed was a trust estate only; that whereas the treaty of 1855 empowered the United States to locate upon these lands only those Indians whose ranges were included within certain specified limits, this treaty of 1866 authorized the United States—

(1) To locate upon these lands Indians like the Cheyennes and Arapahoes, whose ranges were not within the limits designated in the treaty of 1855, and whom, prior to the treaty of 1866, the United States had no right to locate upon the lands;

(2) To locate upon the lands Choctaw and Chickasaw freedmen;

(3) Deprived the Choctaws and Chickasaws themselves of the right to settle thereon.

The treaty disposed of this sum of $300,000 as follows: It was to remain in the Treasury of the United States. If the Choctaws and Chickasaws should decide not to confer citizenship upon their freedmen, and the United States should remove the freedmen with their consent from the Choctaw and Chickasaw nations, then the sum of $300,000 was to be held in trust for the freedmen. If the Choctaws and Chickasaws should deside not to admit their freedmen to citizenship, and the freedmen should decline to be removed from the Choctaw and Chickasaw nations, then this sum of $300,000 was to remain the property of the United States. But if within two years the freedmen should be invested with citizenship, and should refuse to leave the Choctaw and Chickasaw nations, then, and only then, was the money to be paid to the Choctaws and Chickasaws.

The purpose of this provision relating to the $300,000 was not to pay for the land. Its object was to cover the cost of the removal of the freedmen if the Choctaws and Chickasaws should not admit them to citizenship, or to compensate the Choctaws and Chickasaws in some measure for the benefits conferred upon the freedmen by conferring citizenship upon them, in case this should be done. These benefits were material and substantial; in addition to all the civil and political rights enjoyed by the Indians themselves, they acquired property rights such as were conferred upon no freedmen outside of the Indian Territory. They have the free use of lands just as the Indians have, and the benefit of excellent schools, for the support of which they have never contributed in any way a single cent. To have these rights conferred upon 3,000 freedmen the Government agreed to pay $300,000. The Choctaws agreed to it, the Chickasaws did not. This sum was fixed at $300,000 because the number of freedmen were estimated at 3,000, and it was agreed that each freedman, in case of removal, should receive for the expenses incident to emigration the sum of $100.

The Choctaws admitted their freedmen to citizenship and received their share of the sum of $300,000, less $7,200 paid to freedmen who promised to emigrate from the Choctaw Nation.

The Choctaws and Chickasaws claim that their position was like that of the Creeks and Seminoles, who have already been paid under the acts of March 1 and 2, 1889, for their interest in the lands ceded by the treaties of 1866.

The language of the Creek treaty is:

"In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as

the United States may choose to settle thereon, the west half of their entire domain," etc.

In the Seminole treaty the language is:

"In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Seminoles cede and convey to the United States their entire domain, being," etc.

In the Choctaw and Chickasaw treaty the words are:

"The Choctaws and Chickasaws, in consideration of the sum of $300,000, hereby cede to the United States the territory west of the ninety-eighth degree west longitude: Provided," etc.

The difference between these treaties is that the Choctaw and Chickasaw treaty does not contain the words "in compliance with the desire of the United States to locate other Indians and freedmen thereon" preceding the words of conveyance; but this committee believe that these words are distinctly implied and just as binding upon the United States as if they had been so used, for the reason that when the commissioners of the United States met these Indians to negotiate this treaty they informed the Indians that they were authorized to treat only upon condition that they (the Indians) would consent that the Indian country should be set apart for Indian occupation. This demand of the Government was acceded to by the Indians, and upon this condition the treaty was made. The agents of the United States so reported to their Government at the time, and it has been so understood since.

The following is taken from a report made to Congress in this case by the Indian Office September 13, 1890:

"The records of this office show that in 1865 a commission was appointed to negotiate with the Indians of the then Southern Superintendency, among them the

Choctaws, Chickasaws, Creeks, Seminoles, and Cheroke
* * * A council was held between this commissi
and representatives of the Southern Indians at Fort Smi
Ark., in September, beginning on the 8th and ending
the 21st day of that month. On the 9th of Septemb
1865, the president of the commission, Hon. D. N. Cool
who was also at that time Commissioner of Indian Affai
addressed the council, * * * and declared * *
that, as the representatives of the President of the Unit
States, the commission, for which he spoke, was empower
to enter into new treaties with the proper delegates of t
tribes located within the Indian Territory and others abo
named living west and north of Indian Territory; th
such treaties must contain substantially the followi
stipulations, viz:

* * * * *

"'Fifth. A part of the Indian country to be set apart
be purchased for the use of such Indians from Kansas a
elsewhere as the Government may desire to coloni
therein.

"'Sixth. That the policy of the government to unite
the tribes of this region into one consolidated governme
should be accepted.

"'Seventh. No *white person*, except officers, agents, a
employés of the Government, or of any internal improv
ment company authorized by the Government, will
permitted to reside in the Territory, unless formally i
corporated with some tribe according to the usage of t
band.'

"On September 11, 1865, in a letter addressed to t
commissioners of the United States, the Choctaw delegat
said: .'In answer, therefore, to your propositions to t
several tribes of Indians, we say that the first, secon
third, fourth, fifth, and sixth articles meet our approva

and submitted in lieu of the seventh proposition a proposition which provided that "no white person, except officers, agents, employés of the Government, or of any internal improvement company authorized by the Government of the United States; also, no person of African descent, except our former slaves, or free persons of color who are now or have been residents of the Territory, will be permitted to reside in the Territory unless formally incorporated with some tribe according to the usages of the band.'

"Later, in the progress of the council, about the 18th of September, the commissioners of the southern factions of the Choctaw and Chickasaw tribes accepted the propositions suggested by the commissioners, and before the final adjournment of that council, the 21st of September, all of the delegates of the tribes represented signed a treaty of peace between themselves and the United States. (These proceedings will be found in the Annual Report of the Indian Bureau, 1885, p. 105, etc.)

"It will be observed that in each of the treaties made with each of the other civilized tribes, extracts from which are above given, the purpose for which the land was being ceded to the United States is specifically stated. No such purpose is stated in the treaty made about the same time with the Choctaws and Chickasaws. It is possible that the commission, when it came to negotiate with the Choctaws and Chickasaws, may have omitted from the treaty with those Indians a similar condition and reservation regarding the purposes for which the lands were to be used, because of the fact that the United States had secured by a prior treaty a lease, which amounted to a permanent lease, of the lands in question for Indian purposes, for which, together with other considerations. it had paid the sum of $800,000. Considering this fact, the commission

negotiating the treaty may have considered the payment of the $300,000 additional, as provided for in the treaty of 1866, a sufficient compensation for an absolute cession of all right, title and interest that the Choctaws and Chickasaws had in and to the said 'leased district.' This conclusion, however, can not be fairly reached, when the record of the negotiations is fully considered; for we have already seen that these Indians accepted the terms proposed by the commission, upon which the treaties would be negotiated; and these very terms indicate the purpose for which the ceded lands were to be used. And it shows quite clearly that the Indians understood that they were parting with whatever right, title, and interest remained to them in the 'leased district' to the United States, to be used for the location and settlement of other Indians thereon.

"The negotiations made about that time by the United States with Indian tribes show very conclusively that a policy had been carefully mapped out for the acquisition by the United States of the right to locate other Indians upon portions of the lands owned and occupied by the five civilized tribes in the Indian Territory.

"I am inclined, therefore, to the opinion that the Choctaw and Chickasaw Indians have good ground for the claim that the United States took the land ceded by them upon the trust to settle other Indians and freedmen thereon, as the policy upon which the negotiations were made clearly indicated its desire and purpose to do.

"While there are clearly no words of limitation in the treaty of 1866 as to the use to which the ceded lands should be put by the United States, the history of the negotiation preceding and resulting in that treaty and the subsequent treatment of the subject quite clearly indicate that the Choctaws and Chickasaws have good ground for claiming that they understood that the lands were to be

used for the location of other Indians and freedmen thereon."

Hon. D. N. Cooley was Commissioner of Indian Affairs at the time this treaty was negotiated. He was president of the treaty commissioners, was himself personally present and conducted the negotiations, and in his formal report as Commissioner of Indian Affairs to the Secretary of the Interior, in 1865, he uses this language:

"With the Choctaws and Chickasaws a treaty was agreed upon the basis of the seven propositions heretofore stated, and in addition to which those tribes agreed to a thorough and friendly union among their own people, and forgetfulness of past differences; to the opening of the leased lands to the settlement of any tribes whom the Government of the United States may desire to place thereon," etc.

The Secretary of the Interior, in an official communication to the Secretary of War, dated May 1, 1879, said:

"The lands ceded by the Choctaws and Chickasaws were, by article 9 of the treaty of June 22, 1855, leased to the United States for the permanent settlement of the Wichitas, and such other tribes or bands of Indians as the Government may desire to locate therein. The treaty of 1866 substituted a direct purchase for the lease, but did not extinguish or alter the trust."

On the 17th of February, 1882, the Secretary of the Interior communicated to the Senate of the United States a decision of the Commissioner of the General Land Office, containing the following statement:

"The Choctaw and Chickasaw cession of April 28, 1866 (14 Stat., 769), was, by the tenth section thereof, made subject to the conditions of the compact of June 22, 1855 (11 Stat., 613), by the ninth article of which it was stipulated that the land should be appropriated for the permanent settlement of such tribes or bands of Indians as the

United States might desire to locate thereon. The lands embraced in the Choctaw and Chickasaw cession were also included in a definite district, established by the stipulations of the treaty of 1855, pursuant to the act of Congress of May 28, 1830, the United States reengaging, by the seventh article of the said treaty, to remove and keep out from that district all intruders.

"In pursuance of the stipulations of the foregoing compacts, and in the exercise of the trusts assumed by the United States, under the several treaties, and in accordance with specific provisions of law and the lawful orders of the President, all the lands in the Indian Territory to which the United States has title have been permanently appropriated or definitely reserved for the uses and purposes named. The title of the United States to lands in the Indian Territory is, as heretofore shown, subject to specific trusts, and it is not within the lawful power of either the legislative or executive departments of the Government to annihilate such trusts, or to avoid the obligations arising thereunder. Such trusts are for the benefit of Indian tribes and Indian freedmen."

In response to a Senate resolution of January 23, 1884, the Secretary of the Interior transmitted to the President of the Senate the following communication:

"SIR: I have the honor to acknowledge receipt of Senate resolution of January 23 last, directing the Secretary of the Interior—

"'To advise the Senate of the present status of lands in the Indian Territory, other than those claimed and occupied by the five civilized tribes, the extent of each tract separately, the necessity for or obligation to keep said lands in their present condition of occupancy or otherwise, and as to whether any portion of said lands, and if so, what portion, are subject to entry under the land laws

of the United States, and as to what portion, if any, could be made so subject to entry by the action of the Executive.'

"These lands were acquired by treaties with the various Indian nations or tribes in that Territory in 1866, to be held for Indian purposes and to some extent for the settlement of the former slaves of some of said nations, or portions thereof.

"Such are the purposes for which said lands are now being used or held, according to the common understanding of the objects of treaties by which they were acquired; and from these arise the necessity for or obligation to keep said lands in their present condition of occupancy or otherwise."

In an official communication to the President, dated January 26, 1885, the Secretary of the Interior said:

"Objection will be made to the occupation of any part of the Indian Territory by other than Indians, on the ground that the Government set apart the Territory for the exclusive use of the Indians and covenanted that no others should reside therein. It is not denied that the treaties so provide. It is, however, within the power of the Government, with the consent of the Indians interested, to change this provision of the treaties so that these desirable unoccupied lands may be placed within the lawful reach of the settlers."

In the case of the United States *v.* Paine (2 McCrary, 290), the court said:

"Now we must look to the acts of the Government, since the adoption of this treaty, in order to understand its purpose. We find that in the year 1866 it entered upon the policy of settling tribes of Indians, other than the five civilized tribes, in the Indian country. Since that time by treaties, laws, and executive orders of the President it has settled upon reservations in the Indian country

the Cheyennes, the Arapahoes, the Kiowas, the Comanches, the Wichitas, the Pawnees, the Sacs and Foxes, the Nez Perces, the Poncas, the Modocs, the Kansas, the Osages, the Pottawatomies, the Absentee Shawnees, as well as some other small tribes. This explains why the treaty-making power thought, on March 21, 1866, that there was an urgent necessity of the Government for more lands in the Indian Territory. This shows that the Government not only had a desire to locate other Indians in the Indian Territory, but to a great extent it has consummated that desire."

But the President, referring to the leased district, says:

"As to these lands, the Government had already, under the treaty of 1855, secured the right to use them perpetually for the settlement of friendly Indians. This was not true as to the other tribes referred to."

This statement, if material to the question now at issue, means, first, that by the treaty of 1855 the Government acquired the right to locate upon these lands *any* Indian tribes which it might be convenient for the Government to locate thereon, without restriction or limitation; and, secondly, that the Government, by the treaty of 1855, acquired the right to allot these lands in severalty to such Indians. On both of these points, your committee think the President is mistaken.

The treaty of 1855 secured to the Government the right to locate on the lands in controversy those Indian tribes whose homes and ranges were within certain designated limits, and no others. The following is the text of the treaty:

"The Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude, for the permanent settlement of such other tribes or bands of

Indians as the Government may desire to locate therein; excluding, however, all the Indians of New Mexico, and also all those whose usual ranges at present are north of the Arkansas River, and whose permanent locations are north of the Canadian River, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas."

Moreover, the treaty of 1855 did not grant, or purport to grant, to the United States any right to allot these lands in severalty to individual owners, or to transfer the ownership of the lands. As to these lands the treaty of 1855 was not a deed in fee simple, but only a lease from the Choctaws and Chickasaws to the United States. It empowered the United States, not to convey, but only to sublet the lands. The words of the treaty are:

"The Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude."

Until the Choctaws and Chickasaws assented to the provisions of the act of March 3, 1891, they were never willing nor did they ever consent that these lands should be opened to settlement by whites, or allotted, or conveyed in severalty, to whites, blacks, or Indians.

The President expresses the opinion that the conditions attached to the cessions in the Creek and Seminole treaties of 1866 were the same as those which were attached to the lease in the Choctaw and Chickasaw treaty of 1855, and that, therefore, the claim of the Choctaws and Chickasaws that the cession in their latter treaty of 1866 was encumbered by a condition, or trust, is not supported by any analogies of the Creek and Seminole cases. This is a mistake. The trusts created in the Creek and Seminole treaties of 1866 were trusts (1) for the location of friendly Indians, in general, without restriction, and (2) for the

location of freedmen. Neither of these two trusts was created by the Choctaw and Chickasaw treaty of 1855. Neither of them existed, in the case of the leased district, until created by the Choctaw and Chickasaw treaty of 1866. The trust created by the Choctaw and Chickasaw treaty of 1855 was a trust not to locate Indians in general, but to locate certain Indians whose ranges were included within the boundaries designated in the treaty. This treaty of 1855 contained no trust whatever for the location of freedmen. That trust was first created, for the leased district, by the Choctaw and Chickasaw treaty of 1866.

It is true that these two trusts of the Choctaw and Chickasaw treaty of 1866 are not created by express words qualifying the grant. But this is also true of the Creek and Seminole treaties. In those treaties the trusts are not expressed, but are implied in words used in recitals only. They are not implied in either of those treaties, in words used in the body of the grant. The recital in each case is in the following words: "In compliance with the desire of the United States to locate other Indians and freedmen thereon," etc. The words of the grant are even stronger in the Creek and Seminole treaties than in the Choctaw and Chickasaw treaty. The Choctaws and Chickasaws "cede," but the Creeks and Seminoles "cede and convey."

These trusts in the Choctaw and Chickasaw treaty of 1866 are implied in the language of the third article, in which the words of conveyance, the statement of the consideration, and the arrangements for the freedmen are placed in such juxtaposition as not only to warrant, but to necessitate, the inference that it was the object of the parties, and the effect of the treaties, to authorize the United States to locate upon these lands Indians whose ranges were not embraced within the limits designated in

the treaty of 1855, and also to locate Choctaw and Chickasaw freedmen thereon, and that the cession was encumbered by corresponding trusts.

If this be not true, if the Choctaw and Chickasaw deed of 1866 was an absolute deed, while those of the Creeks and Seminoles were only deeds in trust, then gross injustice was practiced upon the Choctaws and Chickasaws by the United States in 1866, for the Creeks then received $325,362 for a deed in trust of only 2,169,080 acres of land, and the Seminoles received $975,168 for a deed in trust of only 3,250,560 acres; but for 7,713,239 acres of land, which had been previously held by the United States under a gratuitous lease for thirty-six years, the Choctaws and Chickasaws received not a single penny, unless the $300,000 provided for the freedmen be erroneously reckoned as compensation to the Choctaws and Chickasaws for the grant. And now the President having, in 1889, paid the Creeks for the same lands the additional sum of $2,280,857, and having, in the same year, paid the Seminoles for the same lands an additional sum of $1,912,942.02, has, for almost twelve months, refused to pay the Choctaws and Chickasaws the amount appropriated by the act of March 3, 1891.

The third article of the treaty of 1866, standing alone, shows a cession by the Choctaws and Chickasaws to the United States of 7,713,239 acres of land, unsurpassed in point of fertility by any body of land of equal area within the limits of the United States. If the sum of $300,000, named in this article, constituted the sole consideration for the conveyance, and the United States became the absolute owners of the land in their own right, and not the mere grantees of a trust estate therein, then the remarkable spectacle is presented of a purchase by the United States from their feeble and dependent "wards" of 7,713,239

acres of land, then worth in money more than 10,000,000 and now worth more than 40,000,000, for the nominal consideration of $300,000, which sum of $300,000 was to remain the property of the United States if the freedmen should not be removed from the Chickasaw and Choctaw nations, or become citizens of those nations, but was to be paid to the freedmen if they should be removed, and was only to be paid to the Choctaws and Chickasaws in the event that they should confer citizenship upon the freedmen and the freedmen should not be removed. Was such a bargain ever before made between a powerful republican government and a dependent Indian tribe? Was such a bargain ever made between an honest guardian and a helpless "ward"?

The treaty between the United States and Spain, by which the United States ceded these lands to Spain, in part payment for Florida, which was ratified February 19, 1821, is designated by the President as the treaty of 1819. And he designates the treaty by which the United States had previously ceded the same lands to the Choctaws as the treaty of 1820. He says:

"The boundary between the Louisiana purchase and the Spanish possession, by our treaty of 1819 with Spain, was, as to these lands, fixed upon the one hundredth degree of west longitude. Our treaty with the Choctaws and Chickasaws, made in 1820, extended their grant to the limit of our possessions. It followed, of course, that these lands were included within the bounds of the State of Texas, when that State was admitted to the Union, and the release of the Choctaws and Chickasaws, whatever it was worth, operated for the benefit of the State of Texas, and not of the United States."

These statements are altogether erroneous. They mean that the lands in question had been sold to Spain before

the Choctaw treaty of 1820 was made, and so were not ceded to the Choctaws by the treaty of 1820, and, therefore, the release of 1855 operated for the benefit of Texas, whose title was derived from Spain, and not for the benefit of the United States. But the facts are as follows:

The district west of the one hundredth meridian, as already shown, belonged to France, as a part of the province of Louisiana, from 1685 to 1762. In 1762 it was ceded by France to Spain. In 1800 it was retroceded by Spain to France. In 1803 it was ceded by France to the United States. In 1820 it was ceded by the United States to the Choctaws in part payment for their lands east of the Mississippi River. In 1821, while this district was the property of the Choctaws, the United States, without their consent or knowledge, ceded it to Spain in part payment for Florida. It afterwards became successively the property of Mexico and Texas. (American State Papers, vol. 2, pp. 574, 575, 630, 634, 637, 663, 664; vol. 4, pp. 471, 473, 478, 479; Henry Clay's speech, House of Representatives, April 3, 1820; sixteen European maps, eighteenth century.)

The Spanish treaty was negotiated in 1819; but it was most vehemently opposed in the Congress of the United States and was rejected by the King of Spain. While this rejected treaty was dead the United States, in 1820, conveyed the same land to the Choctaws, without disclosing to the Choctaws the facts connected with the defunct Spanish treaty. After the treaty had been dead and buried nearly two years, it experienced a resurrection and a ratification in 1821.

The Government then found itself in this embarrassing predicament: The Choctaws, by the treaty of 1820, had conveyed to the United States all their lands in the State of Mississippi, and in payment therefor the United States

had conveyed to the Choctaws all the lands included within certain defined boundaries west of the Mississippi River. The deed to the Choctaws embraced the district west of the one hundredth meridian, but afterwards, in 1821, the United States, without the consent or knowledge of the Choctaws, conveyed the same lands to Spain in part payment for Florida. It then became obligatory upon the United States, as already indicated, to take one of four courses, either to reconvey to the Choctaws a part of their lands in the State of Mississippi, or to convey to the Choctaws additional lands west of the Mississippi River, or to surrender the treaty of 1820 altogether and restore to the Choctaws all their lands in the State of Mississippi, and receive back the lands ceded to them west of the Mississippi River, or, finally, to compensate the Choctaws in money for those lands west of the one hundredth meridian which had been sold to, and paid for, by them, and subsequently, without their consent, conveyed to Spain. The United States chose the latter course, and by the treaty of 1855, for the sum of $800,000, secured from the Choctaws a quitclaim of their title to these lands and a lease of the lands between the ninety-eighth and one hundredth meridians of west longitude. That a large part of this consideration must have applied to the lease the President says:

"It seems probable that a very considerable part of this consideration must have related to the leased lands, because these were the lands in which the Indian title was recognized and the treaty gave to the United States a permanent right of occupation by friendly Indians."

One of the grounds assigned for the President's opinion is that the Indian title to the leased lands "was recognized" by the United States. This implies that the Indian title to the lands west of the one hundredth meridian

was not recognized by the United States. But your committee think that this fact, if it were a fact, would have no bearing whatever upon the question of the apportionment of the consideration of $800,000 as between the conveyance and the lease. The Indians themselves recognized the fact that the legal title conveyed to them in 1820 had been extinguished by the conveyance to Spain in 1821. They knew that the United States, a sovereign power, invested with the right of eminent domain, had ceded their lands, by a valid treaty, to the King of Spain. But they believed that the ratification of the Spanish treaty in 1821 had not extinguished their right of reclamation against the United States for this transfer of their lands without their consent to a foreign power.

Your committee, therefore, believe that the entire sum of $800,000, paid, in pursuance of the treaty of 1855, was but a small part of the value of the 6,589,440 acres of land west of the one hundredth meridian, and that the whole of that sum was fairly applicable to the quitclaim or release of that land west of the one hundredth meridian.

The President says:

"Our treaty with the Choctaws and Chickasaws, made in 1820, extended their grant to the limit of our possessions. It followed, of course, that these lands were included within the boundaries of the State of Texas when that State was admitted to the Union, and the release of the Choctaws and Chickasaws, whatever it was worth, operated for the benefit of the State of Texas, and not of the United States."

He thinks that when the Choctaws and Chickasaws, for the sum of $800,000, relinquished their right of reclamation against the United States, for the alienation of their lands, by a release or quitclaim of their interests in those lands, this release "operated for the benefit not of the

United States, but of the owner deriving title from Spain." But the Chickasaws assert, with good reason, as your committee think, that when they furnished the United States 6,589,440 acres of land, which was actually applied by the United States in part payment for Florida, the transaction inured to the benefit of the United States. They think that when an individual furnishes a debtor means to pay his debts, the transaction inures to the benefit of the debtor. But, then, it is not true that "our treaty from the Choctaws and Chickasaws, made in 1820, extended their grant to the limit of our possessions." There was no such provision in the treaty of 1820. It occurred for the first time in the treaty of 1830, made ten years after the land had been sold to the Choctaws; and while it did deprive the Choctaws of that part of their land which was sold to Spain in 1821, it did not curtail the area actually ceded by the United States to the Choctaws in 1820, nor did it impair their right of reclamation against the United States.

The President thinks that if an Indian nation, being the owner of a tract of land purchased from the United States and fully paid for, cedes the land back to the United States by a conveyance in trust, the terms of the trust permitting the location of other Indians and of freedmen upon the land, but interdicting the location of white men thereon, the United States can evade the interdict by locating other Indians upon the land and purchasing from them a release from the interdict, and can then open the land to settlement by white citizens. He thinks that upon the assumption that the Choctaws and Chickasaws, in their lease of 1855 and in their cession of 1866, interdicted the location of whites upon the leased district, it was nevertheless competent for the United States to cede the land to the Cheyennes and Arapahoes and then purchase

from the Cheyennes and Arapahoes their interest in the land, with the right to open it to "white settlement," and that, by this device, the United States could evade the interdict of the Choctaws and Chickasaws. He thinks that if the United States, after paying the Cheyennes and Arapahoes for their interest in the lands, should be required to pay the Choctaws and Chickasaws for exemption from the restrictions imposed by their conveyance, then the United States would, in effect, be required to pay twice for the privilege of opening the land to "white settlement," or, as he expresses it, would be compelled to pay twice for the same land.

On this point your committee are constrained to differ in opinion with the President. It certainly was competent for the United States to locate Cheyennes and Arapahoes upon these lands and afterward to pay them whatever the United States saw fit to pay for a quitclaim of their interest in the land and for their consent to the location of whites thereon. But whatever effect such an arrangement might have as between the United States and the Cheyennes and Arapahoes, it could have no effect whatever to release the United States from the restrictions imposed in the treaties of the Choctaws and Chickasaws. In the same way an individual holding land in trust might, by purchasing from his own grantee a release from the obligation of the trust imposed by the grantor, divest his title of the trust and invest himself with an absolute title, and then resist his grantor's demand for redress by setting up his grantee's release and his own payment to his grantee for such release. If the United States saw fit not only to give the Cheyennes and Arapahoes allotments in severalty of a part of the land, but also to pay them money for their quitclaim of the residue and for their consent to its occupation by white settlers, and attempted by that

arrangement to evade the terms of the Choctaw and Chickasaw lease of 1855 and cession of 1866, the United States ought to bear the expense of this speculation themselves and can not rightfully recoup that expense from the Choctaws and Chickasaws.

But the President thinks that all or a large part of the money promised to the Cheyennes and Arapahoes, in the agreement of 1890, is to be paid as compensation for their interest in lands within the leased district. This is a mistake. The facts are as follows:

By the Cheyenne and Arapaho treaty of 1867 the United States set apart for the Cheyennes and Arapahoes, and for such other friendly Indians as they should be willing to admit among them, the entire country bounded on the north by the south line of the State of Kansas, on the east by the Arkansas River, on the south and west by the Cimarron River (15 Stat., 594). This tract contained over 5,207,000 acres of land.

By an Executive order, dated August 10, 1869, the President set apart, for the Cheyennes and Arapahoes, the country between the thirty-fifth and thirty-seventh parallels of north latitude, and between the eastern line of Texas and the western line of Oklahoma. This country contains 4,270,771 acres of land. (Commissioner's report, 1888, p. 89.) Of this land, 1,781,611 acres lie north of the Canadian River and outside of the leased district, and 2,489,160 acres lie south of the Canadian River and within the leased district. The authority for the Executive order, setting this land apart for the Cheyennes and Arapahoes, was not conferred by any specific constitutional or statutory provision. Its origin is nebulous, and its origin and nature are not yet well defined.

When, by virtue of the Executive order of August 10, 1869, the Cheyennes and Arapahoes were located in the

country north and south of the Canadian River, they already held, under a treaty duly ratified by the Senate, the tract of 5,000,000 acres between the Arkansas and Cimarron rivers. And yet the President is of the opinion that it was competent for the executive authorities of the United States to substitute a reservation set apart by Executive order for a reservation set apart by a duly ratified treaty, with the effect of investing the Cheyennes and Arapahoes with such a title to the 2,489,160 acres south of the Canadian River that a quitclaim of their interest therein to the United States will extinguish not only their own interest, but also that of the Choctaws and Chickasaws. He thinks that to pay the Choctaws and Chickasaws, after paying the Cheyennes and Arapahoes, would be to pay twice for the same land.

Your committee think that this Executive order was not effective to vest in 3,000 Cheyennes and Arapahoes such a title to 4,270,771 acres of land, in addition to the 5,000,000 previously set apart by treaty, between the Arkansas and Cimarron rivers, as to make the quitclaim of the Cheyennes and Arapahoes effective, not only to extinguish their own interest, but also that of the Choctaws and Chickasaws.

But Congress will not lose sight of the real character of the Cheyenne and Arapaho agreement of 1890. By that agreement the Cheyennes and Arapahoes quitclaimed to the United States, not only the 2,489,160 acres of land within the leased district, but also the 1,781,611 acres north of the Canadian River, and more than 5,000,000 between the Arkansas and Cimarron rivers, in all 9,630,771 acres. Of this aggregate amount only one-fourth was within the leased district. And yet although 96,000 acres of land within the leased district are given to the Cheyennes and Arapahoes, in severalty, the President is of the opinion that the sum of $1,500,000 promised to the

Cheyennes and Arapahoes in the treaty of 1890 is to be paid mainly, not for the 7,348,611 acres outside of the leased district, but for the 2,489,160 acres within that district.

It is difficult to reconcile this opinion of the President with the statement, made by Secretary Noble, in the "compilation" printed on page 9, of Senate Ex. Doc. No. 78, Fifty-first Congress, first session, in the following words:

"The select committee of the Senate, in its report on the removal of the Northern Cheyennes, etc., in speaking of the lands set apart for the Cheyennes and Arapahoes by the Executive order of August 10, 1869, say that 'it was never intended to be more than a temporary abiding place for these tribes, where they were to stop until the United States could extinguish the claim of the Cherokees to the lands included in the treaties with the Arapahoes and Cheyennes.'" (Senate Report No. 708, Forty-sixth Congress, second session, page 2.)

Nor is it easy to reconcile this opinion of the President with the following statements, made by Secretary Noble, in the "compilation" printed on pages 7, 8, 9, and 10, Senate Ex. Doc. No. 78, first session Fifty-first Congress, in the following words:

"CHEYENNE AND ARAPAHOE RESERVATION ON A PORTION OF THE OUTLET.

"By the second article of the treaty with the Cheyennes and Arapahoes, concluded October 21, 1867 (15 Stats., 593), a tract of country west of the ninety-sixth degree, bounded by the Arkansas River on the east, the thirty-seventh parallel of north latitude being the southern boundary line of the State of Kansas on the north, and the Cimarron or Red Fork of the Arkansas River on the

west and south, in which boundaries are included 4,294,-734 acres of the Cherokee lands west of the ninety-sixth degree, all of which lies west of the Arkansas River, was set apart for the undisturbed use and occupation of said Indians, and for such other friendly Indians as from time to time, they might be willing, with the consent of the United States, to admit among them.

"This tract (so far as it relates to Cherokee lands) is indicated on the map by a dark-blue line and numbered 2.

"This cession also covers 730,162 acres, including 53,006 acres subsequently set apart for the Pawnees, of the lands ceded to the United States by the third article of the treaty of 1866 with the Creek Nation of Indians (14 Stat., 785) for the purpose of settling friendly Indians thereon, lying north of the Arkansas River and south of the Cherokee line referred to; also that portion of the unceded Creek territory lying north of the Arkansas River, south of the Cherokee line, and east of the line dividing the Creek domain under the treaty of 1866, numbered on map 23½. But as to this latter tract the Cheyennes and Arapahoes acquired the title. (See United States *v.* Ben Reese, above referred to.)

"These lands, it must be conceded, were secured to these tribes by solemn treaty stipulation, and they have made no treaty ceding them nor agreement of relinquishment that is of any binding force or effect. They have committed no act of forfeiture. Their title stands to-day as it did at the date of the ratification of the treaty of 1867. As between the United States and the Cheyennes and Arapahoes the title to the lands is in these Indians, and they have a perfect and indisputable right to now remove to that reservation and enjoy all the privileges guaranteed to them by the treaty."

But then Secretary Noble was actually notified by the

commission, in the spring of 1891, that the amount allow to the Cheyennes and Arapahoes for their interest, not the "leased district," but in the entire Executive or reservation, was $250,000. Why this information not communicated to the President, by the Secreta your committee are not advised.

This would make the amount allowed for their land the "leased district" less than $150,000, or less tha cents per acre.

Your committee, therefore, conclude that the Uni States are not the absolute owners of the leased distr but only hold a trust estate therein; and they submit following recapitulation of the grounds on which this c clusion is based:

(1) Under the treaty of 1855 the sum of $800,000 paid for the release of the land west of the one hundre meridian and the lease of the land between the nin eighth and one-hundredth meridians.

(2) Much the larger part of that payment was appl ble to the release of the land west of the one hundre meridian, and a small part, if any, of it to the lease of land between the ninety-eighth and one hundre meridians.

(3) In 1865 the commissioners, appointed by the P ident, officially notified the five civilized tribes, at Smith, that the lands to be treated for were to be acqu for the use, not of white men, but of Indians.

(4) The Choctaws and Chickasaws, as well as the o civilized tribes, formally accepted that basis of the posed negotiations, and upon that basis consented treat, and did treat, in 1865.

(5) When the commissioners of the Choctaws Chickasaws met the commissioners of the United St to negotiate the treaty of 1866, there is no pretense

anything had been paid by the United States towards the purchase of the land between the ninety-eighth and one hundredth meridians, although the United States had held that land under lease for eleven years.

(6) The treaty of 1866 provided no compensation for the transfer of the absolute ownership of the leased district. The sum of $300,000, named in the third section of that treaty, was to be paid to the freedmen, if they should be removed, but was to remain the property of the United States if citizenship should not be conferred upon the freedmen, and was only to be paid to the Choctaws and Chickasaws in the event that citizenship should be conferred upon the freedmen and they should refuse to emigrate.

(7) The sum of $300,000, named in the treaty of 1866, was not to compensate the Choctaws and Chickasaws for anything except for conferring citizenship and a right to forty acres of land each, upon the freedmen. If citizenship should not be conferred upon the freedmen, the United States, by the terms of the treaty, were to acquire whatever new interest the treaty conveyed in the land, without paying the Choctaws and Chickasaws a dollar for such conveyance.

(8) The effect of the treaty of 1866 was to authorize the Government of the United States, whenever it should remove the freedmen, to locate them in the leased district.

(9) It was also the effect of the treaty of 1866 to open the leased district to settlement by friendly Indians in general; for the treaty of 1866 omitted the inhibition of the lease of 1855, which excluded from that district all Indians, except those residing or ranging within certain specified limits.

(10) The Creeks and Seminoles entered into treaties with the United States in 1866 upon the basis which had

been proposed to and accepted by the five civilized tribes in 1865, and which excluded white settlers from the lands to be ceded to the United States.

(11) The United States, in 1866, paid the Creeks 30 cents per acre for 3,250,560 acres, and also paid the Seminoles $325,362 for 2,169,080 acres, but paid the Choctaws and Chickasaws nothing for 7,713,239 acres ceded, unless the sum of $300,000 provided as compensation for the possible grant of citizenship to the freedmen is to be regarded as payment for the land.

(12) In 1889 the United States paid the Creeks $2,280,857.10 for a release of their interest in the lands ceded by them in 1866, and also paid the Seminoles $1,912,942.02 for a release of their interest in the lands ceded by them in 1866.

(13) To assume that the cession of 1866 was intended by the parties to the treaty, as an absolute conveyance, is to assume that the Choctaws and Chickasaws intended to convey, and the United States intended to acquire, without any compensation whatever, 7,713,239 acres of land, worth more than $10,000,000 in 1866 and worth more than $40,000,000 at the present time.

(14) As the Supreme Court has often held, treaties between the United States and the Indian tribes are not without necessity to be so construed as to work injustice upon the "wards of the nation;" but a construction of the treaty of 1866 which makes that treaty the conveyance of an absolute title to the United States will inflict a grievous and unnecessary wrong upon the Choctaw and Chickasaw nations.

(15) The propositions submitted to the civilized tribes by the United States in 1865 as the basis of the negotiation of the treaties of 1866, the provisions of the treaty of 1866, the facts and circumstances attending the mak-

ing of that treaty, and the contemporaneous dealings of the United States with the Creeks and Seminoles necessitate the conclusion that the cession made in the Choctaw and Chickasaw treaty of 1866 was intended as a conveyance, not of an absolute title, but only of a trust estate.

The President makes the following statement:

"In view of the fact that the stipulations of the treaty of 1866 in behalf of the freedmen of these tribes have not, especially in the case of the Chickasaws, been complied with, it would seem that the United States should, in a distribution of the money, have made suitable provisions in their behalf. The Chickasaws have steadfastly refused to admit the freedmen to citizenship, as they stipulated to do in the treaty referred to, and their condition in that tribe, and in a lesser degree in the other, strongly calls for the protective intervention of Congress.

In this matter the President has certainly been misinformed. The Chickasaws never stipulated in the treaty of 1866 or in any other treaty to admit the freedmen to citizenship, and the "protective intervention of Congress" suggested by the President would, if carried out on this line, be an act of the grossest injustice. It was provided in the treaty of 1866 that, if the Choctaws and Chickasaws should elect to admit to citizenship the freedmen, certain specified arrangements should be made, and that, if they should elect not to admit them to citizenship, then certain other specified arrangements should be made. There was no promise, express or implied, by either nation to confer citizenship upon the freedmen. Nor has either of these two nations failed to comply with a single stipulation of the treaty of 1866 or of any other treaty relating to the freedmen. Nor is the condition of the freedmen in either nation such as to call for or justify any intervention by Congress on their behalf, to the prejudice of the Choctaws

and Chickasaws. The Choctaws admitted their freedmen to citizenship. They were able to do this with safety, because the freedmen constituted only an insignificant minority of the population of the nation. But the Chickasaws declined to confer citizenship upon their freedmen.

It is not true that the lot of freedmen is a hard one, either in the Choctaw or in the Chickasaw nation. On the contrary, their condition there is better than in the United States. In the United States freedom has been given to the freedmen, but nothing else has been given to them. They must buy or lease their land and pay their taxes or have no land. In the Choctaw and Chickasaw nations every freedman uses, without paying rent or taxes, all the land he sees fit to use, and he is protected in his person and property as completely as any Indian or white man. Article 4 of the treaty contains the following provision:

"And they agree, on the part of their respective nations, that all laws shall be equal in their operation upon the Choctaws and Chickasaws and negroes, and that no distinction affecting the latter shall at any time be made, and that they shall be treated with kindness and protected against injury; and they further agree that while the said freedmen, now in the Choctaw and Chickasaw nations, remain in said nations, respectively, they shall be entitled to as much land as they may cultivate for the support of themselves and families, in cases where they do not support themselves and families by hiring, not interfering with existing improvements, without the consent of the occupant."

These promises have all been fairly kept by the Choctaws and Chickasaws.

The President seems to think that the freedmen ought to participate in the distribution of the moneys of the

Choctaws and Chickasaws appropriated by the act of March 3, 1891, and seems to completely overlook the plain letter of article 3 of the treaty of 1866, in which participation "in the annuities, moneys, and public domain claimed by or belonging to said nations, respectively," is expressly excepted from the rights proposed to be conferred upon the freedmen, and the further fact that the act of the Choctaw council admitting these freedmen to citizenship so excluded them without any objection on the part of the United States.

There is absolutely no sort of foundation for this claim of the President, but it is plainly in violation of the agreement made in this treaty of Fort Smith. These nations had the right under this treaty to incorporate these freedmen into their nations or not, but there was at no time a suggestion that they should, if adopted, be allowed to participate in the "annuities, moneys, or public domain."

The President seems to intimate that the white citizens of these nations are entitled to some sort of protection in the distribution of this money at the hands of Congress, though he does not distinctly say so. Upon this very question the Attorney-General of the United States uses this language:

"The persons entitled to such distribution, the evidence necessary to establish their claims, and the manner of such distribution are all matters to be regulated by the laws of the Choctaw and Chickasaw nations, respectively, subject doubtless to the rule that such laws must not be in conflict with the Constitution and laws of the United States."

This seems to this committee to be unquestionably the law of this case. * *

Soon after the passage of the act of March 3, 1891, the Choctaws and Chickasaws prepared two forms of release;

and two other forms were prepared in the Indian Office. The Choctaws and Chickasaws gave formal notice to the United States that they were ready to execute releases in either or any of these four forms, or in any other form satisfactory to the President; but the President, instead of approving or disapproving of these releases, conceived it to be within his province to approve or disapprove of the law itself.

The United States, then, by grant from the Choctaw and Chickasaw nations, hold a trust estate in the lands now occupied by the Cheyennes and Arapahoes. The terms of the trust under which these lands are held prohibit the United States from opening the same to settlement by citizens of the United States. Congress, by the act approved March 3, 1891, appropriated the sum of $2,991,450 to compensate the Choctaws and Chickasaws for their interest in said lands, to the end that they might become the absolute property of the United States, divested of the trust, and open to settlement like other public lands. That appropriation was made immediately available.

For a period of more than a year the executive authorities of the United States have failed to pay any part of the money so appropriated for the extinguishment of the interest of the Choctaws and Chickasaws in these lands; but meantime they have proceeded to make the preliminary arrangements necessary to prepare the land for public settlement, and have asked and obtained from Congress now in session, an appropriation for the completion of such arrangements with the avowed purpose of speedily throwing the lands open to occupation by citizens of the United States.

Moreover, Mr. Cannon stated in the House of Representatives on the 2d day of March, 1891, that Secretary

Noble had said to him that "if the Cheyenne and Arapaho agreement was ratified the land would be thrown open to settlement." And Secretary Noble, in his letter of January 4, 1892, to the President, printed on the first page of Senate Ex. Doc., No. 14, says:

"I have the honor to submit herewith an agreement made and entered into by and between the Cherokee Commission and the Wichita and affiliated bands of Indians in the Territory of Oklahoma, and also a report of the said commission transmitting the agreement.

"In my judgment the Choctaws and Chickasaws have no legal or equitable right for compensation for any of the lands covered by this agreement, and hence no provision is made therefor in the draft of the bill herewith presented."

Your committee thinks that if an attempt shall be made to convert the trust estate of the United States into an absolute estate, without compensation to the Choctaws and Chickasaws for their interest in said lands, and to transfer the lands to citizens of the United States, the Choctaws and Chickasaws will have the right to regard such action on the part of the United States as a forfeiture of the trust estate now held by the United States therein, and to assert the right of the Choctaws and Chickasaws to resume the full ownership and actual possession of said lands, and also to resort to such measures as shall be proper to test the validity of any transfers of said lands to white men made or attempted by the Executive Department of the Government.

Your committee, therefore, recommend the adoption of the following resolution of the Senate:

Resolved, That for reasons set forth in the report of the Committee on Indian Affairs upon the President's message of February 18, 1892, upon the appropriation of March 3, 1891, for payment to the Choctaw and Chickasaw nations

for their interest in the Cheyenne and Arapahoe Reservation, in the Indian Territory, submitted with this resolution, that it is the opinion of the Senate that there is no sufficient reason for interference in the due execution of the law referred to.

No. 115. Extract from Report of Commissioner of Indian Affairs for 1864, pages 33 and 34.

Under these circumstances, I feel that I cannot too strongly urge the importance of preserving the Indian country for the use of the Indians alone, and in all treaties or other arrangements which may hereinafter be made with its former owners insisting upon, and, if need be, enforcing such terms as will secure ample homes within that country for all such tribes as, from time to time, it may be found practicable and expedient to remove thereto.

No. 116. Prior to 1866 the whole area of the Indian Territory, except a small portion in the northeast corner which belonged to the Senecas, Shawnees, and Quapaws, was embraced in the grants made and patented to the Cherokee, Choctaw, and Creek Indians, under the treaties with said tribes, respectively.

The several treaties under which the title of the United States was conveyed to said tribes are as follows:

CHEROKEE TREATIES.

May 6, 1828, 7 Statutes, p. 310.
February 14, 1833, 7 Statutes, p. 414.
December 29, 1835, 7 Statutes, p. 478.
Patent issued to the Cherokee Nation December 31, 1838.

CHOCTAW TREATIES.

October 18, 1820, 7 Statutes, p. 210.
January 20, 1825, 7 Statutes, p. 234.
September 21, 1830, 7 Statutes, p. 333.
Patent issued to the Choctaw Nation March 23, 1842.

CREEK TREATIES.

January 24, 1826, 7 Statutes, p. 286.
March 24, 1833, 7 Statutes, p. 366.
February 14, 1833, 7 Statutes, p. 417.
Patent issued to the Creek Nation August 11, 1852.

The treaties with the Senecas, Shawnees, and Quapaws were the treaties, respectively, of February 28, 1831, 7 Stat., 348; July 20, 1831, 7 Stat., 351; and May 13, 1833, 7 Stat., 424.

By agreements approved by the United States the Choctaws conveyed a portion of their lands to the Chickasaws, and the Creeks in like manner conveyed a portion of their lands to the Seminoles.

The titles of the several tribes under the foregoing treaties and agreements were subject to the following conditions:

1st. That the land should not be conveyed by them except to the United States.

2d. If the Indians abandoned the land, or became extinct, the lands were to revert to the United States.

It was stipulated by the United States that the Indians should be protected in their homes and lands against all interference by any person or persons.

The treaties by which the United States reacquired title to any of the lands in the Indian Territory, or obtained the conditional right to control the disposal of any of said

lands, were the treaties with the Seminoles of March 21, 1866; with the Choctaws and Chickasaws of April 28, 1866; with the Creeks of June 14, 1866; and with the Cherokees of July 19, 1866.

By the third article of the treaty with the Seminoles (14 Stat., 756), said Indians ceded to the United States about 2,100,000 acres of land, "in compliance with the desire of the United States to locate other Indians and freedmen thereon."

In compliance with the same desire, the Creeks, by the 3d article of the treaty with that tribe (14 Stat., 786), ceded about 3,200,000 acres to the United States, "to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon."

The freedmen referred to were the former slaves of Indian tribes. The treaty stipulations, as uniformly understood and construed, have no application to any other freedmen than the persons freed from Indian bondage. They relate exclusively to friendly Indians and to Indian freedmen of other tribes in the Indian Territory whom it was the desire of the United States to provide with permanent homes on the lands ceded for that purpose.

The lands reconveyed to the United States by the foregoing treaties are therefore held subject to the trust named. They can be appropriated only to the uses specified, and to those uses only by the United States, and then only in the manner provided for by law. Miscellaneous immigration even by the intended beneficiaries would be unauthorized and illegal.

The Choctaw and Chickasaw cession of April 28, 1866 (14th Stat., 769), was by the 10th section thereof made subject to the conditions of the compact of June 22, 1855 (11th Stat., 613), by the 9th article of which it was stipu-

lated that the lands should be appropriated for the permanent settlement of such tribes or bands of Indians as the United States might desire to locate thereon.

The lands embraced in the Choctaw and Chickasaw cession were also included in a definite district established by the stipulations of the treaty of 1855, pursuant to the act of Congress of May 28, 1830, the United States re-engaging by the 7th article of said treaty to remove and keep out from that district all intruders.

* * * * * * *

The title of the United States to lands in the Indian Territory is, as heretofore shown, subject to specific trusts, and it is not within the lawful power of either the legislative or executive departments of the government to annihilate such trusts, or to avoid the obligations arising thereunder.

Such trusts are for the benefit of Indian tribes and Indian freedmen. The "freedmen of the United States" are not comprehended within the policy or intention of the treaty provisions, and said lands have accordingly *not* "been purchased for the use and occupation" of the colored people of any of the States. Senate Ex. Doc. No. 111, 47th Cong., 1st Sess., pp. 2, 3, 4.

No. 117. The annexed statement of John C. Carr is a correct copy of the original, dated November 17, 1819, now on file in the Indian Office, Miscellaneous Files.

NATCHITOCHES, 17*th Nov.*, 1819.

SIR: I have the honor of acknowledging the receipt of your circular letter and enclosure, of the 17th Sept. last, and have only to observe that the order therein contained shall be implicitly obeyed.

The enclosed statement of Indian population, in the province of Texas, I procured from an intelligent gentleman, who has resided, a considerable time, in the Comanche nation, and, from its coincidence with other statements in my possession, I believe it to be as nearly correct as, under existing circumstances, it would be possible to procure.

About fifteen days ago, a detachment of about 250 Spanish cavalry, under the command of Don Ignatio Perez, surprised Nacogdoches, then occuped by a few of the followers of Dr. Long, who were nearly all made prisoners. The detachment then advanced to the Sabine River, burning and destroying all the settlements they found on the way, and, afterwards, divided themselves into small parties, for the purpose of intercepting the Comanche traders, many of whom have fallen into their hands. Their main body, composed of about 1,000 men, is encamped on the Trinity River. It is presumed they intend to establish a post at Nacogdoches, with the view of cutting off all intercourse between our traders and the Indian tribes within the province.

With great respect, I have the honor to be, sir,

Your obt. servt.,

JOHN C. CARR.

Hon'ble J. C. CALHOUN,

Secy. of War,

Washington City.

No. 118. Report of Superintendent of Emigration, accompanying Report of Commissioner for 1835, page 287.

EMIGRATION OF INDIANS.

OFFICE COM. GEN. OF SUBSISTENCE,
November 12, 1835.

To the Hon. LEWIS CASS,
Secretary of War.

SIR: I have the honor to submit, for your consideration, the accompanying reports, in conformity with your directions of the 4th of September, viz: A report of the amount of funds remitted to the different agents and disbursing officers, for the expenses of Indian emigration, during the first three quarters of the present year, and the amount for which accounts have been rendered in the same period; and a report of the number of Indians that have been removed, since the 30th day of September, 1834; the whole number of Indians west of the Mississippi, distinguishing the native from the emigrated tribes; the quantity of land assigned to each, and its situation; and the number of Indians yet to be removed under treaty stipulation. * *

Respectfully, your obdt. serv't.

GEO. GIBSON, *C. G. S.*

* * * * * * *

Native tribes, and their numbers, resident west of the Mississippi.

*

Pawnees..... 10,000

* *

Caddoes..... *2,000

* *

No. 119. Extract from a report of Capt. J. Brown, dated July 18, 1837, on file in the Indian Office, indorsed

*The agent has reported these Indians at upwards of two thousand—(The Wichitas are not mentioned.)

O. I. A., West[n] Sup[y], B, 270.—Printed in Rep. 18
p. 583.

LITTLE ROCK, *July 18th*, 183

SIR: * * In obedience to instructions of the 22
March last, which were received while at Washing
requiring me, at a convenient time, to address to y
office a communication upon the following subjects,

* * * * * *

The condition and resources of the several tribe
Indians residing in the Acting Superintendency of
Southwestern Territory * * have the honor to s
mit the following remarks: * * Under this head
Choctaws, from their location and early emigration, a
first. * The Cherokees. * * The Creeks and S
noles. * * Senecas and Shawnees. * * The
paws. * * Osages. * * The foregoing compris
the tribes of Indians residing within the Acting Supe
tendency of the Southwestern Territory, and, with
exception of the last mentioned tribe (Osages) have
emigrated to that country, the greater portion
1831. * *

Very respectfully, I have the honor to be
Your obdt. servt.,
J. BROWN, *Capt. U. S. A.,*
Pr. Disg. Agt. Ind. De

C. A. HARRIS, Esq.,
Commr. of Ind. Affrs.,
Washington, D. C.

No. 120. The annexed documents are, first, an acc
extract from a report of A. M. M. Upshaw, Indian a
dated May 27, 1844, and second, a true copy of a
dorsement thereon, by T. Hartley Crawford, Commiss

of Indian Affairs. Both are taken from a file in the In-office, indorsed O. I. A. Miscell. U. 162.

CHICKASAW AGENCY, *May* 27, 1844.

SIR: * * I have just heard that the two boys, that were missing from Trinity River, in the Republic of Texas, about the last of February, or first of March, ult. (at the time that their father, mother and two children were murdered in the most shocking manner, the lady had her limbs cut off, at her body), are now among the Wichitaw Indians, who live north of Red River and south of the False Washita, and are within the Chickasaw District of the Choctaw Nation. My information is certainly correct. Capt. Ish-tic-i-u-ka-tubby, a Chickasaw, in whom every confidence can be placed, brought in the information.

You will please excuse me for giving you my opinion of what ought to be done. It is this, that some discreet person should be sent there, with a tolerably strong command, and induce those Indians to give up the prisoners, and also the Indians who committed the murder, and let them know distinctly that they will not be permitted to live in this country and go into Texas (a republic that we are on the most friendly terms with) and commit murder, and then flee into this for protection.

I shall send a copy of this letter to the commanding general of this department, and also one to Maj. Wm. Armstrong, acting superintendent.

With high respect, I have the honor to be
Your mo. Obed. Servt.,

A. M. M. UPSHAW.

Hon. T. HARTLEY CRAWFORD,
Com. of Indian Affairs.

(Endorsement.)

Respectfully referred to the Secretary of War. The outrage was committed on Texan citizens, but by wild Indians who are as much inhabitants of that republic as of our territory. The murderers should be delivered up to Texas, and the lads liberated; and as they are now within our limits, the matter is respectfully submitted.

T. HARTLEY CRAWFORD.

JUNE 26, 1844.

No. 121. Report of Agent accompanying Report of Commissioner for 1845, page 525.

CHICKASAW AGENCY, *August* 16, 1845.

SIR: * * In the extreme western part of the Chickasaw district, there are several tribes, or parts of tribes, settled, which are generally called the wild Indians, viz: The Kechi, the Taw-a-ash, the Witchataw and Wacoes, and, on Washita, about ten miles from the agency, three-fourths of the Caddo Indians have settled; but there have been but few complaints of their having committed depredations upon the Chickasaws in the last year. * *

Very respectfully, your most obedient servant,

A. M. M. UPSHAW,
U. S. Agent for Chickasaws.

Col. WM. ARMSTRONG,
Superintendent Western Territory.

No. 122. Report of Commissioner for 1845, page 455.

WAR DEPARTMENT, OFFICE INDIAN AFFAIRS,
November 24, 1845.

* The superintendency of Indian affairs, for the western territory, includes all the Indians south of the

line of the St. Louis superintendency, and as far west as the Rocky mountains, and north of the line of Mexico and Texas. This is a large district, and requires the undivided attention of the present efficient superintendent, owing to the unsettled condition of the Comanches, Witchetaws and other tribes who lead a wandering life. Sometimes being in Texas, and sometimes in the United States, it has been impossible to extend over them the eye of this department. They have neither belonged, hitherto, to the one government nor to the other; and although several attempts have been made to negotiate with them, every effort of the kind has thus far proved unsuccessful. A commission has, this fall, been sent out, under more favorable auspices, and it is confidently expected that a treaty, or treaties, of peace and friendship will be entered into with these wandering tribes. * *

All which is respectfully submitted.

W. MEDILL.

Hon. WM. L. MARCY,
Secretary of War.

No. 123. Extract from Report of Special Indian Agent, on file in the Indian Office, indorsed, O. I. A. Texas, N. 14.

TORREY'S TRADING HOUSE, *June 22d*, 1847.

SIR: * * From the frequent depredations committed by the Wacoes, Witchitas, Tah-wah-carros, and Keechies, I found it necessary, at as early a day as possible, to give them my attention, and, apprehending great personal risk in visiting their villages, well knowing their hostile character, I applied to Capt. Howe, comdr. of this frontier, for an escort of Rangers for that purpose, and to assist in recovering horses that had been stolen from our citizens,

as I was informed, by good authority, that there were a large number of stolen horses in their villages. Capt. Howe refused to furnish me the escort required, upon the ground that he had no orders to send troops into the Indian country. Seeing the great necessity of action, I determined, at all risks, to go to their villages, and, accordingly, engaged the services of a small party of Delaware Indians, six in number, to accompany me.

On application to the chief of the Anadakos, he sent Towiash, 2d chief, with six of his warriors, with me, Jose Maria, the principal chief, having been thrown from his horse and badly injured, was unable to accompany me in person.

On the 10th inst. we arrived at the village of the hostile bands, and finding that the friendly Indians would sustain me in any measures I might adopt towards them, I determined on the boldest course as the best that could be adopted. Accordingly, as soon as the chiefs could be assembled, I made a formal demand of the horses, and threatened them in the strongest terms, if my request was not complied with. After much counciling among themselves, we were invited to attend a council in their village. We attended the council and were treated in a most friendly manner. Our council lasted four days, during which time all matters of difference were discussed at length, and the following conditions agreed upon:

1st. That they were to restore all the horses, mules, &c., that had been stolen, both from whites and friendly Indians, since the treaty was concluded between them and the U. States Commissioners.

2d. That they are not to steal any more horses or mules from the whites or friendly Indians, or commit any act of hostility whatever.

3d. When all the stolen property is given up, they are

to be entitled to all the privileges of the treaty that they had violated, and shall be entitled to the same considerations as other tribes that are friendly with the United States.

In accordance with said agreement, they delivered up 46 head of animals, which was all that were in that village, the largest portion having been driven to the main Witchita village, which is situated on the Witchita River. The chiefs present immediately dispatched men for the horses, which are to be delivered up in the course of the next month. The Keechies, on my arrival at their village, immediately delivered into my possession seven head of stolen horses, which were all that that tribe had stolen. They also gave many proofs of friendship, in the assistance they gave me against the Wacoes, Witchitas, and Tah-wah-caroos. * *

The Caddoes, Anadakos, Wacoes, Tah-wah-caroos, Keechies, and Witchitas, are making corn this year to a considerable extent. The Comanches, Lipans, and Tonka-huas subsist entirely by hunting. * *

I have the honor to be, very respectfully,
Your obt. servt.,

ROBT. S. NEIGHBORS,
Special Ind. Agent.

To Col. W. MEDILL,
Comr. of Indian Affairs, Washington, D. C.

No. 124. Extract from Report of Special Indian Agent, on file in the Indian Office, indorsed Texas, N. 25.

SPECIAL INDIAN AGENCY,
TORREY'S TRADING HOUSE,
Sept. 14th, 1847.

SIR: * * On the 28th I arrived at the village of the Keechies, about one hundred and seventy-five miles above

this place, where I found a considerable body of Indians, of the following tribes, viz: Keechies, Caddoes, Ionies, Wacoes, Tahwahcarros, Wichitas and some few Pawnee Mohaws. They were assembled for the purpose of holding a grand medicine dance, which was in full operation at the time of my arrival, and continued for four days afterwards.

I found the Indians residing in that neighborhood, viz: the Keechies, Wacoes, Wichitas, and Tahwahcarros, (whose village is about six miles farther up the river) in a very contented and happy condition, they having made fine crops of corn, beans, pumpkins, melons, &c. * *

I have the honor to be, very respectfully,
Your obt. servant,
ROBT. S. NEIGHBORS,
Special Indian Agent.

To Col. W. MEDILL,
Com'r of Indian Affairs,
Washington, D. C.

No. 125. Extract from report of Special Indian Agent, on file in the Indian Office, indorsed N. 29, Ex. Doc. No. 8, 30 Cong., 1 Sess., p. 903.

U. STATES SPECIAL INDIAN AGENCY,
October 12, 1847.

SIR: * * The several bands having been much scattered, I could not commence the distribution until the 28th, by which time they were all well represented, there being in attendance the following tribes and bands, viz: the Comanches, Ionies, Caddoes, Anadahkas, Wacoes, Keechies, Wichitas, Tahwaccarras, Tonkahuas, and the bands of Delawares, Shawnees, and Cherokees, that reside in Texas,

also some few Beluxies, Kickapoos, and Pawnee Mohaws. * *

I have the honor to be, very respectfully,
Your obt. servant,
ROBT. S. NEIGHBORS,
Spl. Ind. Agent.

To Col. W. MEDILL,
Comr. Ind. Affairs,
Washington, D. C.

No. 126. Extract from Report of Special Indian Agent, accompanying Report of the Commissioner of Indian Affairs for 1848, pages 578, 580.

Report of R. S. Neighbors, Esq., Special Agent for Texas Indians, from 20th January, to 2d March, 1848.

UNITED STATES SPECIAL INDIAN AGENCY,
TRADING POST NO. 2,
March 2, 1848.

SIR: * * On the morning of the 14th, I arrived at the main camp, which I found to consist of about 250 lodges of Comanches, 50 of Tonkahuas, and 10 of Wichetas. * *

On the 18th I arrived at the camp of the Wacos and Tahwaccarros. I found them perfectly friendly and peaceable, and could trace no act of hostility to them, since my arrangement, as reported on the 22d June last. On the 22d I arrived at the village of the Keechie, and found a considerable number of Indians assembled in the neighborhood, consisting of Caddoes, Ionies, Keechies, and Wacos. The principal body of these tribes had not returned from their winter hunt; but, from the friendly manifestations of those I saw, I was fully assured of their

friendly and peaceful disposition. The only depredation, that can be traced to these bands, is a theft, committed by three Keechies and one Wicheta, who stole twelve horses from our settlements. Immediately on the arrival of the thieves, at camp, the horses were taken away by the chiefs, and eight of them were placed in my hands, to be returned to their owners, with a promise to return the balance, as soon as the hunters returned, the four not recovered being with a party of the Keechies, who had not come in from their winter's hunt. * *

I have the honor to be, very respectfully,

Your obedient servant,

ROBT. S. NEIGHBORS,

United States Special Indian Agent.

To Colonel W. MEDILL,

Commissioner of Indian Affairs,

Washington, D. C.

No. 127. Extracts from report of Special Indian Agent, and from an enclosed letter of C. E. Barnard, both accompanying the report of the Commissioner of Indian Affairs for 1848, pages 587, 588.

UNITED STATES SPECIAL INDIAN AGENCY,

April 28, 1848.

SIR: * * As I anticipated, when calling your attention to the massacre of the Indians (Wichitas) by Captain Highsmith's company, on the 10th instant, those Indians have already commenced a system of retaliation, by killing three surveyors, on the Trinity river, and it is impossible to say how long before we can again stop the effusion of blood on this frontier.

During my absence from this post, at my request (as I

expected many Indians to visit it), Mr. C. E. Barnard assisted the interpreter, Jim Shaw, in holding talks with the Indians. I herewith transmit for your information, such intelligence as was left for me, by said tribes, during my absence. * *

I have the honor to be, very respectfully,
Your obedient servant,
ROBERT S. NEIGHBORS,
Special Indian Agent.

To Colonel W. MEDILL,
Commissioner Indian Affairs,
Washington, D. C.

[Letter transmitted.]

SIR: In compliance with your request, to "assist the interpreter in holding talks, with whatever Indians visited this post, in your absence," I have obtained the following information: * *

Sunday eve (16th). This evening, by the arrival of Mr. Rolfe, from Captain Johnston's station, I have received the following information, viz: that, on the 9th inst. three surveyors, engaged in running the line of Peters' Colony, were killed and scalped, by some Indians, supposed to be Wichitas; they were found, by the balance of the party, who had just returned from the settlements, having been absent two days. It is supposed that the act was committed by the Wichitas, out of revenge for the killing of their people by Highsmith's company. * *

Yours respectfully,
C. E. BARNARD.

Major R. S. NEIGHBORS.

No. 128. Extract from a Report of R. S. Neighbors, Special Indian Agent, on file in the Indian Office, in-

dorsed O. I. A., Texas, N. 64. Ex. Doc. No. 1, 30 Cong., 2d sess., p. 591.

U. STATES SPECIAL AGENCY, *June 15th*, 1848.

SIR: * * The Wichitas still hold themselves aloof from our councils and occupy a very doubtful and threatening position since their people were killed by Capt. Highsmith's company. I am informed, by the friendly Indians, that they are making preparations to attack our frontier, as soon as their corn is harvested. I have not been able to see them, and am at a loss what course to pursue to pacify them, unless instructed by the Comr. what satisfaction to offer them. I would respectfully call the attention of the Commissioner to the propriety of giving the proper instructions, at as early a day as practicable, as that difficulty might be adjusted, without bloodshed, if the proper correction was applied in time. I learn from the Keechies and Wacoes, who have been for some days at this place, that both the Wichitas and Caddoes intend to commence depredations on our frontier settlers, unless satisfaction is given for the killing of their people by the Rangers. * *

Very respectfully, your obt. servt.,

ROBT. S. NEIGHBORS,
U. S. Special Ind. Agent.

To Col. W. MEDILL,
Comr. of Ind. Affairs,
Washington, D. C.

No. 129. Extract from Report of Special Indian Agent, accompanying the Report of the Commissioner of Indian Affairs for 1848, page 593.

UNITED STATES SPECIAL INDIAN AGENCY,

August 10, 1848.

SIR: Since the date of my last report, there has been no movement worthy of notice, among our border tribes of Indians, until about the 1st instant, when a small party, supposed to be Wichitas, Wacoes and some of the upper Comanches, made a descent on our frontier, visiting the stations of Captains Highsmith and Crump, where they succeeded in stealing, from the former company, thirty, and the latter, twenty horses, and made a nasty retreat beyond the mountains. About the same time two of Captain McCulloch's company were attacked, a short distance from their camp; but they succeeded in gaining the timber, and, after a short engagement, the Indians retreated, after having, as is supposed, two of their warriors killed. * *

The Wichitas continually threaten to retaliate on Captain Highsmith's company, for killing a portion of their tribe last spring, and I presume that to be the cause of the present hostile movements, as they have not approached our settlements. * *

Very respectfully, your obedient servant,

ROBERT S. NEIGHBORS.

Colonel W. MEDILL,
Commissioner of Indian Affairs,
Washington, D. C.

No. 130. Extract from report of Indian Agent, now on file in the Indian Office, indorsed O. I. A. Texas, N. 68. Rep. 1848, p. 539.

U. STATES SPECIAL IND. AGENCY,

Aug. 10, 1848.

SIR: * * The Wichitas continually threaten to retaliate on Captain Highsmith's company, for killing a

portion of their tribe last spring, and I presume that be the cause of the present hostile movements, as th have not approached our settlements. * *

Very Respectfully, your obedient servant,

ROBT. S. NEIGHBORS.

COL. W. MEDILL,
Comr. of Indian Affairs,
Washington, D. C.

No. 131. Extract from Report of Special Indian Age on file in the Indian Office, indorsed O. I. A. Texas, N. House Ex. Doc. No. 1, 30 Cong., 2 Sess., 593.

U. STATES SPECIAL INDN. AGENCY,
TORREY'S TRADING POST, *September* 14, 1848.

SIR: * * I have not as yet been able to see any the Wichitas, but have sent them a talk, and shall proce to the upper Brassos to see them, in a few days. * *

On account of the many misunderstandings, growi out of the several attacks on the Indians, I have deem it proper to require an escort for my visit to the Wichit and Col. Bell has furnished me with forty men, for t occasion.

Very respectfully, your obdt. servant,

ROBT. S. NEIGHBORS,
U. States Spl. Indian Agent.

To Col. W. MEDILL,
Comr. of Indn. Affairs,
Washington, D. C.

No. 132. Extract from Report of Special Indian Age enclosed in Texas, N. 93, on file in the Indian Offi Ex. Doc. No. 1, 31 Cong. 1 Sess., p. 963.

UNITED STATES SPECIAL INDN. AGENCY,
TORREY'S TRADING HOUSE, *March 7th*, 1849.

SIR: In accordance with your request of the 25th Feby., I submit the following table, showing the supposed number of Indians residing on our immediate borders. The estimate is made from the best information that could be obtained from the Indians, by frequent enquiry on the subject:

		No. of Souls.	No. of Warriors.
* *		*	*
Caddoes, Ionies, Anadahkas	Associates.....	1,400	280
Keechies.....		300	60
Witchitas, Wacos, Tahwaccarros	Associates.....	1,000	200
* *		*	*

These Indians range promiscuously across our frontier, from Red River to the Rio Grande, during the greater portion of the year, and seek shelter, during the winter, in the upper Cross Timbers of Texas, between the headwaters of the Colorado River and the Witchita mountains. * *

I have the honor to be, very respectfully,
Your obdt. servt.,

ROBT. S. NEIGHBORS,
U. States Special Indn. Agent.

To Maj. Genl. WM. J. WORTH,
San Antonio, Texas.

(Copy.)

No. 133. Extract from a statement of H. G. Catlett, accompanying the report of the Commissioner of Indian Affairs for 1849, page 968.

WASHINGTON, D. C., *May* 12, 18

SIR: * * I will now proceed to show the pos
&c., of those people in Texas. The Wichitas, To
and Keechies, numbering in all about 600 souls, live
together upon the Brazos head of the Trinity, and
the Big Wichita (the main southern branch of Red R
They are about 180 miles above the upper white s
ments on the last named river, and about two hun
miles above the settlements upon the Brazos. The
all of the Wichita tribe, and their proper homes a
the Wichita mountains, north of Red River and w
the United States Indian Territory. They live in
wams, and raise corn, pumpkins, &c., &c. The Cad
Annadarcoes and Ionies, although having each
separate chief, or head man, and living in separate vill
are associated together under the government of
principal chief. The Caddoes and Ionies live upo
Brazos and its northern tributaries, in the upper
Timbers, about 140 miles above the settlements on
River, 120 miles from those on the Trinity, and about
miles from those of the Brazos. The Annadarcoes
their village on the Brazos, about 40 miles above
settlements, but spend most of their time 100 miles w
the settlements, between the Brazos and Trinity ri
where they have been permitted to go, at their plea
in violation of the laws of the state. * *

A law of Texas, passed 14 January, 1843, provide
the establishment of a line of trading posts, which
intended to mark the temporary line between the w
and the Indians. The points designated were as foll

No. 1. On or near the south fork of the Trinity, s
where between the upper and lower Cross Timbers.

No. 2. At or near the Comanche Peak.

No. 3. At or near the old San Saba post or missio

No. 4. At or near the Porto Vanders.

No. 5. At or near the junction of the Moras and Rio Grande.

The same law provides that no trader shall furnish any warlike stores to the Indians. It is also forbidden for Indians to come into the settlements, or below the line established. * *

I have the honor to be, very respectfully,

Your obedient servant,

H. G. CATLETT,

Late Assistant Quartermaster U. S. Army,
stationed upon the northern frontier of Texas.

Hon. W. MEDILL,
Commissioner of Indian Affairs,
Washington, D. C.

No. 134. Extract from Report of Indian Agent, accompanying the Report of the Commissioner of Indian Affairs for 1849, page 1130.

CHICKASAW AGENCY, *August* 29, 1849.

SIR: * * This year several of the Keechies, Witchetaws, Tonquawas and Pah-ah-hu-ka, the principal chief of the Comanches, have visited me. The Keechies, or a number of their tribe, are very anxious to settle on the False Washita river, in the Chickasaw district, but the Chickasaws are opposed to it. The Witchetaws have been for some time living in the western part of the district, and the Chickasaws would be very much pleased for them to move off. Their visit to me is, I think, only a begging trip. They never bring any robes, or skins, to sell.

The Witchetaws and Caddoes have had some difficulties this spring. The Witchetaws stole several horses from the Caddoes, and the Caddoes went to the camp of the Witchetaws and requested them to give them up; the Witchetaws positively refused, and the Caddoes, with Jim Ned, part Delaware, and some few Boluxi Indians, drove off a number of the Witchetaws' horses. The Witchetaws saw and followed them, and, after going a mile or two, the Caddoes were overtaken and fired on by the Witchetaws. The Caddoes returned the fire, and, during the fight, the Caddoes lost two men killed, and one wounded; the Witchetaws lost 10 or 12 killed and wounded. So soon as I heard of the difficulty, I sent for both parties; several of the Caddoes, with their chief, came in, and three or four Witchetaws, with a second chief, came in. Col. D. S. Miles, United States Army, commanding Fort Washita, and myself talked to them and they agreed to be friendly for thirty days. At the end of that time, both tribes were to meet at the Chickasaw Agency, to have a council, which was to have been on the 27th of July last; but, on account of the high water, neither tribe came, and I have not seen them since. The greater part, or a number, of each of those tribes are living in the western part of the Chickasaw district. The Keechies are also opposed to the Witchetaws. They say that the Witchetaws are continually committing depredations upon the citizens of Texas, and it gives them (the Keechies) great uneasiness, thinking that the Texans might suppose that they were also engaged in stealing horses from them. These people I have no control over; but I thought it my duty to put a stop to their stealing and killing each other, if I could by council.

If they were to fight for a month I would have no means to put a stop to it.

Very respectfully, your most obedient servant,

A. M. M. UPSHAW,

United States Indian Agent, for the Chickasaws.

Colonel JOHN DRENNEN,

Acting Superintendent, Western Territory, &c.

No. 135. Extract from Report of Acting Special Indian Agent, on file in the Indian Office, indorsed O. I. A. Texas, R. 622. Sen. Ex. Doc. No. 1, 31 Cong., 2 Sess., p. 145.

AUSTIN, *Nov.* 2, 1850.

SIR: * * The Wichitahs, Tonkaways, and Keechies I did not see. They are, as I am informed, somewhere on Red River, and have formed a general combination for the purposes of plunder. It is this combination that does most of the horse stealing along the frontier. I do not expect them at the council, consider them beyond my control, and refer them to the government as a set of rascals who ought to be exterminated. * *

Very respectfully, your obt. svt.,

JNO. H. ROLLINS,

Acting as Special Agent for U. S. for Texas Indians.

To L. LEA, Esq.,

Com. Indian Affairs,

Washington City.

No. 136. Extract from statement of C. S. Todd, accompanying the Report of the Commissioner of Indian Affairs for 1851.

SAN ANTONIO, *March* 25, 1851.

SIR: I have the honor to enclose herewith a copy of a letter addressed to me by Judge Rollins, one of the special Indian agents in Texas. As it contains many interesting details and views, in relation to Indian affairs on this frontier, I have deemed it a duty to transmit it for the information of the department. The line, to which he alludes as having been agreed to by General Houston, in a council with the Indians, in 1843, and which, though not ratified by the congress of the republic of Texas, was so far adopted as to be made the basis of a chain of trading posts, had the effect to preserve peace with the Indians for several years. * *

I have the honor to be, with great respect,

Your obedient servant,

C. S. TODD.

Hon. L. LEA,

Commissioner Indian Affairs,

Washington, D. C.

No. 137. Extract from Report of Special Indian Agent, on file in the Indian Office, indorsed Texas, S. 694. Rep. 1851, p. 525.

To the Hon. L. LEA,

Commissioner of Indian Affairs,

Washington City, D. C.

SIR: * * The Wichitas were represented to me as a small tribe, numbering about one hundred. They, together with about eighty warriors from the Caddoes, Wacoes and Keechies (including about two-thirds of the latter tribe) with a small proportion of women and children, left Texas, and are now inhabiting the Washita mountains, north of Red River. * *

Respectfully submitted.

JESSE STEM,

Special Agent for the Indians of Texas.

No. 138. Extract from report of Special Indian Agent, now on file in the Indian Office, indorsed Texas, S. 214. Sen. Ex. Doc. No. 1, 32 Cong., 2 Sess., p. 433.

FORT GRAHAM, TEXAS, *Oct.* 8, 1852.

SIR: * * Under date of 12 June last, I communicated the fact that the Wichitas had been in the habit of visiting the frontiers of Texas, in small parties, and committing occasional depredations on her citizens, and, although they are perhaps not now strictly within the jurisdiction of Texas, I conceived it to be my duty to make an effort to arrest these practices, and establish some understanding with them, more especially as they have been parties to treaties with the government heretofore made within the limits of this state, and, so far as I know, are not under the charge of any other officer, or agent of the government. I accordingly dispatched a messenger (a chief of of the Wacoes) to their villages in the Wichita mountains, with some tobacco, and a talk to them upon the subject of their depredations, and a demand of such stolen property as they had in their possession. Soon afterwards, and while I was out in the Indian country, another party of this tribe robbed the train of W. Mackay of eight horses and mules. I thereupon secured a small escort, under command of Lt. Beall, of 5th Inf., and started after my messenger, intending to visit the Wichitas in person. We encountered a succession of rains and high waters, which so embarrassed and delayed us that, after swimming several streams, we were finally stopped by Red River within forty-five miles of the Wichita village; and, being too nearly out of provisions to await the subsidence of the stream, were compelled to return.

My messenger brought back eight stolen horses, which were given up by the Wichitas, and reported that the

chief of that tribe expressed the determination to put a stop to these aggressions of his people.

Besides these, I recovered four government horses from other Indian tribes, while on this expedition.

Lt. Beall afterwards, in the month of August, while out in search of Captain Marcy and his command (then reported to have been massacred by the Comanches), visited the Wichita villages, and held a talk with them. They then delivered up six more horses and mules, and, so far as I know, have committed no outrage on this frontier, since the robbery of Mackay's train.

I have the honor to be, very respectfully,
Your obt. servt.,

JESSE STEM,
One of the Spl. Agts. for Indians of Texas.

No. 139. Extract from Report of Special Indian Agent, accompanying the Report of the Commissioner of Indian Affairs for 1854, page 158.

SAN ANTONIO, TEXAS, *September* 16, 1854.

SIR: * * I would call the attention of the department to the serious depredations, committed by Indians residing east of Red river in the United States Indian reserve. There now reside on our border, in the Choctaw and Chickasaw reserve, the Wichitas, Wacoes, Tahwacconas, Keechies, and small bands of Ionies, and a considerable band of Kickapoos. They have, from time to time, crossed into Texas, and have, during the year, stolen large numbers of horses and committed other serious depredations on our citizens. * *

Your obedient servant,

ROBT. S. NEIGHBORS,
United States Special Indian Agent, &c.

HON. GEO. W. MANYPENNY,
Commissioner Indian Affairs,
Washington, D. C.

140. Report of Indian Agent accompanying Report of Commissioner for 1854.

FORT BELKNAP, TEXAS, *September* 20, 1854.

SIR: * * The Wichitas I have not met during the year; in fact they may be considered in a state of open hostility with the people on this portion of the frontier. They commit depredations by stealing horses, from time to time, as opportunities offer and prospects of escape will justify. * *

I have the honor to be, very respectfully,
Your obedient servant,

G. H. HILL,
Special Agent, Texas Indians.

R. S. NEIGHBORS, Esq.
Special and Supervising Agent, &c.,
San Antonio, Texas.

No. 141. Report of Commissioner for 1856, page 15.

DEPARTMENT OF THE INTERIOR,
OFFICE INDIAN AFFAIRS, *November*, 22, 1856.

SIR: * * The flattering success in Texas gives promise that, by a similar policy, the Southern Comanches, Wichetaws and other wandering bands, near the northern frontier of that state, may be successfully colonized on the western end of the Choctaw country, for which provision was made, by the treaty of 1855 between the United States and the Choctaws and Chickasaws. * *

Very respectfully, your obedient servant,

GEO. W. MANYPENNY,
Commissioner.

Hon. R. MCCLELLAND,
Secretary of the Interior.

No. 142. Extract from a report of Special Indian Agent, now on file in the Indian Office, indorsed Texas, N. 210.

BRAZOS AGENCY, TEXAS, *Decr. 27th*, 1856

SIR: * * On the 26th inst., we were visited by ten camps of Wichita Indians, who came in for the purpose of expressing their sincere friendship for the Indians of the reserve. They show a strong desire to settle here and come under the rules and regulations of this agency. * *

Your obdt. servant,

S. P. Ross,
Spel. Agent Tex. Indians.

To Maj. R. S. NEIGHBORS,
Supervising Agent Texas Indians.

No. 143. Report Commissioner 1858, page 12.

DEPARTMENT OF THE INTERIOR,
OFFICE INDIAN AFFAIRS,
November 6, 1858.

SIR: * * I regret to state that no progress has yet been made, in carrying out the provision in the act of March 3, 1857, for "collecting and establishing the Southern Comanches, Wichitas, and certain other bands of Indians, on reservations to be located South of the Arkansas river, and west of the ninety-eighth degree of longitude." Those Indians are wild and lawless, in their disposition and habits, and cannot be brought together without danger of difficulties occurring among themselves, or of their committing forages upon the western Choctaws and Chickasaws, with whom they will be brought into close proximity, and whom we are bound by treaty stipulations to protect from such casualties. A strong military force, in the region of country where it is intended to settle them, is absolutely necessary, to hold in check and control them, and

to afford the requisite protection to the agent appointed to take them in charge. * *

Very respectfully, your obedient servant,

CHARLES E. MIX,
Commissioner.

Hon. JACOB THOMPSON,
Secretary of the Interior.

No. 144. Extract from a report of Supervising Agent, now on file in the Indian Office, indorsed, Texas, N. 567.

SAN ANTONIO, TEXAS,
December 19th, 1858.

SIR: I have the honor to acknowledge the receipt of your letter of the 7th, in relation to the letter of Col. Elias Rector, in regard to the Wichita Indians; and, in answer thereto, would state that the information received by him, through F. P. Page, is false, from beginning to end, as no such emissaries as those spoken of have ever been sent by me to the Wichitas; on the contrary, the Wichitas have, on several occasions, within the last three years, been refused permission by me to emigrate to Texas, and settle on the reserve at Brazos Agency, and in no instance have either myself or the special agents under my control interfered, either directly or indirectly, with the Indians in the Southern Superintend'cy, except to report some cases of horse stealing to the commanding officer at Fort Arbuckle, or to Col. Cooper, Agent of the Choctaws and Chickasaws. * *

Very respectfully, your obdt. svt.,

ROBT. S. NEIGHBORS,
Supervising Agent, Texas Indians.

Hon. J. W. DENVER,
Commr. Indian Affairs, Washington, D. C.

No. 145. Extract from an order of Acting Commissio
of Indian Affairs, now on file in the Indian Office
Wichita Case No. 81. Sen. Ex. Doc. No. 2, 36 Co
1 Sess., p. 632.

DEPARTMENT OF THE INTERIOR,
OFFICE INDIAN AFFAIRS, *March 30th*, 185

ELIAS RECTOR, Esq.,
Superintendent, &c.

SIR: * * So soon as it may be practicable and
for the Wichitas to remove to their new location, you
require them to go there, giving them to understand
it is to be their permanent home, and that none of th
must leave their reservation without the permissio
the agent. * *

Very respectfully, your obt. servt.,

CHAS. E. MIX,
Acting Commissione

No. 146. Extract from a report of Superintend
Indian Affairs, on file in the Indian Office, indo
South[n] Sup., R. 44. Rep. 1859, p. 677.

FORT ARBUCKLE,
CHICKASAW COUNTRY, 2*d July*, 185

SIR: * * Of the country on the Canadian, selec
by the Wichitas and Kichais, I obtained accurate infor
tion from Se-kit-tu-ma-qua, my Delaware interpreter,
is thoroughly acquainted with it; and I, therefore, did
deem it necessary to examine it in person. The Wich
and Kichais all desire to settle there; and, as they h
resided in this region from a time beyond any o
memory, and have a better claim to it than any ot

tribe, they ought, I think, to have the privilege of selecting their home. *

I have the honor to be, sir, very respectfully,
Your obdient servant,

ELIAS RECTOR,
Supt. Ind. Aff. Ft. J.

Hon. A. B. GREENWOOD,
Commissioner of Indian Affairs.

No. 147. Report of Superintendent of Indian Affairs accompanying Report of Commissioner for 1859, page 165.

OFFICE SOUTHERN SUPERINTENDENCY,
FORT SMITH, *September* 20, 1859.

SIR: * * In pursuance of instructions from your office, and as I have already reported, I selected in the month of June last, reserves on the Fausse Wachita river, near the old Kichai village, and about forty miles northeast of the eastern extremity of the Wichita mountains, in the river valley, on the south side, for the Comanches, and other Indians from Texas; and on the north side, between the river and Sugar Tree Creek, for the Delawares and Caddoes, heretofore affiliated with the Wichitas or Tawai-hash; and for the latter and the bands of Kechais, affiliated with them, I selected a reserve on the Canadian, some twenty-five miles west of those on the Fausse Wachita. I made those selections, after having explored the country adjacent to the Wichita mountains, and satisfied myself that that region was not such as it had been represented to be, but was unfitted for a home for any people. * *

I have the honor to be, very respectfully,
Your obedient servant,

ELIAS RECTOR,
Supt. Indian Affairs.

Hon. A. B. GREENWOOD,
Com. Indian Affairs, Washington City, D. C.

No. 148. Report of Commissioner for 1890, p. XXXI.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *September* 5, 1890.

The Secretary of the Interior:

SIR: * * The Wichita Reservation, in Indian Territory, is defined in an unratified agreement, made October 19, 1872, and is located within the limits of the reservation of the Cheyenne and Arapaho Indians, established by Executive order of August 10, 1869; but there is no evidence that they hold it by any higher title than that contained in said unratified agreement, although they claim to have resided thereon for many years prior to said order. A small tract, partly within this reservation, was selected for them in 1859, by Superintendent Rector.

Very respectfully,

T. J. MORGAN,
Commissioner.

No. 149. Report of agent accompanying Report of Commissioner for 1868, page 287.

WICHITA AGENCY, INDIAN TERRITORY,
October 1, 1868.

SIR: * * The work of building fences and putting in crops commenced with commendable energy and zeal, on the part of the Shawnees and Delawares, they using the ploughs with very little assistance and instruction; the Wichitas and some of the other tribes refusing to make any effort in that direction, saying they could not think of making a squaw of themselves by working. The

women and children, however, managed to plant and cultivate an amount of ground beyond my expectation. * *

I am, very respectfully, your obedient servant,

HENRY SHANKLIN,
United States Indian Agent.

Colonel S. N. ROBINSON,
Superintendent Indian Affairs,
Southern Superintendency, Creek Agency, C. N.

No. 150. Report of Agent accompanying Report of Commissioner 1877, p. 112.

OFFICE WICHITA AGENCY, INDIAN TERRITORY,
Eighth month 20, 1877.

* * * * * * *

A recent enumeration of the different tribes shows that there are 1,295 Indians attached to this agency, divided into bands, as follows:

Caddoes, including Delawares and Ionies	643
Wichitas	210
Towaconies	154
Wacoes	45
Keechies	90
Comanches	153
Total	1,295

* * * * * * *

The Wichitas, Wacoes, and Towaconies are virtually one people, speaking the same language, the names Wacoes and Towaconies being given to the descendants of two bands of the Wichitas, who, about one hundred years ago, left the main tribe on the Neosho River in Kansas, one taking up a residence on the Arkansas River, near the

present town of Wichita, and the other pushing
Texas. * *

Respectfully submitted.

A. C. WILLIAMS
United States Indian Ag

The COMMISSIONER OF INDIAN AFFAIRS.

No. 151. Extract from a report of Special Indian
accompanying the Report of the Commissioner of I
Affairs for 1871, page 478.

WICHITA AGENCY, INDIAN TERRITORY,
Eighth month 28, 1

DEAR FRIEND: * * In presenting this subject,
refer to the fact that, in a treaty held with the Wi
and other affiliated bands, at or near Fort Arbuck
Brazos Agency, on or about 1858–'59, the title
Wichitas was recognized to the land on which the
reside, and extending from the Red River to the
dian. * * *

Very respectfully,

JONATHAN RICHARDS,
Special United States Indian Agent f
the Wichitas and other affiliating ba

ENOCH HOAG,
Superintendent Indian Affairs,
Lawrence, Kansas.

No. 152. Report of Commissioner for 1872, page

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS, *November* 1, 1

SIR: * * The Indian title to lands, within the
of the States and Territories of the United States,

settled to be the right of occupancy alone, except in special instances when perhaps a title of a higher nature has been vested by statute, or by treaty provision.

In the early history of the Western World the principle was established, as between European nations, that discovery conferred sovereignty upon the government under whose authority the discovery was made; and to the discoverers was accorded the exclusive right of acquiring the soil from the natives. The Indians in possession were conceded to be the rightful occupants, with a just and perfect claim to retain possession and enjoy the use, until they should be disposed to part with it; but it was also well established that they could only part with the soil to those who claimed sovereignty, by right of discovery. Thus far were the rights of the natives, as original owners of the soil, restricted; they could not sell, or convey, to any other power, or to the citizens of any other power.

By the treaty of peace with Great Britain, in 1783, the United States acquired all the rights in respect to the soil, which had previously been in that nation.

By treaty with France, in 1803, known as the treaty of Paris, by which France ceded to the United States territory previously ceded to France by Spain, it was stipulated in the sixth article thereof:

"The United States promise to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians, until, by mutual consent of the United States and the said tribes or nations, other suitable articles shall have been agreed upon. * *"

Page 101. The Wichitas and other affiliated bands having, for a long time, resided within the limits of the tract known as the leased district, in the Indian Territory, without any defined reservation set apart for their occupancy, and having, also, a claim good or bad to a large

tract of country, an agreement was made by the Commissioner of Indian Affairs, with a duly authorized delegation of said Indians, by which the following described tract of land is set apart for them, viz: Commencing at a point in the middle of the main channel of the Washita River, where the ninety-eighth meridian of west longitude crosses the same; thence up the middle of the main channel of said river to the line of 98° 40′, west longitude; thence, on said line of 98° 40′, due north, to the middle of the main channel of the main Canadian River; thence, down the middle of the said main Canadian River, to where it crosses the ninety-eighth meridian; thence, due north, to the place of beginning.

In consideration for said tract of land, the Indians cede and relinquish to the United States all their right, title, interest, or claim, of any nature whatsoever, to any lands in Texas, Louisiana, the Indian Territory, or elsewhere within the limits of the United States.

I have the honor to be, sir, very respectfully,
Your obedient servant,
FRANCIS A. WALKER,
Commissioner.

Hon. C. DELANO,
Secretary of the Interior.

No. 153. Report of Commissioner for 1872, page 43.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS, *November* 1, 1872.

SIR: * * Wichitas, &c. The Wichitas and other affiliated bands of Keechies, Wacoes, Towoccaroes, Caddoes, Ionies and Delawares number 1,250, divided, approximately, as follows: Wichitas, 299; Keechies, 126; Wacoes,

140; Towocarroes, 127; Caddoes, 392; Ionies, 85; Delawares, 81. These Indians, fragments of once important tribes, originally belonging in Louisiana, Texas, Kansas, and the Indian Territory, were all, excepting the Wichitas and Delawares, removed by the government from Texas, in 1859, to the "leased district," then belonging to the Choctaws and Chickasaws, where they have since resided, at a point on the Washita River near old Fort Cobb. They have no treaty relations with the government, nor have they any defined reservation. * *

I have the honor to be, sir, very respectfully,
Your obedient servant,

FRANCIS A. WALKER,
Commissioner.

Hon. C. DELANO,
Secretary of the Interior.

No. 154. Report of Captain Henry E. Alvord, commissioner to the Kiowas, Comanches and other tribes, in the western part of the Indian Territory. Accompanying Report of Commissioner, 1872, p. 134.

WASHINGTON, D. C., *October* 10, 1872.

GENERAL: * * The Wichita Agency has been established on the north bank of the (False) Washita River, just opposite what is known as Eureka Valley. It is on the direct road from Fort Sill to the Cheyenne agency, thirty-five miles from the former, and forty from the latter. There are properly belonging to this agency about twelve hundred Indians, viz: Caddoes, 392; Ionies, 85; Wichitas, 299; Wacoes, 140; Keechies, 126; Towoccaroes, 127. The Caddoes and Ionies are virtually one people and should be so regarded, and the Wacoes, Keechies and

Towoccaroes, originally from Texas, have long been affiliated with the Wichitas. The proper designation for this agency is therefore "The Caddoes, Wichitas and Affiliated Bands." There are also now attached to this agency nearly three hundred of the Pineteghka or southern band of Comanches.

Very respectfully, your obedient servant,

HENRY E. ALVORD.

The Hon. COMMISSIONER OF INDIAN AFFAIRS,
Department of the Interior, Washington.

No. 155. Report of Commissioner for 1870, page 264.

OFFICE OF KIOWA AND COMANCHE AGENCY,
FORT SILL, INDIAN TERRITORY,
8th month 12th, 1870.

* * *

There has been no opportunity to count the Indians for several months. I shall therefore take the last census that was made for issuing rations, which was about one year ago, with the corrections as we have been able to make since: Kiowas, 1,896; Apaches, 300; Comanches, 2,742; Wichitas, 260; Caddoes, 500; Delawares, 95; Keechies, 100; Towaconies, 140; Wacoes, 125; Hie-en-eyes, 100.

* * * * * *

Respectfully,

LAURIE TATUM,
United States Indian Agent.

Friend ENOCH HOAG,
Superintendent Indian Affairs.

No. 156. Letter of Wm. Clark and A. Chouteau, to the Secretary of War.

ST. LOUIS, *Sept. the 6th*, 1818.

SIR: We have the honor herewith to transmit the treaty concluded with the Quawpaws on the 24th ult., by which it will be seen that a large tract of valuable country (which has at all times heretofore been considered their property, as well by the former governments as by the Osages, their neighbors) has been ceded to the United States, embracing all the white settlements in that quarter and extending far to the west of them. *

We have the honor to be, very respectfully, sir,

Your obdt. huml. serts,

WM. CLARK.
AUG. CHOUTEAU.

No. 157. Report of Agent accompanying Report of Commissioner for 1872.

WICHITA AGENCY, INDIAN TERRITORY,
Ninth month 1, 1872.

RESPECTED FRIEND: * * The census of the Indians on the reservation is as follows, to wit: Caddoes, 392; Wichitas, 299; Wacoes, 140; Tawacanies, 127; Keechies, 126; Delawares, 81; Ionies, 85; Penetethka Comanches, 285; total, 1,535. * *

Very respectfully,

JONA. RICHARDS,
United States Indian Agent.

ENOCH HOAG,
Superintendent of Indian Affairs,
Lawrence, Kansas.

No. 158. Report of Agent accompanying Report of Commissioner for 1873, 224.

WICHITA AGENCY, INDIAN TERRITORY,
Ninth month 1, 1873

DEAR FRIEND: * * From a census, recently taken with great care and much labor, in which service I had the assistance of A. J. Standing, I find the Indians belong to the reservation number as follows, to wit: Caddoes, 401; Wichitas, 300; Wacoes, 140; Tawacanies, 125; Keechies, 106; Delawares, 61; Ionies, 50; and Penetethka Comanches, 345. Total, 1,528. * *

Very respectfully,

JONA. RICHARDS,
United States Indian Agent.

ENOCH HOAG,
Superintendent Indian Affairs,
Lawrence, Kansas.

No. 159. Report of Agent accompanying Report of Commissioner for 1874, page 237.

WICHITA AGENCY, INDIAN TERRITORY,
Ninth month 1, 1874.

ENOCH HOAG,
Superintendent Indian Affairs,
Lawrence, Kansas.

* * * * * *

The number of Indians belonging to this agency varies but little from my former report, except in one or two of the bands. It is as follows, to wit: Caddoes, 521; Wich-

itas, 300; Wacoes, 140; Tawacanies, 125; Keechies, 106; Penetethka Comanches, 345; Pawnees, 360; total, 1,897.

* *

Very respectfully,

JONA. RICHARDS,
United States Indian Agent.

No. 160. Report of Commissioner for 1875, page 99.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *November* 1, 1875.

SIR: * * The Wichitas, numbering 228, the Wacoes, 66, Tawacanies, 102, and the Keechies, 90, are located, with the Caddoes, in the Wichita reservation, in the Indian Territory; are in much the same condition as reported last year. * *

I am, sir, very respectfully,
Your obedient servant,

EDW. P. SMITH,
Commissioner.

Hon. SECRETARY OF THE INTERIOR.

No. 161. Report of Agent accompanying Report of Commissioner for 1876, p. 64.

WICHITA AGENCY, INDIAN TERRITORY,
ANADARKO, *Eighth month* 21, 1876.

* * * * * *

A careful enumeration of all the bands, belonging to the agency, has recently been made, showing the whole number of Indians to be 1,220, divided into bands, as follows:

Caddoes, including Delawares and Iowas (Ionies?)	580
Comanches, two bands	168
Wacoes	70
Wichitas	217
Tawacanies	100
Keechies	85

Total number of Indians on reservation is 1,220, of which number there are 385 men, 459 women, 208 boys and 168 girls. * *

Of the several bands of Wacoes, Wichitas and Tawacanies there are 387 persons, in which bands the general characteristics are similar, speaking the same language and, in various particulars, acting as one people. *

Among the various bands five different languages are spoken. The Caddoes and Delawares each have a language of their own; the Comanches have theirs; the Wacoes, Wichitas and Tawacanies have the Wichita language in common, while the Keechies have theirs, yet unlike any other.

Except the Caddoes, Delawares and Wacoes, these bands are now occupying the lands of their fathers, and, being the original settlers, they feel that they are entitled to permanent homes. The reservation now occupied by them, bounded north by the main Canadian River, east by the ninety-eighth degree of west longitude, south by the Washita River and west by range 14, has been defined and surveyed, but has never yet been confirmed to them, and I would suggest that early measures be adopted toward the end that the affiliated bands be made secure in the homes they are now so desirous to secure and establish. * *

I am, very respectfully,

A. C. WILLIAMS,
United States Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

No. 162. Report of Agent accompanying Report of Commr. for 1879, page 62.

KIOWA, COMANCHE AND WICHITA AGENCY,
ANADARKO, IND. TER., *August* 30, 1879.

SIR: * * The following table will show the number of Indians attached to the consolidated agency:

Kiowas	1,138
Comanches	1,393
Apaches	315
Wichitas	209
Wacoes	49
Towaconies	155
Kechies	75
Caddoes	543
Delawares	81
Comanches (of Wichita)	159
Total	4,117

* *

I have the honor to be, very respectfully,
Your obedient servant,

P. B. HUNT,
United States Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

No. 163. Report of Agent, enclosed in Report of Commissioner, 1880, page 71.

KIOWA, COMANCHE AND WICHITA AGENCY,
ANADARKO, IND. TER., *September* 1, 1880.

SIR: * * The following will show the number of Indians attached to this agency, according to the census just taken:

	No. of Men.	No. of Women.	No. of Boys.	No. of Girls.	Tota
Kiowas	291	381	229	223	1,1
Comanches	338	567	245	249	1,3
Apaches	81	90	89	74	3
Wichitas	57	66	38	31	1
Wacoes	14	18	8	7	
Towaconies	39	56	28	22	1
Keechies	24	25	15	10	
Caddoes	139	156	123	120	
Delawares	15	24	14	25	
Penetethkas (Comanches) with affiliated bands	42	60	35	18	1
At agency	1,040	1,443	824	779	4,0
Absent (at Carlisle)	.....	.....	28*	9*	
Total present and absent	1,040	1,443	852	788	4,1

* * * * * *

It may be seen, by an examination of the reports fo several years past, that there has been no material chang in the numbers of these tribes, or that, certainly, there has been no increase. I am not able to state with certainty what may be the cause of this, but think I can indicate pretty accurately what is one of the chief reasons. As it is well known that many infants die, who are never reported to the physician or to the agent, and as the births are not always reported, and there are no means of ascertaining this number, there can, of course, be no comparison made the one with the other; but it is thought, if both were known, a frightful mortality would be shown of infants and children under four years old. Very many of each of the tribes are seriously affected with venereal

*The absentees are Kiowas 11 boys and 4 girls; Comanches, 13 boys and 1 girl; Wichitas, 3 boys and 3 girls; Keechies, 1 boy; Towaconies, 1 girl.

disease—that curse which has borne so heavily on the red man for generations; and the children of such come into the world, so frail, so tainted by the foul disease, that it is thought few live to adult age; indeed only those with the very strongest constitutions do so. I regret to have to state that the habits of the young women are such, especially those of some of the tribes, that the prospect of a better future for these people, in this particular, looks gloomy indeed.

* * * * * *

Very respectfully, your obedient servant,

P. B. HUNT,
United States Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

No. 164. Report of Agent accompanying Rep. Commr. for 1881, page 77.

KIOWA, COMANCHE AND WICHITA AGENCY,
ANADARKO, IND. T., *September* 1, 1881.

SIR: * * The following table will show the number of Indians belonging to this agency:

Name of tribe or band.	No. of men.	No. of women.	No. of boys.	No. of girls.
Kiowa	277	381	251	236
Comanche	336	555	244	261
Apache	77	90	88	82
Wichita	59	59	45	43
Wacoe	16	18	9	6
Towaconie	37	55	29	30
Keechi	27	26	15	9
Caddo	151	151	127	123
Delaware	14	24	16	25
Penetethka (Comanche)	45	60	37	23
Total number	1,039	1,419	861	838
Absent at Carlisle			26	9
Kiowa			10	4
Comanche			12	1
Wichita			3	3
Keechi			1	
Towaconie				1

It will be seen that there are nine different tribes un my charge, the Penetethkas being one of the branche the great Comanche tribe of Indians. Some years ag portion of this family, about 170 in number, were p mitted to associate themselves with the Wichitas, Wac Towaconies, Keechies and Caddoes, and become of six affiliated bands, out of which was formed the Wic Agency. The Delawares, the remnant of that once pow ful tribe which figured so conspicuously in the early h tory of this country, although not a party to the agr ment between the United States government and affiliated bands, were permitted to enjoy its benefits, a having, in some way, become associated with the Caddo were formerly counted and reported with them, by agen Seven languages, only, are spoken, as the Wichit Wacoes, and Towaconies speak the same language, a are, indeed, one people, the Wacoes and Towacon being branches of the Wichita tribe. It is said th

about one hundred years ago, two bands left the main tribe (the Wichitas) on the Neosho River, in Kansas, one taking up its residence on the Arkansas River, near the present town of Wichita, Kans., and the other going to Texas; and to the descendants of these two bands the names of Wacoes and Towaconies were given. As, however, many members of each of these tribes speak the Comanche language, it has become, as it were, a court language among them. * *

Very respectfully,

P. B. HUNT,
United States Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

No. 165. Report of agent accompanying Report of Commissioner for 1888, page 96.

KIOWA, COMANCHE AND WICHITA AGENCY,
ANADARKO, IND. T., *August* 18, 1888.

SIR: * * The tribes residing on this reserve and under the control of this agency are as follows:

Tribes.	No.
Comanches	1,564
Kiowas	1,121
Caddoes	491
Apaches	348
Wichitas	165
Tehuacanoes	143
Delawares	89
Wacoes	64
Keechies	30
Children away at school	211
Total	4,226

* * * * * *

These tribes are all to-day in a prosperous, and
I may say, a happy condition. Some of them liv
houses; but the most of them live in grass lodges
in form and structure peculiar to the Wichitas.

I have the honor to be, sir,

Very respectfully, your obedient serva

E. E. Wh

Special Agent in C

The Commissioner of Indian Affairs.

No. 166. Report of Agent accompanying
Commr., 1889, p. 188.

Kiowa, Comanche and Wichita Agency,
Anadarko, Ind. T., *August* 27,

Sir: * * According to a very careful cen
completed, I find the following number of Indians
ing to the several tribes under the control of this
viz:

Tribes.	No.
Comanches	1,590
Kiowas	1,142
Apaches	349
Wichitas	164
Wacoes	29
Keechies	62
Towaconies	145
Caddos	517
Delawares	90
Total	4,088

This shows an increase of 73 Indians, "divide
the various tribes," for the fiscal year. I feel

that the census is as nearly correct as it can be made, as it has been taken with great care. * *

With perfect respect, I remain,

Your obedient servant,

W. D. MYERS,
Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

No. 167. Report of Agent accompanying Report of Commissioner for 1890, page 186.

KIOWA, COMANCHE AND WICHITA AGENCY,
ANADARKO, OKLAHOMA, *September* 16, 1890.

SIR: * * The census returns, according to enumeration of 1890, are as follows:

Tribes.	No.
Kiowas	1,140
Comanches	1,598
Apaches	326
Wichitas	174
Caddos	538
Towaconies	150
Keechies	66
Wacos	34
Delawares	95
Total	4,121
Number of deaths	186
Number of births	222

* * * * * *

In connection with liquor there has been little or no trouble. Among the Indians themselves there has been greater harmony than could be expected. There is, how-

ever, one matter which demands prompt and decisive attention from the department, and from higher power. Murder, pony-thieving, wife-beating and immorality of all kinds are consequent upon the present manner of making or breaking the marital bonds. * *

With sentiments of highest respect,

Your obedient servant,

CHAS. E. ADAMS,

United States Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

No. 168. Report of Agent accompanying Report of Commissioner for 1891, page 352.

KIOWA, COMANCHE AND WITCHITA AGENCY,

ANADARKO, OKLA., *August* 10, 1891.

SIR:

* * * * * * *

Population.

Kiowas	1,151
Comanches	1,624
Apaches	325
Wichitas	175
Caddoes	545
Towaconies	150
Delawares	95
Wacoes	35
Keechies	66
Total	4,166
Males	1,971
Females	2,195
Total	4,166

* * * * * * *

Your obedient servant,

CHAS. E. ADAMS,

United States Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

No. 169. Wichita population. The number of the Wichitas is not shown in any of the reports of the Commissioner of Indian Affairs from 1835 to 1842, inclusive. The numbers of the Caddoes and Pawnees are shown as follows:

		Caddoes.	Pawnees.
Report of 1835,	page 297	2,000	10,000
1836,	" 403	2,000	10,000
1837,	" 642	2,000	12,500
1842,	"	2,000	12,500
1843,	"	2,000	12,500
1844,	"	2,000	12,500
1845,	"	2,000	12,500

Report of Indian Agent, accompanying Report of Commissioner for 1849.

POPULATION.

Caddoes, Ionies, Anadahkas,	Associates	1,400	280
Keechies		300	60
Wichitas, Wacos, Tahwacanes,	Associates	1,000	200

Report of Commissioner, 1854, page 255.

POPULATION.

1854.	Residence.
Anadahkas, Caddoes and Ionies.....500	Texas.
Keechies, Wacoes and Tawaccarros....300	"
Wichitas.....950	"

Report of Commissioner for 1867, page 379.

Wichitas	364
Keechies	127
Wacoes	124
Tawacanas	143
Caddoes and Ionies	347

Report of Commissioner for 1868, page 353.

Wichitas	280
Keechies	123
Wacoes	135
Tawacanas	157
Caddoes and Ionies	480

Report of Commissioner for 1869, page 394.

Caddoes on the reservation	284
Wichitas and affiliated bands	700

Report of Commissioner for 1870, page 264.

Wichitas	260
Caddoes	500
Keechies	100
Delawares	95
Towacanos	140
Wacoes	125

Report of Commissioner for 1871, page 612.

Wichitas and affiliated bands	1,216

Report of Commissioner for 1872, page 254.

Caddoes	392
Wichitas	299
Wacoes	140
Towacanies	127
Keechies	126
Delawares	81
Ionies	85
Penetethka Comanches	285
Total	1,535

Report of Commissioner for 1873, page 234.

Caddoes, 401; Wichitas, 300; Wacoes, 140; Tawacanies, 125; Keechies, 106; Delawares, 61; Ionies, 50; Penetethka Comanches, 345; total, 1,528.

Report of Indian Agent, accompanying Report of Commissioner for 1874, page 237.

Caddoes, 521; Wichitas, 300; Wacoes, 140; Towacanies, 125; Keechies, 106; Penetethka Comanches, 345; Pawnees, 360; total, 1897.

Report of Commissioner for 1875, page 110; table.

Caddoes, 552; Wichitas, 228; Comanches, 165; Tawacanies, 102; Keechies, 90; Wacoes, 66.

Report of Indian Agent, accompanying Report of Commissioner for 1876, page 64.

Caddoes, including Delawares and Iowas (Ionies ?), 580; Comanches, two bands, 168; Wacoes, 70; Wichitas, 217; Keechies, 85; total number, 1,220.

Report of Indian Agent, accompanying Rep. of Comr. 1877, page 112.

Caddoes, including Delawares and Ionies, 643; Wichitas, 210; Towaconies, 154; Wacoes, 45; Keechies, 90; Comanches, 153; total, 1,295.

Report of Commissioner for 1878, page 286.

Wichita, 206; Waco, 65; Towaconie, 160; Keechie, 87; Caddo, (including Delaware) 652; Comanche, 165.

Report of Commissioner for 1879, page 232.

Wichita, 209; Waco, 49; Towaconie, 155; Keechie, 75; Caddo, 543; Delaware, 81.

Report of Commissioner for 1882, page 64.

WICHITAS.

Men	59
Women	59
Boys	45
Girls	43
At Carlisle,	
Boys	5
Girls	3
Total	214

Report of Commissioner for 1883, page 70.

WICHITAS.

Men, Women, Boys, Girls, At Carlisle, Boys, Girls,	216

Report of Commissioner for 1884, page 79.

WICHITAS.

Males	98
Females	111
Total	209

Report of Commissioner for 1885, page 83.

WICHITAS.

Males	92
Females	107
Total	199

Report of Commissioner for 1886, page 132.

WICHITAS.

Male	96
Females	91
Total	187

Report of Commissioner for 1887, page 81.

WICHITAS.

Males	98
Female	94
Total	192

WICHITA POPULATION.

Tabulated Statement.

1867	364
1868	280
1870	260
1872	299
1874	300
1875	228
1876	217
1877	210
1878	206
1879	209
1882	214
1883	216
1884	209
1885	199
1886	187
1887	192

No. 170. Extract from a Report of Indian Agent on file in the Indian Office, indorsed Wichita, R. 212.

WICHITA AGENCY, L. D., *April* 19, 1860.

SIR: By order of Supt. Rector, of the Southern Superintendency, your circular, dated Nov. 17, 1859, directing

that the proposition for surveying and alloting to them, in severalty, so much of their land as was necessary for their actual occupancy and cultivation, was submitted to the chiefs and head men of the several bands who compose this agency, in council, early in January last.

Having had the subject under consideration for over three months, and again having assembled in council, they request me, as their agent, to say:

That there are nine different bands and parts of bands now resident in this district, viz: Caddoes, Anahdahkos, Comanches, Tonkahuas, Ionies, Keechies, Witchitas, Wacos and Tahuacarros; of these, only three bands claim any right to speak in the premises, viz: Witchitas, Wacos and Tahuacarros. These three bands are composed of a people having the same habits and speaking the same language, and claim to have had the same origin.

They say that this country (by which they mean all that country lying between the Red River and the Canadian River from the mouth of the False Washita on River to a point due north of the same, on the Canadian, as its eastern boundary, and as far west as the west end of the Wichita mountains, is exclusively their own; that they have held it in possession, and cultivated as much of it as was necessary for their support, from time immemorial; that they used to be powerful, and kept intruders, such as Comanches and others, off of it; that they have, by long wars, become enfeebled, and have sought and obtained the favor and protection of the United States Government; that they do not think it would be just, in so powerful a government, to take and distribute their country to a people, who had warred upon them, without first paying for it; that in all the treaties which they have held with their Indian neighbors, whether civilized, or wild roving

bands of the prairies, this right has never been disputed.

* * * * *

Very respectfully, your obt. svt.,

S. A. BLAIN,
U. S. Agent for Wichitas and Others, L. D.

Hon. A. B. GREENWOOD,
Com. Indian Affairs, Washington, D. C.

No. 171. Negotiations relating to the district between the 98th and 100th meridians.

Extract from letter of July 11, 1854, from Choctaw Delegates to Commissioner of Indian Affairs.

* * * We shall, therefore, have to demand the immediate removal of the several bands of Texas and other Indians, who have settled within our limits; and if this demand be not complied with, we will remove them ourselves, using force if necessary. The Government must look to the consequences, whatever they may be. *Our country extends west to the headwaters of the Canadian, about the* 103*d degree of west longitude*, and we are prepared to maintain our rights to a boundary that far west by facts and evidence which cannot be disputed. In the compromise with Texas, in 1850, that portion of our country west of the 100th degree of west longitude was assigned to that State, in direct and palpable violation of our rights. We must demand to be re-possessed of this portion of our country; and if this is not done our people will take possession of it, and leave the Government to settle with Texas and the Indians upon it for such damages as they claim.

Letter of U. S. Agent for Choctaws.

WASHINGTON CITY, *April* 9, 1855.

GENTLEMEN: I am to-day in receipt of a letter from Geo rge W. Manypenny, Commissioner of Indian Affairs, instructing me to confer with the Choctaw delegation now in this city, for the purpose of ascertaining what arrangements, if any, can be made with them, having in view the adjustment of all differences between their tribe and the Chickasaw tribe of Indians, the Government of the United States, and the permanent settlement of the Wichita and other bands of Indians in the Choctaw country.

I respectfully request that you will furnish me, as early as practicable, with an answer in writing to the above interrogatories, in order that the same may be reported to the Commissioner of Indian Affairs.

Your friend,

DOUGLAS H. COOPER,
United States Agent for Choctaws.

To P. P. PITCHLYNN,
ISRAEL FOLSOM,
SAM'L GARLAND,
DICKSON W. LEWIS,
Choctaw Delegation, Washington City.

Reply of the Choctaw Delegates.

* * * Respecting the Wichia and other bands of Indians, who have intruded themselves within the limits of our country, we have to remark they are, as you know, a nuisance, and we had far rather be rid of them altogether. In our communication to the Acting Commissioner of Indian Affairs, of the 11th of July last, we demanded their removal, as we had a right to do; but we are not aware that any order has been given on the subject. We have had it in contemplation to renew this demand, and, if not

complied with, to remove them by force if necessary. We and our people have, however, as we have ever had, every disposition to comply with the policy and wishes of the Government; and, if it be an object of importance to it, to have these Indians accommodated with a home within the boundaries of our country, though such an arrangement would be greatly repugnant to our inclinations and feelings, we would consent to it on fair and reasonable terms, *if it can be made a part of a just and equitable adjustment of all the matters involved in* the existing controversy between the Choctaws and the Government; otherwise we could not take the serious responsibility of encountering the prejudices and opposition of our people to the measure.

Statement of the Chickasaw Delegates, April 14, 1855.

In regard to the third point, they have only to say that, in conjunction with the Choctaws, they are willing to enter into an arrangement with the United States Government for the permanent settlement of the Wichita and other bands of Indians in the Choctaw country, upon terms just, fair, and safe for both the Choctaws and Chickasaws.

Letter of April 21, 1855, from Secretary of Interior to Commissioner of Indian Affairs.

If you have any plan for the settlement of these difficulties, or if the Choctaws will submit a distinct offer, as the terms on which they will settle with the Chickasaws, and provide for the Witchitas and other Indians within the limits of the Choctaw country, the Department will give it prompt consideration, and with every disposition to award to them and the Chickasaws such degree of favor as may not be incompatible with the rights and interests of the United States.

Letter of April 26, 1855, from Commissioner of Indian Affairs to Indian Agent.

* * You will also ascertain upon what terms the Choctaws will arrange with the United States, for the use of their country west of 98° west longitude, for the Wichitas and such other bands of Indians as the Government may desire to settle permanently west of that degree of longitude, also upon what terms the right to settle said Indians west of 99° west longitude can be obtained, and report to this office with the least delay possible.

Letter of April 26, 1855, from Indian Agent to Commissioner of Indian Affairs.

SIR: I herewith inclose a proposition * *; and also a proposition for the lease of the Choctaw possessions west of the 99th degree of west longitude to the Government, for the permanent settlement of the Wichita and other bands of Indians within the Choctaw country.

Letter of April 24, 1855, from Choctaw Delegates to Indian Agent.

2. We will agree to provide, in the same convention or supplemental treaty, that the Government shall have the permanent use of a limited portion of the western part of our country, for the accommodation of the Wichita and other bands of Indians, for a fair and just consideration; the amount to depend, of course, upon the extent of country required for the purpose. The Commissioner of Indian Affairs, in his letter, requires you to ascertain our terms for the use of that portion of our country west of the 98th degree of west longitude, and also for that west of the 99th degree. We are unwilling to lease, for the purpose mentioned, any portion of our country east

of the 99th degree; but for the lease of that west of that degree we will consent, in behalf of our people, to take the sum of four hundred thousand dollars.

Letter of April 27, 1855, from Secretary of Interior to Commissioner of Indian Affairs.

As I have heretofore said, I have every disposition to act towards these Indians in a spirit of the utmost liberality consistent with the just rights and interests of the United States; and, all things considered, am disposed to think the proposition for the permanent accommodation of the Wichita and other Indians, and the amount demanded therefor, worthy your consideration; and you are authorized to enter into negotiations with the Choctaws on that basis. I think, however, that, notwithstanding their claim to an extent of country west of the 100th meridian of longitude is regarded by the department as without any foundation in law or equity, it might prevent further trouble, in regard to it, to insert an article in the supplemental treaty or convention, now to be held, requiring the Choctaws to relinquish and abandon all right or claim to the same.

Letter of May 2, 1855, from Indian Agent to Choctaw Delegates.

GENTLEMEN: In view of the probability that an arrangement will be effected between the Choctaw and Chickasaw tribes, restricting the western boundary of the "Chickasaw district" to the 98° of west longitude, west from Greenwich, I desire to ascertain whether you will agree, the Chickasaws assenting, to lease the country between 98° and 100° west longitude and between Red and Canadian rivers to the United States, for the permanent settlement of the Wichita and other bands of Indians within the territorial limits of the Choctaw nation; and if

so, upon what terms, it being understood that the C
taws shall relinquish and quitclaim, in favor of
United States, whatever interest they may have in
country lying west of the 100° of west longitude.

Letter of May 3, 1855, from Choctaw Delegates to
dian Agent.

In our communication to you of the 9th ultimo, we
ferred to the prejudices and opposition of our peopl
the location of the Indians referred to within the li
of our country, and our repugnance to such an arra
ment; but we stated that we had every dispositio
comply with the policy and wishes of the Governm
on the subject; and that, if the measure were one of
portance to it, we would take the responsibility and
sent to it, on fair and reasonable terms. In our su
quent communication of the 24th instant, we stated
unwillingness to lease, for that purpose, any portio
our country east of the 99° of west longitude, but tha
would agree to lease that west of that degree, for
sum of four hundred thousand dollars. On further
sideration of the subject, however, since the receip
your letter, we have concluded, in the same spiri
accommodation, to agree to comply with the wishe
the Government by leasing to it the further portio
our country between the 98° and 100° of west longit

The question of the total relinquishment of any por
of our territorial rights is one of even greater deli
and difficulty. We have fully acquainted you with
grounds of our claim to title to the headwaters of
Canadian River, extending as far west as at least to
103° of west longitude. We believe our title to be perfe
valid and good; but as it is questioned, if not dispu
by the Government, west of the 100° of west longit

and we are anxious to put at rest all questions of controversy with it, we will relinquish and quitclaim to it our rights west of that degree of longitude, on fair and equitable terms. The extent of country involved is large; we know it to be valuable; and we believe the acquisition of our title to it to be important to the Government; still we have no disposition to be exorbitant. As a consideration for the whole arrangement, *we would consent to take eight hundred thousand dollars—one half thereof for the lease of the country between the* 98° *and* 100° *west longitude, and the other half for the relinquishment of our right west of the latter degree.*

The above proposition has reference to the arrangement as a whole. Were it to be confined only to the lease of the portion of the country between the two degrees of longitude mentioned, we should for obvious reasons feel constrained to ask not less than six hundred thousand dollars therefor.

Letter of May 4, 1855, from the Indian Agent to the Choctaw Delegates.

If the Choctaws will propose to lease to the United States the territory west of 98° and east of 100° west longitude, (the Chickasaws assenting) and couple with it a relinquishment of all claim west of 100° west longitude, the Government will agree to pay them $600,000.

Letter of June 7, 1855, from Commissioner of Indian Affairs to Acting Secretary of Interior.

* * After consultation with the Secretary of the Interior, and with his concurrence, Agent Cooper was instructed, verbally, to inform the delegation that if they would accept the sum of $600,000 for the lease of the country between the two degrees, and the relinquishment

west of the 100°, the Government would give that sum. The delegation assented to this proposition, and agreed to take the sum of $600,000 for the lease of the territory within the two degrees mentioned, and the relinquishment of their claims to the country west of the 100th degree. The Chickasaw delegation also assented and agreed to the terms of the lease, and the question was settled, as I supposed; but both delegations now contend that the United States shall be restricted, in the number of bands of Indians to be located in the country leased, to such as are now residing in it. With such a limitation on the use of the country, the lease would be of but little value, and I have, therefore, declined to assent to the limitation which the Indians desire to impose, and have claimed that the Government must be left free to locate such Indians as it may desire within the ceded country. * *

The delegations propose, as a compromise, that the Choctaws quitclaim to the country west of 100°, and that they and the Chickasaws will lease the country between 99° and 100° for the permanent settlement of any Indians whom the Government may desire to locate therein, for the sum of $600,000.

Letter of June 14, 1855, from Choctaw Delegates to Commissioner of Indian Affairs.

The lease we had consented to agree to was a limited one, viz: for the permanent settlement, within the country leased, of the Wichita and several alien tribes and bands now in our country, the Government to have the control of them, but we still to retain jurisdiction over the country itself, with the right of settlement therein by Choctaws and Chickasaws as heretofore, as expressed and provided for in the convention. If the Government had the unrestricted right to bring in any and all Indians it pleased, the whole district might soon be filled up with

a discordant, restless and predatory population, which would endanger the frontier settlements of the Choctaws and Chickasaws, deprive us practically of our jurisdiction and necessarily exclude Choctaws and Chickasaws from settling within the district, if they so desired. Such an arrangement would be a virtual sale of that portion of our country, to which we could under no circumstances submit. Moreover the consideration offered would be entirely inadequate. We had agreed to relinquish our claims to territory west of the 100° of west longitude, embracing at least six and a half millions of acres. The district desired to be leased contains quite seven millions more; so that practically the Government would have acquired from us some thirteen and a half millions of acres of land, for the certainly insufficient sum of six hundred thousand dollars.

FEB 27 1900
JAMES H. McKENNEY,
Clerk.

Brf. of Barnes for Choctaws.

Filed Feb. 27, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, *Appellant*,
vs.
THE CHOCTAW NATION and THE CHICKASAW NATION. } No. 337.

THE WICHITA AND AFFILIATED BANDS OF INDIANS, *Appellants*,
vs.
THE CHOCTAW NATION and THE CHICKASAW NATION and THE UNITED STATES. } No. 338.

THE CHOCTAW NATION and THE CHICKASAW NATION, *Appellants*,
vs.
THE UNITED STATES and THE WICHITA AND AFFILIATED BANDS OF INDIANS. } No. 339.

BRIEF FOR THE CHOCTAW NATION.

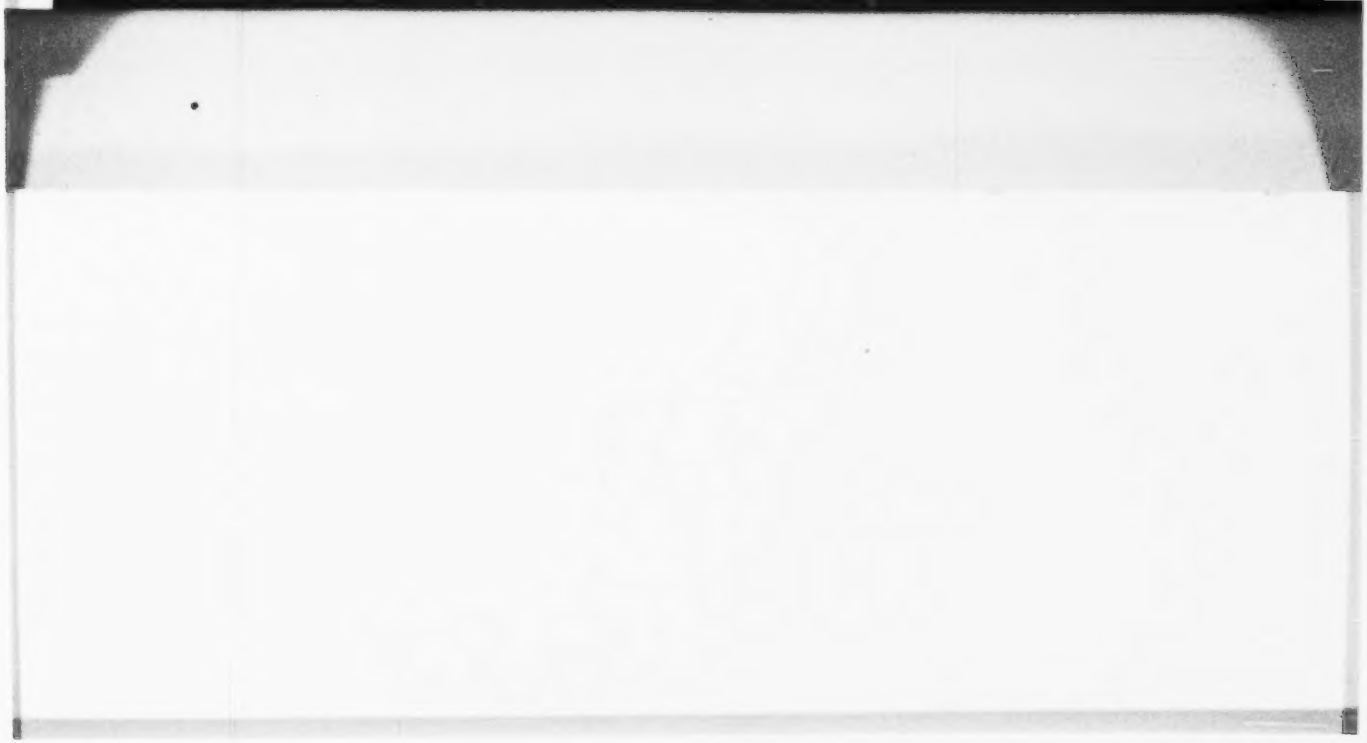
GEORGE T. BARNES,
Attorney for Choctaw Nation.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-3-1900

Canada pages 82 & 83. 139 & 152

Marginal references in writing are by pages to the Appendix to Record printed subsequent to this brief.

A. R. abbreviation for Appendix to Record.



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APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE CHOCTAW NATION.

ORIGIN OF THE CASE.

This case arises out of an agreement made and entered into between the United States and the Wichita and affiliated bands of Indians, at Anadarko, in the Indian Territory, on the 4th day of June, 1891. Under this agreement the Wich-

ita and affiliated bands of Indians ceded to the United States all their right, title, claim, or interest in a certain district here shown on the map—beginning where the 98th meridian west longitude crosses the Washita river, thence up the main channel of said river to 98° 40′, thence up the line of 98° 40′ to the Canadian river, thence down the Canadian river to 98°, and thence down 98° to the point of beginning. Under the terms of this agreement the United States was to allot in severalty to each member of the Wichita and affiliated bands 160 acres of land in said district. The residue of said land was to be opened to settlement under the general land laws of the United States. The lands embraced in this district were a part of what is known as the leased district of said Indian Territory. The leased district constitutes a part of the territory ceded by the United States to the Choctaw Nation of Indians by treaty of October 18, 1820. The Chickasaws subsequently acquired an interest in the same. The United States subsequently reacquired from the Choctaws and Chickasaws this leased district under the treaty of 1855 and the treaty of 1866. The Choctaws and Chickasaws contend that it was acquired by the United States simply for the location thereon of Indian tribes, and that when any of said lands embraced in said leased district are opened to settlement certain legal, equitable, and beneficial interests in said lands immediately accrue to them.

The United States controverts this claim—that is, the act is not to be construed as admitting or denying the validity of the claim. The Wichitas and affiliated bands deny it and assert an exclusive interest in themselves. But, notwithstanding the claim was controverted by the United States and the defendant Indians, the act provided that the Choctaws and Chickasaws might at any time before final judgment enter into negotiations with commissioners who had been appointed by the United States and their successors for a settlement of their claims. The agreement was made subject to ratification by Congress. Congress, in rati-

fying it, provided for the trial of this claim of the Choctaws and Chickasaws. (For this agreement and for the act of Congress see Statute of the United States, 53d Congress, 3d session; act of March 2d, 1895, p. 894.) The leased district contains 7,713,239 acres. The area of the land in controversy, which is a part of said leased district, embraces 743,257.19 acres. A.R. 1

JURISDICTION.

The act confers jurisdiction on the Court of Claims to try this issue. In the trial it is provided that the court is to determine the legal and equitable rights of the parties. The court is required to receive and consider as evidence everything which tends to shed light on the claims of either party. This means that the court is to inquire what are the legal and the equitable rights of the parties, untrammeled by technical rules of procedure and unrestrained by any distinction between law and equity (Old Settlers (Cherokees) *vs.* The U. S., 148 U. S., p. 427).

PARTIES.

The claimants are the Choctaw and the Chickasaw Nations of Indians. The Choctaws own a three-fourths and the Chickasaws a one-fourth interest in this claim. See petition (Record, p. 1): treaties of January 17, 1837; June 22, 1855; 11th Stat., 573; 11th Stat., 611; also Revision of Indian Treaties, 274, 285. These two tribes or nations of Indians have been recognized as distinct political communities, with acknowledged territorial limits, from the commencement of the United States Government. See treaties with Choctaws, 1786, 1801, 1802, 1803, 1805, 1816, 1820, 1825, 1830, 7th Stat.; 1837, 1855, 1866, 11th Stat., 573; 11th Stat., 611; 14th Stat., 769; Revision of Indian Treaties, 1046, 274, 285. With Chickasaws, 1786, 1801, A.R. 20 A.R. 24 A.R. 517 A.R. 5

1805, 1816, 1818, 1832, 1834, 7th Stat.; 1847, 1855, and 1866, 11th Stat., 573; 11th Stat., 611; 14th Stat., 769; Revision of Treaties, 1046, 274, 285. Under these treaties they now occupy well defined districts in the Indian Territory. The Choctaws number between 14,000 and 15,000 people, of whom nearly 10,000 are Indians and about 1,500 are colored of African descent. The Chickasaws number over 7,000, of whom about 3,400 are Indians and 3,700 are colored of African descent (Census Bulletin, 1890, No. 25.

The defendants are The United States and The Wichita and affiliated bands. The Wichitas assert an original title in the whole of the leased district, and also a title, under agreement with the United States, made in pursuance of the treaties of 1855 and 1866, made between the United States and the Choctaws and Chickasaws.

The affiliated bands are tribes who were settled in the same tract with the Wichitas by the United States, and in pursuance of the same treaties of 1855 and 1866. They are known as the Caddoes, Wacoes, Towaconies, Keechies, Delawares, and Ionies. They all, including the Wichitas, do not number 1,100 people—men, women, and children. Of them the Caddoes number one-half, while the Wichitas proper do not exceed altogether more than 175 (Census Bulletin 1890, No. 25).

The claim of the Choctaw and Chickasaw Nations is based on treaties, compacts, and agreements into which they have entered with the United States from time to time.

The defendant Indians set up as the basis of their claim the assertion that the Wichitas were the original possessors of the land in controversy, and that their aboriginal rights were never extinguished, and are subject only to the right therein acquired by their affiliated bands through the acquiescence of the Wichitas in their joint occupation with them since 1859 (defendant's answer, Record, p. 23).

We absolutely deny that the Wichitas were ever the aboriginal owners of the land in controversy. We say

moreover, that even if they were such aboriginal owners, such fact would in nowise relieve the United States Government from the obligations it assumed towards the Choctaws and Chickasaws in the various treaties, compacts, and agreements into which it entered with them. These obligations were absolute and independent of any rights or claims of any other tribe or people whatsoever.

THE ISSUE.

The Choctaws acquired this land under the treaty of 1820. By a subsequent arrangement between the Choctaws and Chickasaws, made in 1837, with the approval of the Government, these two Indian nations became the owners of it as tenants in common. They leased what is called the leased district to the United States by the treaty of 1855, and retroceded it to the United States by the treaty of 1866. The defendants say that this act of retrocession was absolute and unqualified, without any restriction or limitation whatsoever. We say that it was for the use of such Indian tribes as the United States might desire to colonize thereon, and in the event that it ceased to be used for such purpose, it reverted to the Choctaws and Chickasaws and again became their property. This constitutes the issue.

A.R.9

After argument had on this issue in the Court of Claims, the court held that the cession of the territory west of the 98th meridian, known as the leased district by the Choctaws and Chickasaws, made by the treaty of April 28, 1866, was not absolute.

And held that the cession of said territory, made by the said treaty, was made upon a trust of such a character that the sale of the unallotted portion of the Wichita reservation would constitute a breach of the trust, even though such sale should be made for the benefit of the Wichita and affiliated bands of Indians located upon the said reservation.

And thereupon the court decreed that the Choctaw
Chickasaw Nations are in law and equity entitled to
are the owners of the unallotted portion of the Wichita
ervation, and that in the event of the sale of such unallo
portion by the United States they shall be entitled to
shall receive from the United States the proceeds of s
sale.

And upon this decision and decree the counsel of
Government assigns the several grounds of error set f
in their bill of exceptions.

And inasmuch as the court held and decreed that in
case the Wichitas and affiliated bands were nevertheless
titled to an allotment out of said Wichita reservation o
hundred and sixty acres of land each, the counsel for
Choctaws and Chickasaws assigned error thereon, as set f
in their bill of exceptions.

The Choctaws and Chickasaws were two of the tr
usually known to the country as

THE FIVE CIVILIZED TRIBES; THEIR REMOVAL TO INDIAN TERRITORY.

A.R. 7

The country known as the Indian Territory was a pa
Louisiana, acquired from France under the treaty of
Early after its acquisition the United States adopt
policy of transferring the Indian tribes living east of
Mississippi river to the new territory west of that r
On the 26th of March, 1804 (2d Stat., p. 283), Cong
passed an act authorizing the President to exchange l
in the new territory of Louisiana with tribes for their l
on the east side of that river. What is known as the In
Territory was assigned to the tribes since known as the
civilized tribes—the Cherokees, the Creeks, the Semin
who were a branch of the Creeks, both speaking the
language, and the Choctaws and Chickasaws, also
speaking the same language. The two last named are

claimants in this case. The Government had recognized the Cherokees, Creeks, and Seminoles in the same manner in which it had recognized the Choctaws and Chickasaws from our earliest history as a government. (See Cherokee treaties 1785, 1791, 1805, 1816, 1828, 1832, 1835, 7th Stat.; Creeks, 1790, 1796, 1802, 1814, 1825, 1826, 1827, 1832, 1833, 7th Stat.; Seminoles, 1832 and 1833, 7th Stat., and subsequent treaties with these tribes, including treaties of 1866, in Revision of Indian Treaties; also 14th Stat.) They were all recognized as distinct political communities; their territories were marked and defined and their governments within the same were acknowledged.

These five tribes had been neighbors of each other in their original homes in Georgia, Alabama, Mississippi, and Tennessee. (See Jones' Antiquities of Southern Indians, pp. 3, 4, and 7; Bancroft's History of the United States, vol. III, p. 246 *et seq.*, and map.)

The Government encountered many obstacles in carrying out the policy of removal. The war with Great Britain, participated in by southern Indians—especially the Creeks—and the subsequent troubles with Spain on the Florida border greatly delayed the execution of the policy; nevertheless the movement began. A large number of Cherokees, relying on promises made by the President in 1809, had emigrated to the West and settled on the White and Arkansas rivers, in what is now the State of Arkansas. These lands were confirmed to them by treaty in 1817. (See treaty of 1817, 7th Statute, p. 156.) But by new treaties (1828, 7th Statute, 311; 1833, 7th Statute, 411, and 1835, 7th Statute, 478), the Cherokees in Arkansas and Georgia were induced to remove and settle in what is the northern part of the Indian Territory. They surrendered all their lands east of the Mississippi river and received in exchange new homes on the west side of the river. Their new territory was the northern part of the Indian Territory, south of the present State of Kansas, and extending west from the western

boundary of Arkansas as far west as the sovereignty of the United States extended.

The Creeks, in pursuance of the treaties of 1826, 1827, 1832, and 1833 (7th Statute, pp. 286, 307, 366, and 417), finally ceded all their lands east of the Mississippi, and were located on lands in the Indian Territory south of the Cherokees. Their country extended as far west as the Mexican line. (See treaty of 1833, p. 417, as above.) By article IV of said treaty a home for the Seminoles was provided in the same territory with the Creeks. The Seminoles by the treaty of May 9, 1832 (7th Statute, 368), and of March 28, 1833 (7th Statute, 423), ceded their lands in Florida and received their new home in the Indian Territory. (See convention between the United States, the Creeks, and Seminoles, August 7, 1856, Revision of Indian Treaties, p. 165; 11 Stat., 699.)

By the treaties of 1820 (7th Statute, 210) and 1830 (7th Statute, 333) the Choctaws were located in the southern part of the Indian Territory. By the convention of 1837 (Revision of Treaties, 1046; also 11th Stat., 573) between the Choctaws and Chickasaws, the Chickasaws acquired a district in the Choctaw country; and thus, in pursuance of a fixed policy, steadily pursued by the Government, the five civilized tribes, who had been neighbors on the east side of the Mississippi river, were brought in contact with each other as neighbors again in the Indian Territory.

They had not received their new homes through the generosity of the Government. They had surrendered in exchange for them their far more valuable homes. The exchange had been made for good and valuable consideration. But there were other considerations which induced them to make the exchange, and these considerations operated alike on all these five tribes.

MAIN CONSIDERATIONS FOR REMOVAL.

In the treaty of 1828 with the Cherokees (7th Stat., 311) e preamble recites that whereas it is the anxious desire the United States Government to secure to the Cherokee ation a home that shall never, in all future time, be em- arrassed by having extended around it the lines or placed er it the jurisdiction of a State or Territory, nor be essed upon by the extension in any way of the limits of y existing Territory or State: therefore (article 2) the nited States agrees to possess the Cherokees and guarantee them forever the territory described.

The guarantee was repeated in the treaty of 1833 (7th at., 415), with the additional guarantee at the end of arti- l that letters patent shall be issued by the United States soon as practicable for the land hereby guaranteed. By e treaty of 1835 (7th Stat., 478) the United States guaran- d that the lands ceded by the treaties of 1828, 1833, as ll as the additional land ceded by the treaty of 1835, uld be included in one patent, according to the provision the act of May 28, 1830 (4th Stat., 411). This was an authorizing the President, whenever an Indian tribe ich had exchanged lands in any of the States or Territories lands west of the Mississippi to which the Indian title l been extinguished desired it, to cause a patent or grant be made and executed to them for their new lands. der the fifth article of this treaty the United States cov- nted and agreed that the lands ceded should in no future e, without the consent of the Cherokees, be included within territorial limits or jurisdiction of any State or Territory, all rights of local self-government not inconsistent with Constitution of the United States and the acts of Con- s regulating intercourse with the Indians should be ared to them.

A.R. 40

imilar guarantees were made to the Creeks, that no State

2

or Territorial government should ever be placed over them, and that a patent should issue to them for their lands, agreeably to said act of Congress of May 28, 1830.

A. R. 13

The treaty of September 27, 1830, with the Choctaws (7 Stat., 333) provided that under a grant specially to be made the United States shall cause to be conveyed to the Choctaw Nation the territory described, in fee-simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it. It is to be observed that this guarantee was entirely independent of the act of May 28, 1830, for no reference whatever is made to the act in the treaty. The land in controversy was embraced within this territory.

Article IV of this treaty provided:

The Government and the people of the United States are obliged to secure *to the said Choctaw Nation of red people the jurisdiction and government of all persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of red people, and their descendants, and that no part of the land granted them shall ever be embraced in any Territory or State, but the United States shall forever secure said Choctaw Nation from and against all laws, except such as from time to time, may be enacted in their own national councils, not inconsistent with the Constitution, treaties and laws of the United States, except such as may, and have been enacted by Congress, to the extent that Congress, under the Constitution, are required to exercise a legislation over Indian affairs.*

A. R. 9

This was a part of the land already owned and acquired by the Choctaws under the treaty of October 18, 1820.

Article IV provided that the United States are obliged to protect the Choctaws from domestic strife and foreign enemies.

Article XII provides that all intruders shall be removed from the Choctaw Nation and kept without it.

By the convention between the Choctaws and Chickasaws

f 1837 (Revision of Treaties, 1046, 11th Stat., 573), and to
hich the United States was a party, the Chickasaws were
hold their lands on the same terms as the Choctaws held
eir land. By the treaties with the Seminoles, 1832 and
33, they were to be united with the Creeks with the same
rivileges as the Creeks.

But, after all, the great inducement held out to these
ople was removal to a country where they would be free
om the presence of the white man. The volumes known
Indian Removals are full of evidence on these points.
et a few extracts suffice. The Secretary of War, Hon.
ewis Cass, in a letter to the Creek chiefs, urges them to go
here no bad whites will trouble them (8 Indian Removals,
3).

One of the features of certain propositions for the removal
the Cherokees made by Secretary Cass was that all white
ersons, unless specially authorized by the laws of the
nited States, shall be excluded from their country (816).
Governor Gilmer in his message to the Georgia legislature,
ecember 11, 1829, says:

Long experience has satisfied all that the Indian tribes,
en surrounded by white men, continue to disappear until
t out from existence (223).

Secretary Cass to the Creeks, November 1, 1831, says:

In the West you will be remote from the white people, in-
endent of any State authorities, and allowed to manage
r own concerns in your own way (p. 366).

In a letter to Governor Gilmer he says on the subject of
removal of the Cherokees:

t is undeniably true that to remove from their present
nes affords the only hope for their preservation and hap-
ess. * * * The suggestion has been frequently made,
t the Indians, if placed in the West, may again be subject
intrusion and interruption. This is assuming too much,

and more, I should fain hope, than the good faith of this Government will authorize to be conjectured (p. 2).

In a letter to the chairman of the Senate Committee on Indian Affairs, January 30, 1832, he writes that "the same general causes which are everywhere producing want and misery among the Indians who are placed in immediate contact with the white settlements are operating upon the Seminoles (*ibid.*, 751).

Commissioners Eaton and Coffee address the Chickasaws and speakiag for the President say—August 30, 1830:

He knows you cannot live under those laws (laws of the State of Mississippi). To do so will render you a miserable, unhappy people. We advise our red brothers for their own sake to remove, that they may rest in a country free from a white man's interruption (p. 245).

The same commissioners, addressing the Choctaws on the 18th of September, only a few days before the execution of the treaty of September 27, 1830, on the same subject (their subjection to the laws of the State of Mississippi) say:

Are you willing to be sued in courts, then to be tried and punished for any offense you may commit? To be subjected to taxes, to work on roads and attend in musters? For all these you must do. (They urged the Choctaws to go to a country where the President can keep the white man's laws from interrupting and disturbing you.) There no State or Territory will be created, and he will have it in his power to protect you fully in your usages, laws and customs (257).

These extracts with others, says a House report of the 45th Congress, show conclusively *that, so far as the leading tribes are concerned, the main consideration held out to them to induce them to emigrate was that they would escape from the white man's law and go where they could confidently rely on*

overned by their own peculiar customs. (See House Re-88, 45th Cong., 1st session.)

nts were now issued the Cherokees, Creeks, and Choc-These three patents embraced the entire area of the Territory.

patent to the Choctaws was dated March 23, 1842. y is affixed to the petition of claimants in this case. be noted that it was not issued in accordance with atute of May 28, 1830. It was issued in accordance he treaty of September 27, 1830, and embraced the f land described in that treaty. The land in contro-as a part of the leased district was embraced in this f land.

five tribes were now located, not merely as neighbors ir new homes, but with covenants from the United , under the same solemn obligations that their homes l never be subjected to any State or Territorial govern-; that they should be free from the intrusion of the man; that they should hold them as white men hold homes, by fee-simple titles, and that they should be ned by their own laws and customs, subject only to nstitution of the United States and the laws of Con-regulating intercourse with the Indian tribes. They ntered in their new homes, upon a new career, modeled governments after the governments of the States, erected hes, built school-houses, engaged in industrial pur-and have since made commendable progress in the civilized life. While differing in many respects from ther, they thus, under the influence of the policy of vernment, became parts of one common system. And the treaties of the Government with them and the es of the United States in reference to them are to strued together *in pari materia*, so that each of them xplain and elucidate every other part of this general on system. (Endlich on Interpretation of Statutes, . 54.)

I have now stated the issue and the parties and t grounds on which their claims are based. I have endea ored to give some account of the Choctaws and Chickasa and their relations to their Indian neighbors in their ori nal homes—east of the Mississippi. I have endeavored give some account of this removal, together with the moval of their neighboring tribes in their original hom and their removal and settlement again as neighbors their new homes in the Indian Territory. In this conn tion I have referred to the treaties under which these movals took place and these settlements were made. I ha quoted from these treaties so far as was necessary for the purposes.

I now propose specially to inquire into the grounds which the claims of the Choctaws and Chickasaws are base But before proceeding to do so I will refer the court to th various treaties on which these claims rest by quoting much of them as may be necesary for a clear understandi of these grounds.

The first of these treaties is the treaty of October 1 1820:

A.R. 9

I quote from this treaty of October 18, 1820, as follow (7th Statute, 210)

PREAMBLE.

Whereas, it is an important object with the President the United States, to promote the civilization of the Choct Indians, by the establishment of schools amongst them and to perpetuate them as a nation, *by exchanging, for a small part of their land here*, a country beyond the Mississip river, where all, who live by hunting and will not wor may be collected and settled together: and,

Whereas, it is desirable to the State of Mississippi, to ob tain *a small part of the land belonging to said nation*, for th mutual accommodation of the parties, and for securing th happiness and protection of the whole Choctaw Nation, well as preserving that harmony and friendship which

happily subsists between them and the United States, James Monroe, President of the United States of America, by Andrew Jackson, of the State of Tennessee, major general in the Army of the United States, and General Thomas Hinds, of the State of Mississippi, commissioners plenipotentiary of the United States, on the one part, and the Mingoes, head men and warriors, of the Choctaw Nation, in full council assembled, on the other part, have freely and voluntarily entered into the following articles, viz:

Art. 1. To enable the President of the United States to carry into effect the above grand and humane objects, the Mingoes, head men, and warriors, of the Choctaw Nation, in full council assembled, in behalf of themselves and the said nation, do, by these presents, cede to the United States of America, all the land lying and being within the boundaries following, to wit: Beginning on the Choctaw boundary, east of Pearl river, at a point due south of White Oak springs, on the old Indian path; thence north to the said spring, thence northwardly to a black oak, standing on the Natchez road, about forty poles eastwardly from Doake's fence, marked A. J. and blazed with two large pines and a black oak standing near thereto, and marked as pointers; thence a straight line to the head of Black creek or Bouge Loosa; thence down Black creek or Bouge Loosa to a small lake; thence a direct course, so as to strike the Mississippi one mile below the mouth of the Arkansas river; thence down the Mississippi to our boundary; thence around and along the same to the beginning.

Art. 2. For and in consideration of the foregoing cession on the part of the Choctaw Nation, *and in part satisfaction for the same*, the commissioners of the United States, in behalf of said States, do hereby cede to said nation, a tract of country west of the Mississippi river, situate between the Arkansas and Red rivers, and bounded as follows: Beginning on the Arkansas river where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian fork, and up the same to its source; thence due south to the Red river; thence down Red river, three miles below the mouth of Little river, which empties itself into Red river on the north side; thence a direct line to the beginning.

Article 3 provides for commissioners to run the boun
aries mentioned in the first and second articles.

Article 13 relates to an annual appropriation for t
Choctaw Nation.

a. R. 12

It is unnecessary to quote from the treaty of January 2
1825 (7th Stat., 234). It merely relates to a retrocession
the United States of a small part of the territory acquir
in 1820, slightly modifying the eastern boundary line
the Choctaw Nation.

But nothing was said about retrocession of land west
100° at that time in re-arranging boundaries of the cessi
to the Choctaws. Long's report had been published to t
world in 1822. The Choctaws, as appears, in 1855 look
upon their claim as a claim for land, and they then kn
the land had been ceded to Spain. The United States th
knew, if they did not before, that the western boundary
the cession of 1820 was far west of 100°. Upon this poi
the Court of Claims in their decision (Record, p. 384) we
say: "So, if by the treaty of 1820 the Choctaws acquire
title to any territory beyond the 100th meridian, that tit
remained unimpaired so far as any agreement was co
cerned." Why did they not now rectify the western as we
as the eastern boundary?

a. R. 13

I quote the following articles from the treaty of Septem
ber 27, 1830 (7th Stat., 333):

Art. 2. The United States, under a grant specially to b
made by the President of the U. S., shall cause to be co
veyed to the Choctaw Nation a tract of country west of th
Mississippi river, in fee-simple, to them and their descen
ants, to inure to them while they shall exist as a nation an
live on it, beginning near Fort Smith, where the Arkans
boundary crosses the Arkansas river, running thence to th
source of the Canadian fork, if in the limits of the Unite
States, or to those limits; thence due south to Red rive
and down Red river to the west boundary of the Territor
of Arkansas; thence north along that line to the beginnin
The boundary of the same to be agreeably to the treat

made and concluded at Washington city in the year 1825. The grant to be executed as soon as the present treaty shall be ratified.

Art. 3. In consideration of the provisions contained in the several articles of this treaty, the Choctaw Nation of Indians consent, and hereby cede to the United States the entire country they own and possess east of the Mississippi river; and they agree to move beyond the Mississippi river, early as practicable, and will so arrange their removal that as many as possible of their people, not exceeding one-half of the whole number, shall depart during the falls of 1831 and 1832, the residue to follow during the succeeding fall of 1833; a better opportunity in this manner will be afforded the Government to extend to them the facilities and comforts which it is desirable should be extended in conveying them to their new homes.

Art. 4. The Government and people of the United States are hereby obliged to secure to the said *Choctaw Nation of red people the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have the right to pass laws for the government of the Choctaw Nation of red people and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U. S. shall forever secure said nation from and against all laws except such as from time to time may be enacted in their own national councils, not inconsistent with the Constitution, treaties and laws of the United States, and except such as may, and which have been, enacted by Congress, to the extent that Congress, under the Constitution are required to exercise a legislation over Indian affairs. But the Choctaws, should this treaty be ratified, express a wish that Congress may grant to the Choctaws the right of punishing by their own laws any white man who shall come into their nation and infringe any of their national regulations.*

Art. 12. All intruders shall be removed from the Choctaw Nation, and kept without it. Private property to be always respected and on no occasion taken for public purposes without just compensation being made therefor to the rightful owner, &c.

Art. 18. The U. S. shall cause the lands hereby ceded to be surveyed, and surveyors may enter the Choctaw country for that purpose, conducting themselves properly and disturbing or interrupting none of the Choctaw people. But

no person is to be permitted to settle within the nation, or the lands to be sold before the Choctaws shall remove. And for the payment of the several amounts secured in this treaty, the lands hereby ceded are to remain a fund pledged to that purpose until the debt shall be provided for and arranged. *And further, it is agreed that in the construction of this treaty wherever well-founded doubt shall arise, it shall be construed most favorably towards the Choctaws.*

a.R.29

I here introduce a copy of the patent provided for by the second article of this treaty of 1830:

The United States of America to all to whom these presents shall come, Greeting:

Whereas, by the second article of the treaty begun and held at Dancing Rabbit creek, on the fifteenth day of September, in the year of our Lord, one thousand eight hundred and thirty [as ratified by the Senate of the United States on the 24th day of February, 1831], by the commissioners on the part of the United States, and the Mingoes, chiefs, captains and warriors of the Choctaw Nation, on the part of said nation, it is provided that "the United States, under a grant specially to be made by the President of the United States shall cause to be conveyed to the Choctaw Nation" a tract of country west of the Mississippi river, in fee-simple to them and their descendants, to inure to them, while they shall exist as a nation, and live on it, beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas river, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red river, and down Red river to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. the boundary of the same to be agreeably to the treaty made and concluded at Washington city in the year 1825.

Now, know ye that the United States of America, in consideration of the premises, and in execution of the agreement and stipulation in the aforesaid treaty, have given and granted, and by these presents do give and grant, unto the said Choctaw Nation the aforesaid tract of country west of the Mississippi, to have and to hold the same, with all the rights, privileges, immunities and appurtenances, as intended to be conveyed to them in the aforesaid article, in fee-simple,

to them and their descendants, to inure to them while they shall exist as a nation and live on it, liable to no transfer or alienation except to the United States and with their consent.

In testimony whereof, I, John Tyler, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed. Given under my hand at the city of Washington, the twenty-third day of March, in the year of our Lord one thousand eight hundred and fifty-two, and of the United States, the sixty-sixth.

By the President:

JOHN TYLER.

DANIEL WEBSTER,
Secretary of State.

And I here quote so much of the act of Congress of May 28, 1830 (4 Stat., 411), as is necessary: A.R. 40

Be it enacted, &c., That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States west of the River Mississippi, not included in any State or organized Territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside and move there, and to cause each of said districts to be so described, by natural or artificial marks, as to be easily distinguished from every other.

2. *And be it further enacted*, That it shall and may be lawful for the President to exchange any or all of such districts, so to be laid off and described, with any tribe or nation of Indians now residing within the limits of any of the States or Territories, and with which the United States have existing treaties, for the whole or any part or portion of the territory claimed and occupied by such tribe or nation, within the bounds of any one or more of the States or Territories, where the land claimed and occupied by the Indians is owned by the United States, or the United States are bound to the State within which it lies to extinguish the Indian claim thereto.

3. *And be it further enacted*, That in the making of any

such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided, always*, That such lands shall revert to the United States if the Indians become extinct or abandon the same.

I quote this act in connection with these treaties and this patent because the defendants say in their answer (pp. 3 and 4) that the United States derived its authority to agree to convey the lands mentioned in the patent only under this act. I think these extracts are sufficient to make the court, upon examination, clearly to understand the argument which I have the honor to submit.

THE CHOCTAW TREATIES OF 1820, 1825, AND 1830.

When the treaties were made with the Cherokees and the Creeks under which they acquired lands in the Indian Territory, the western boundary of the United States, between the United States and Spain, and subsequently with Mexico, was clearly defined. The treaty with the Cherokees in 1828 defined the limits of the territory granted them as extending as far west as the sovereignty of the United States extended. The treaty with the Creeks extended their western limits to the Mexican line.

But although at this time the 100th degree of west longitude had been fixed as the boundary between the United States and Spain, subsequently with Mexico, neither the Cherokee nor the Creek treaty refers to this degree of longitude as the boundary line, showing clearly that the United States commissioners recognized that such a description was not in the comprehension of the Indian.

But the treaty with the Choctaws antedated the establish-

ment of the boundary line between Spain and the United States fixed by the Spanish treaty of 1821.

By reference to the Choctaw treaty of 1820 (October 18th), it will be seen that the United States, for and in consideration of certain lands east of the Mississippi river, ceded by the Choctaws to the United States by the first article of said treaty, in part satisfaction of the same ceded to the Choctaws by the second article of said treaty a tract of country west of the Mississippi river, between the Arkansas and Red rivers, bounded as follows: Beginning on the Arkansas river, where the lower boundary line of the Cherokee strikes the same, thence up the Arkansas to the Canadian fork, and up the same to its source; thence due south to the Red river; thence down Red river three miles below the mouth of Little river, which empties itself into Red river on the north side; thence a direct line to the beginning (7th Stat., 210).

The lands ceded by the Choctaws to the United States under the first article of said treaty of 1820 were a small part of their lands then owned by them in the State of Mississippi. Defendant's Indian Brief, p. 231, put it at 5,169,788 acres. They quote American State Papers, vol. 2d, Indian Affairs, p. 499. General Jackson's report, 1820, says about 6,000,000 acres. They comprised more than half of the river front of that State; were very valuable for farming purposes, and were the richest cotton lands in the State.

By the treaty of 1825 (7th Stat., 234) the eastern boundary line described in the treaty of 1820 was slightly modified. The Choctaws, under this treaty of 1825, retroceded to the United States a small part of the tract acquired under the treaty of 1820, on its eastern border, which was annexed to the then Territory, now the State of Arkansas. It is unnecessary in this case to further refer to the treaty of 1825. The United States did not seek *for retrocession west of* 100°, and *this was three years after the publication of Long's report.*

a.R. 9

Under this cession of 1820 to the Choctaws the whole sout
ern part of the Indian Territory became Choctaw count

We next call attention to the fact that there was no c
sion of any land, not even a single acre, by the Unit
States to the Choctaws under the treaty of 1830.

a.R. 13

Article 2 of the treaty of 1830 stipulated that the Unit
States should issue a patent to the Choctaw Nation for a
that portion of their territory ceded them under the trea

a.R. 12

of 1820, as modified by the treaty of 1825, as described i
said article 2.

The treaty of 1830 did not cede an acre of land to th
Choctaws. It provided for a formal deed to a part of th
land already ceded in 1820. The execution of such a dee
was in nowise inconsistent with the former cession.

The patent herein incorporated was issued in accordan
with this article of the treaty of 1830, and it is so stated i
said patent, and it follows the description of the land a
embodied in said article.

There was a cession of land in the treaty of 1830, but i
was a cession from the Choctaws to the United States. I
consideration of the provisions of the several articles in th
treaty of 1830, the Choctaws ceded to the United State
under the third article of said treaty, all their remaining
lands east of the Mississippi river. This tract was estimate
at more than ten million acres of land. Deft's Ind. Brie
p. 231, quoting Report of Com. Ind. Affairs, 1836, p. 46
puts it at 7,796,000. I get my statement of 10,000,000 fro
119th U. S., 1.

a.R. 13

Among other provisions in said treaty of 1830, in additio
to the guarantee of a patent, as prescribed in said secon
article of the treaty of 1830, the United States obligated i
self in the fourth article to *secure to said Choctaw Nation*
red people the jurisdiction of all persons and property th
may be in their limits west, so that no State or Territory shou
ever have the right to pass laws for the government of the Ch
taw Nation or their descendants, nor should any State or T

torial government ever be placed over them, and the United States should secure them from all laws except such as might be passed by their national councils. The United States were also, by article 12, to secure them against the intrusion of white people.

Now, it is manifest that all the land acquired by the Choctaws in the West was acquired under the treaty of October 18, 1820. The entire tract, as described in said treaty of 1820, was paid for, and more than paid for, by the lands ceded by the Choctaws under the treaty of 1820 east of the Mississippi.

The land west of 100 degrees of west longitude was as fully paid for under that treaty as the land east of 100 degrees, subsequently described in the patent. The cession of 1820 was an absolute and unqualified cession. It was without any restriction, limitation, or reservation whatever. *There was no reservation on account of any tribe having aboriginal ownership or possessory rights in said lands whatsoever.* It was as free from any reservation of the kind as the lands which they had ceded the United States east of the Mississippi river. This is not only true, but it is impossible to imagine it could have been otherwise. In the language of Judge Wilson in his brief on this point, it is impossible to conceive that the Choctaws would relinquish the sole occupancy of their lands east of the Mississippi, where they had lived from time immemorial, for a tract of land in another and a strange country, that they were to occupy in common with other tribes, to whom they were total strangers, and whose language, habits, customs, and interests were wholly different from their own.

There was not only no additional cession to the Choctaws by the treaty of 1830, but there was no additional title. The title was full and complete and without limitation, which passed from the United States to the Choctaws under the treaty of October 18, 1820.

There was no money consideration promised or paid for the new cession of ten million of acres in Mississippi by the Choctaws to the United States under the treaty of 1830. It was not an exchange of lands east of the Mississippi river for lands west of that river. *The latter tract had already been secured to them by its cession under the treaty of* 1820 (119th U. S., p. 38).

It is notorious as an historical fact (says the Supreme Court of the U. S. in the case of the Choctaw Nation *vs.* The U. S., 119th U. S., p. 37), as it abundantly appears from this record, that great pressure had to be brought to bear upon the Indians to effect their removal and *the whole treaty was evidently and purposely executed, not so much* to secure to the Indians the rights for which they had stipulated, as to effectuate the policy of the United States in regard to their removal.

The main consideration which induced them to remove was the promise of local self-government, the guarantee that no State or Territorial government should ever be placed over them, that they should be removed to a country where they would not be pressed upon by white neighbors, and that all intruders should be removed from their new homes.

A.R.40

The act of Congress of May 28, 1830 (4th Stat., 411), cited by defendants in their answer, and which I have quoted in this brief, can have no reference to the case of the Choctaws. This was a statute intended to promote the removal of the Indians living east of the Mississippi river to lands west of that river. It authorized the President to exchange lands west of the Mississippi where the Indian title had been extinguished for lands east of the Mississippi still held by them, and to assure to the tribes which would make the exchange a patent or grant to the lands which they might receive west of the Mississippi. Now, it is impossible that this statute should have any reference to the case of the Choctaws.

The Choctaws never acquired, by exchange or otherwise, an acre of land from the United States except under the treaty of 1820, and this was nearly ten years before the act

of 1830 was passed. It was impossible that it could have any reference to the treaty of 1830, for there was no exchange of lands under the treaty of 1830. Accordingly the act is not referred to, either in the treaty of 1830 or in the patent of 1842 issued in conformity to it.

Neither the act of May 28, 1830, nor any other act of Congress was necessary to authorize the United States to convey title by treaty. The treaty of 1820 alone, as we have seen, conveyed the lands west of the Mississippi to the Choctaws. This treaty conveyed the land in express terms. The language is: "For and in consideration of the foregoing cession on the part of the Choctaw Nation, and in part satisfaction of the same, the commissioners of the United States do *hereby cede* to said nation." It is not an agreement to cede. There is an actual cession by the treaty itself. No subsequent legislation is necessary to give effect to it. The treaty of 1820 itself is the channel, and the sole channel, through which the title passes from the United States to the Choctaw Nation. In Holden *vs.* Joy, 17 Wallace, 242–3, the Supreme Court of the United States say:

> Express power is given to the President by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur * * * and it must be assumed that the framers of the Constitution intended that it should extend to all those objects, which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty.

In 2d Peters, 314, in the case of Foster *v.* Neilson, the Supreme Court say:

> A treaty is in its nature, a contract between two nations, not a legislative act.
>
> * * * * * * *
>
> In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself, without the aid of any legislative provision.

We have just seen that this was the case in the treaty o 1820. In the treaty of 1830 there was a covenant that th President should cause to be conveyed to the Choctaw Na tion in fee-simple to them and their descendants the tract of country described. A similar provision was in the treaty under consideration in the case of Holden, *v.* Joy, 17th Wal lace, 211. In that case it was insisted that the President and Senate, in concluding a treaty, could not lawfully cove nant that a patent should issue to convey lands without the consent of Congress, but which the court say cannot be ad mitted:

On the contrary there are many authorities, where it is held that a treaty may convey to a grantee a good title to such lands without an act of Congress confirming it, and that Congress has no constitutional powers to settle or in terfere with rights under treaties, except in cases purely political. Much reason exists in view of those authorities and others which might be adduced for holding that the objection of the appellant is not well founded, but it is not necessary to decide the question in this case, *as the treaty in question has been fully carried into effect, and its provisions have been repeatedly recognized as valid* (pp. 246–7).

These principles are clearly set forth in the head-notes of this decision, in the following language:

The Indian tribes are capable of taking as owners in fee simple, lands by purchase, when the United States in form, and for a valuable and adequate consideration so sell them to them. Such sale is properly made by treaty.

Judge Parker in the case of The U. S. *vs.* Payne, 2d Mc Crary, 290, which decision is quoted in full in Report No. 3147, H. of R., 51st Congress, 1st session, p. 31 to 35, citing this very case of Holden *vs.* Joy, among others, says:

The treaty-making power has a right to convey title to the lands of the United States, without an act of Congress, and if a treaty acts directly on the subject of the grant it is equivalent to an act of Congress and the grantee has a good title.

Besides, it is too late to raise this question as to whether an act of Congress was necessary to authorize the Government to convey lands by treaty. Some things must be considered settled by courts. Such a question can no more be raised now than we could raise the question whether it was constitutional to acquire the Territory of Louisiana. The treaty of 1820 has long since been carried into effect. And, furthermore, both the treaties of October 18, 1820, and September 27, 1830, have been recognized by the Supreme Court of the United States (Choctaw Nation *vs.* The U. S., 119th U. S., 1).

And both of these treaties, of 1820 and 1830, have also been repeatedly recognized by acts of Congress:

The act of Congress of March 5, 1837 (5th Stat., 180), making an appropriation under the fourteenth article of treaty of September 27, 1830 (5th Stat., 180).

An act amending same February 22, 1838 (5th Stat., 211).

Act of August 23, 1842, providing for satisfaction of claims under fourteenth and nineteenth articles of treaty of September 27, 1830 (Stat., vol. 5, p. 513).

Indian appropriation act, March 3, 1845 (vol. 5, p. 777).

For amounts awarded Choctaw claimants under treaty of September 27, 1830: act of July 21, 1852 (vol. 10, p. 19).

Permanent annuity under thirteenth article of treaty of October 18, 1820; act of August 30, 1842 (10th Stat., 42).

For appropriation under treaty of October 18, 1820; act of March 3, 1853 (10th Stat., 227).

The act of March 1, 1847, (9th Stat., 132), making an appropriation for carrying out thirteenth article of treaty of October 18, 1820.

Under same act appropriations are made for obligations arising under treaty of 27th September, 1830.

The act of June 19, 1860 (12th Stat., 48) appropriations in pursuance of treaty of October 18, 1820.

So also act of March 2, 1861, 12th Stat., 224.

So also act of June 25, 1864, 13th Stat., 165.

So also act of March 3, 1865, 13th Stat., 544.

So also act of July 26, 1866, 14th Stat., 258.

So also act of March 2, 1877, 14th Stat., 497.

Many acts besides could be cited, recognizing b these treaties of October 18, 1820, and September 27, but these are amply sufficient.

We repeat that the conveyance under the treaty o was full and complete; that the act of May 28, 183 no reference to the Choctaw treaty of 1820 or the Ch treaty of 1830; that both of these treaties were entire dependent of said act; that no act of Congress is nece to authorize the United States to convey title by treaty that if any such act was necessary both of these t have been validated by repeated acts of Congress for than sixty years and by the Supreme Court of the U States.

And now, independent of all considerations wha even if it were established that the Wichitas had a rig occupation, this right might be recognized in the fo compensation, but the superior right of those cla under a cession from the Government by treaty and out a patent is not open to discussion.

G.R.#9 Beecher vs. Wetherly, 95 U. S., 517-526.

Now as to the extent of the cession under the trea 1820 and its western boundary.

At the date of the cession to the Choctaws, Octob 1820, the western boundary of the United States wa western boundary of Louisiana, as acquired from Fra treaty of April 30, 1803 (8th Statute, p. 200). The w boundary line of Louisiana thus became the western b ary line of the United States. It remained so until boundary line was fixed by the Spanish treaty of That treaty was signed the 22d of February, 1819. I not ratified by Spain until the 24th of October, 182 was not ratified by the United States until the 19th o

ruary, 1821 (8th Statute, 252). The western boundary of the United States as fixed by the third article of that treaty as to these lands was the 100th degree of longitude west from London, the said degree of longitude being fixed as the boundary line from where the Red river crosses it to the Arkansas river.

The date of the cession to the Choctaws was October 18, 1820, and the treaty was proclaimed January 8, 1821 (7th Statutes, 210). So this treaty was prior to the consummation of the Spanish treaty, ratified February 19, 1821. a. R. 9

The treaty with Spain was signed the 22d of February, 1819. By its terms it expired six months thereafter for want of ratification by the King of Spain, to wit, on the 22d of August, 1819. The treaty was then dead. See letters of Mr. Forsyth, American minister, quoted in Paine's Reply Brief, pp. 10 and 11; letter of Mr. Adams, American Secretary of State, 3d of May, 1820, pp. 11 and 12; message of President Monroe, 9th of May, 1820; opposition to any renewal of a treaty on same terms, Henry Clay, in House of Representatives, pp. 12 and 13, and see same quoted more fully in Paine's Original Brief, p. 57. See American State Papers, For. Rel., vol. 4, pp. 651–'7, 661–687. See Paine's Supreme Court Brief as to western boundary of Louisiana, where the subject is more elaborately discussed, p. 78 *et seq.*, and as to Spanish treaty of 1819, p. 91 of same brief, *et seq.*

This dead treaty was resurrected and ratified by Spain October 24, 1820, and was not ratified by the United States until the 19th of February, 1821 (8th Stat., 252). The treaty with the Choctaws was executed October 18, 1820; reached War Department December, 1820; transmitted by Secretary to President December 12, 1820; by President to Senate December 14, 1820; referred to a committee; received from committee December 19; ratified December 21, and proclaimed January 8, 1820. Brief of counsel for the United States in Court of Claims, p. 57, admits it probable that the Senate did not know of the ratification of the Spanish treaty a. R. 11

by Spain on October 24, 1820, when it ratified the treat with Choctaws, December 21, 1820.

It is very certain that the Government of the United States did not know at this time of the ratification by the King of Spain. That fact was communicated by the Spanish Minister to the American Secretary of State 12th of February, 1821. The President notified the Senate February 13, 1821 (American State Papers, For. Rel., vol. 4, p. 650). Senate advised ratification February 19, 1821 (Executive Journal, vol. 3, p. 244).

The western boundary of the United States, at the date of the Choctaw cession, was the western boundary of Louisiana.

The cession of 1820, modified by the treaty of 1825, was a tract of country west of Arkansas, beginning on the Arkansas river, where it strikes the western boundary of Arkansas, thence up the Arkansas to Canadian fork and up the same to its source, thence due south to Red river, then down Red river, etc. This included the leased district of which the land in controversy was a part.

The cession extended up the Canadian fork to its source. There was no limitation as to whether the source of the Canadian was or was not within the limits of the United States. There was such a limitation in the treaty of 1830—as to the lands—for which it was provided by said treaty of 1830 a patent should issue.

The Canadian rises among the Gaudalupe mountains in New Mexico, and after flowing south for about 200 miles makes a bend to the east, passes through portions of Texas and the Indian Territory, and enters the Arkansas river about 500 miles from its mouth (Appleton's New American Encyclopedia—article, Canadian River).

Its source is through a number of small streams contributing to its formation between the 104th and 105th degrees W. longitude, but east of the Rocky mountains. (See Rand & McNally's Map of New Mexico).

General Marcy, who, as Captain Marcy, commanded an exploring party through this country in 1852, located the source of the South fork of Red river, now decided by the Supreme Court of the United States in the late decision in the case of The United States *vs.* Texas, to be the main Red river at 104° 7′ 11″, which is near the western boundary of Texas, as now established (Senate Ex. Doc. No. 54, 32d Cong., 2d session, quoted in note on p. 25; U. S. *vs.* Texas, 162 U. S., 1). 9. R. 138

It is clear, therefore, that a line drawn due south from the source of the Canadian river will not strike Red river, because the source of Red river is far to the east of the source of the Canadian river. This course of due south was therefore inconsistent with the two natural objects which the treaty of 1820 called for—the source of the Canadian and the source of Red river. Now, it is a universal rule that course and distance yield to natural objects (6th Wheaton, 580; Princeton's Heirs *vs.* Bowman; so also Newsome *vs.* Prior, 7th Wheaton, 7). C. J. Marshall said: "The courts of Tennessee and all other courts by whom cases of this description have been decided have adopted the same principle and adhered to it. It is that the most natural and most certain calls shall control those which are less natural and less certain. A call for a natural object as a river or a known stream, a spring or even a marked tree, shall control both course and distance. As we cannot therefore draw a line due south from the course of the Canadian to the Red river, we must connect the sources of the two rivers by a straight line." Such a line might fall within the territory owned by Spain in 1820; but it is certain that the cession of the Choctaws under the treaty of 1820 carried all the land between the 100th and 103d degrees of west longitude and the Red and Canadian rivers. It is within the terms of description of the land ceded to the Choctaws by the treaty of October 18, 1820. It is just as much a part of the consideration given for the lands which they ceded to the

United States under that treaty east of the Mississippi is were the lands between the western boundary of Arkansas and the 100th degree of west longitude. It contained 10,296 square miles and 6,589,440 acres. (See Jones' Report, Senate No. 552, 52d Cong., 1st session, pp. 34, 35.)

Counsel for Government contends that we are not to be governed by the terms of description in the treaty. He says the supposed source of the Canadian river is to control, and not the real source, and he says the supposed source was somewhere in the vicinity of the 100th degree of west longitude, and therefore that the western boundary of the cession did not extend beyond the 100th degree west longitude. Now, there is nothing doubtful in the terms of description employed in the treaty. If not then accurately ascertained it was ascertainable, and so could not be doubtful, and therefore the authorities cited do not apply. The argument is necessarily speculative. It is based on presumption.

The counsel presumes that certain maps were referred to—maps scarcely known and still quite unknown, the maps of Arrowsmith, Pike, Melish, Pinkerton, and Darby; but there is not the slightest evidence that any maps were used or referred to in the negotiations which preceded the execution of the Choctaw treaty of 1820. There is no proof that either of the commissioners or any other officer of the Government considered the question of longitude. Most certainly the Indians were wholly ignorant of lines of longitude or latitude. We have the minutes of the council preceding the execution of the treaty, to be found in American State Papers, Indian Affairs, vol. 2, pp. 235 to 237. There is no reference therein to maps, nor degrees of longitude; but we do find therein the address of the United States commissioner, bearing date Choctaw Treaty Ground, October 13, 1820—five days before the execution of the treaty—in which these commissioners—Generals Jackson and Hinds—said to the Choctaws that the limits of their new country will extend from the Arkansas river, where

ie Cherokee line begins, south to the Red river and west to
ie head source of the Arkansas river.

Now, there is nothing here referring to the 100th merid-
n as the western boundary, but what is stated concerning
vers and their headwaters as boundaries is clearly within
ie comprehension of the Indian, and so were the words of
ie treaty.

We have seen that in subsequent treaties with the Chero-
ees and the Creeks, even when the United States boundary
id become fixed at 100° by the Spanish treaty, they do
ot mention that degree as the boundary, but in the one
se fix the western limits of the United States as the bound-
y and in the other the Mexican frontier. Even when the
eaty of 1830 was made with the Choctaws, the western
oundary is not described as the 100th degree of longitude,
it the language fixing the limits of the land for which the
atent was to be issued is, "running to the source of the
anadian fork, if in the limits of the United States, or to
ose limits." The argument of counsel is clearly based
one on presumption.

The Indians evidently knew nothing about degrees of
itude or longitude; but they knew the courses and
urces of rivers, and they accepted the natural boundaries,
mentioned in the treaty, whether then determined or
erwards ascertained. But the source of the Canadian
s actually ascertained before the treaty was submitted to
e Senate. Major Long's expedition established this be-
nd controversy. His report was filed November, 1820,
d the treaty was not proclaimed until the 8th of January,
21. The Government cannot escape the fact that it had
ual knowledge of the source of the Canadian.

Upon this point the Court of Claims, page 45 of the de-
ion (Transcript of Record, p. 393), say:

On July 30, 1820, Major Stephen H. Long, of the topo-
aphical engineers, in command of a detachment of a
all exploring party, sent out by the Secretary of War in

1819 to explore the Mississippi and Missouri rivers, reached a small stream which he believed to be the Red river. * * * He substantially reported that the source of the Canadian was in the neighborhood of the 104th meridian. This report of Major Long reached the War Department in November, 1820. * * * If Long's letter was received before Nov. 8th, 1820, it was in possession of the Government two months before the ratification of the treaty with the Choctaws. If received on the last day of November, it was more than a month before. No matter what time in November the letter was received, the Government had knowledge before the ratification that the source of the Canadian was far west of the 100th meridian. The presumption must be that the treaty-making power had this knowledge.

See, further, Paine's Supreme Court Brief, pp. 97 to 104.

Now, there can be no question that the Choctaws would have been entitled to just as much compensation for a relinquishment of the title acquired by them from the United States *if the United States had no title to these lands as if the United States had a full and unquestioned title to the same.*

But in truth this tract of land did belong to the United States at the time of the cession to the Choctaws, on the 18th of October, 1820.

The Spanish treaty had not been ratified, and this tract was then a part of Louisiana as acquired from France in 1803. Louisiana was originally a French province. As to basis of French claims, see letter of John Q. Adams, Secretary of State, to Spanish minister, page 31 of Senate Report No. 552, 52d Cong., 1st session, with extracts from diplomatic correspondence and maps affixed to said report.

A.R. 187 also 78 et seq

France ceded Louisiana to Spain, in 1762, with boundaries undefined (Bancroft's History of the U. S., vol. IV., p. 452). In 1800 Spain ceded it to France, and on April 30, 1803, France ceded it to the United States, still with boundaries undefined (8th Stat., 200), but in its entirety.

The boundaries were unknown at the time (conversation between Bonaparte and the French minister Marbois,

Blaine's 20 Years in Congress, vol. 1st, p. 20; Jefferson's opinion that the Rio Grande was the western boundary in the lower part and the Rocky mountains in the northern or upper part, *ibid.*, p. 11).

Mr. Jefferson's views, Randall's Life of Jefferson, vol. III, pages 110, 355: He believed the Rio Grande the western boundary as far as that river extended (note on same page; see also p. 471).

See opinion of M. Lousat, commissioner who received Louisiana from Spain and transferred it to the United States; letter of Mr. Madison, Secretary of State, to our minister to France, Robert R. Livingston, January 31, 1804: Appendix to Senate Report 552, 52d Congress, first session.

Texas claimed the Rio Grande as its western boundary throughout its length (act of Texas Congress, Dec. 19, 1836, Lalor's Political Cyclopedia; title, Texas). This would have extended the western boundary beyond the 106th and in some parts beyond the 107th degree of west longitude.

Mr. Benton contended that the Spanish settlements on the Pecos were made anterior to the original French discoveries. This would have extended the Spanish claims to the 105th and probably to the 104th degrees west longitude (Mr. Benton's 30 Years in the Senate, vol. 1st, pp. 15 and 672, and vol. II, p. 600). Views of Mr. Packenham, British minister, who conducted negotiations on the Oregon question with Calhoun, and afterwards with Mr. Buchanan, as Secretary of State: That in the upper part the highlands separating the waters of the Mississippi from those flowing into the Pacific was the true boundary (Calhoun's Works, vol. V, p. 442). The western boundary of the United States certainly extended as far west as the 103d degree of west longitude at the date of the Choctaw treaty of October 18, 1820.

The United States by this treaty of October 18, 1820, for one and the same consideration recited in said treaty, ceded to the Choctaws the entire tract of country extending

certainly as far west as the 103d degree of west longitude and including in its limits the tract extending from the western boundary of Arkansas to the 100th degree of west longitude, which was afterwards included in the patent granted to the Choctaw Nation. This portion of the tract west of the 100th degree of west longitude, containing 6,589,440 acres, was transferred by the United States to Spain by the treaty ratified on the 19th of February, 1821.

Under such circumstances, whether the United States owned it or not, it became responsible to the Choctaw Nation for its value. The United States was the guardian and the Choctaw Nation its ward; and yet it was not until 1855, when the United States was seeking new and other objects of advantage from the Choctaws, after a lapse of a period of 34 years, that we first learn of any recompense whatever to the Choctaws for this long and unjust deprivation of this magnificent property.

The next in order of time comes the convention between the Choctaws and Chickasaws, by which the latter tribe became incorporated with the Choctaws.

This I have already referred to; but in preserving the connection I again call attention to it. The Chickasaws had ceded their lands east of the Mississippi to the United States. They now sought a home with the Choctaws, and as they spoke nearly the same language and had been the neighbors of the Choctaws east of the Mississippi, they entered into a convention with the Choctaws, which was approved by the United States. (See Revision of Treaties, p. 1046, 11 Stat., 573.) It will be sufficient to quote article 1 from this convention, which bears date January 17, 1837:

Q. R. 20

Article 1st. It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country, to be held on the same terms that the Choctaws now hold it, except the right of disposing of it (which is held in common with the Choctaws and Chickasaws) to be called the Chickasaw district of the Cho

w Nation; to have an equal representation in their gen-
ral council, and to be placed on an equal footing in every
ther respect with any of the other districts of said nation,
xcept a voice in the management of the consideration
hich is given for these rights and privileges, and the Chick-
saw people to be entitled to all the rights and privileges of
Choctaws, with the exception of participating in the Choctaw
nnuities, and the consideration to be paid for these rights
nd privileges, and to be subject to the same laws which the
Choctaws are, but the Chickasaws reserve to themselves the
ole right and privileges of controlling and managing the
esidue of their funds, as far as is consistent with the late
reaty between said people and the Government of the
nited States, and of making such regulations and electing
uch officers for that purpose as they may think proper.

It is necessary to bear in mind the formation of this union in order to understand much of the subsequent history.

HE TREATY OF 1855; CHOCTAWS RELINQUISH CLAIM TO LANDS WEST OF 100 DEGREES; CHOCTAWS AND CHICKASAWS LEASE LANDS BETWEEN 98 AND 100 DEGREES WEST LONGITUDE.

In 1845 the United States annexed the Republic of Texas. War followed with Mexico, and large acquisitions of territory were made from Mexico. The boundaries of Texas and New Mexico were adjusted. Large bands of Indians roamed through these territories. They were committing serious depredations on frontier settlements and on travelers through Texas. Texas became clamorous for their removal beyond her borders. In February, 1855, Robert L. Neighbors, special Indian agent for Texas, suggested to Mr. Manypenny, then Commissioner of Indian Affairs, the propriety of opening negotiations with the Choctaw delegation, then in Washington, for a tract of country lying on the east side of Red river, known as Cache creek, near Wichita mountains, for the colonization of the Wichita In-

dians, and such other prairie Indians as may be convenient to that location. (Sen. Ex. Doc. No. 13, 48th Cong., 1st session, p. 15. To be found in my Book of Docs. B.) Here, then, we find occasion for another treaty; and on the 22d of June, 1855, at Washington city, Commissioner Manypenny, representing the United States, entered into a new treaty with the Choctaws and Chickasaws (11th Stat., 611). Among other objects recited in the preamble is the very object suggested by Superintendent Agent Neighbors and almost in the language quoted from his letter, but with it the United States coupled a desire that the Choctaws should relinquish all claims to any territory west of the 100th degree of west longitude. The preamble reciting the object of the treaty reads:

a.R. 24

Whereas, the political connection heretofore existing between the Choctaw and Chickasaw tribes of Indians has given rise to unhappy and injurious dissensions and controversies among them, which render necessary a readjustment of their relations to each other and to the United States; and

Whereas, the United States desire that the Choctaw Indians shall relinquish all claim to any territory west of the 100th degree of west longitude, and also to make provision for the permanent settlement within the Choctaw country of the Wichitas, and certain other tribes or bands of Indians, for which purpose the Choctaws and Chickasaws are willing to lease, on reasonable terms, to the United States, that portion of their common territory which is west of the 98th degree of west longitude.

Now here is the first suggestion of compensation to the Choctaws within the long period of 34 years for payment for those lands which the Choctaws had bought and paid for, but which the United States without their consent had transferred to Spain. In the meanwhile, during this same long period of 34 years, the guardian, the United States, had been in possession of the lands in Mississippi which the ward had exchanged with the guardian for these western

. It is well to understand how the parties approached other in the negotiations preliminary to the treaty of

w, in accordance with these desires of the United States pressed in this preamble, desires of the guardian made n to the ward, the treaty reads:

ie Choctaw Indians do hereby absolutely and forever laim and relinquish to the United States all their , title and interest in and to any and all lands west of 100th degree of west longitude; and the Choctaws Chickasaws do hereby lease to the United States all portion of their common territory, west of the 98th ee west longitude, for the permanent settlement of the hita, and such other tribes or bands of Indians, as the ernment may desire to locate therein; excluding, how- , all the Indians of New Mexico, and also those whose l ranges at present are north of the Arkansas river, whose permanent locations are north of the Canadian r, but including those bands whose permanent ranges outh of the Canadian or between it and the Arkansas; h Indians shall be subject to the exclusive control of United States, under such rules and regulations not in- istent with the rights and interests of the Choctaws Chickasaws as may from time to time be prescribed by President for their government. Provided, however, the tory so leased shall remain open to settlement of Choc- and Chickasaws as heretofore. (See art. 9th of the y.)

ow, it is first to be observed that this article relates to two net tracts of land, but both included in one tract under cession of 1820: First, the tract lying west of the 100th ee of longitude, part of the tract ceded to the Choctaws er the treaty of October 18, 1820, and containing 9,440 acres.

s to this tract there is a relinquishment of all claim and . The Choctaws and the United States are the only ies. The Choctaws alone execute this deed of relin- shment. While the Choctaws alone appear as grantors

to the deed of relinquishment, yet the Chiskasaws were equitably entitled to one-fourth of the price paid for this relinquishment. The title was in the Choctaws, and they only could execute the deed, but the Chickasaws had one-fourth equitable interests. (See Chickasaw memorial to Congress 1890, p. 21, in Book of Documents A.) It was recognized in this treaty in the apportionment of the money paid for the relinquishment and the lease between the Choctaws and Chickasaws.

Then there is a second tract of land—a tract between the Canadian and Red rivers and west of the 98th degree of west longitude, and extending to the 100th degree of west longitude. It contained 7,713,239 acres. (See Jones' Report, p. 5, Senate Report No. 552, 52d Cong., 1st session.) The land concerning which this controversy arises is a part of this tract.

a.R. 189

The Choctaws and Chickasaws both jointly executed a lease of this tract to the United States for the settlement thereon of certain Indian tribes.

Such, then, was the character of the deed of relinquishment of the land west of the 100th degree of west longitude and such were the terms of the lease of the land between the 98th and 100th degrees of west longitude executed by the Choctaws and Chickasaws. Now, what did the United States pay for the relinquishment of the title to the first described tract to the Choctaws, and what did it pay for the lease of the second tract to the Choctaws and Chickasaws?

The United States did not pay a separate amount for the relinquishment of title to the vast body of land west of the 100th degree of west longitude, containing between six and seven millions of acres, but they paid one lump sum for relinquishment of title to this tract, and also for the lease of the tract between 98th and 100th degrees of west longitude. The amount paid was $800,000. The language of the treaty bearing on the consideration for the land described in the

eed of relinquishment and for the lease is in these words nd in the tenth article:

Article 10. In consideration of the foregoing relinquishment and lease, and as soon as practicable, after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and o the Chickasaws the sum of two hundred thousand dollars.

Here is a contract between a guardian and a ward, the ward wholly under the power of the guardian, and the guardian pays the ward $800,000 for a relinquishment of title to 6,589,440 acres, and for a lease of a tract of 7,713,239 acres, and this in the month of June, 1855. Why, the first tract at 12½ cents per acre, a most grossly inadequate price, would amount to $823,680, and it would leave not $1 to be applied to the payment of the lease for 7,713,239 acres, and under this lease this land has been held for nearly forty years. (See Jones' report, Senate Report No. 522, 52d Congress, 1st session, p. 5.)

A.R. 184

Counsel for the Government seek to show that in reality the Choctaws had no claim to the land west of 100°. It is too late to raise this question. The United States in the preamble express a desire that the Choctaws will relinquish this claim, and in the 9th article of the treaty they do actually relinquish this claim, and in the 10th article provision is made for the payment for the relinquishment. This right of the Choctaws has been thus recognized by the Government as a substantial right, and it is too late now to dispute it; but as to the real merits of the claim, we think we have heretofore clearly established it.

Now to return to the lease.

This was not a deed of cession. It was simply a lease. As the Court of Claims say, on pages 40 and 41 of their decision, pages 396 and 397 of Transcript of Record, "The land was not sold at all. The United States negotiated for a lease, and though perpetual in its character it was none the

less a lease. * * * Again it is argued there was no term fixed. This is true, but it rested upon a rental value. * * * Certain Indians were allowed to be located on it, to whom the lessors did not object; but other Indians to whom they did object were not to be located thereon. The land was inalienable without the consent of the lessors, which implied a future sale for their use. The lease must therefore be viewed as a mere permit, the premises remaining Choctaw and Chickasaw country, subject to special uses by the Government for other Indians."

Superintendent Neighbors, in his letter of February 1, 1855, had merely suggested opening negotiations for a tract of land lying on the east side of Red river, known as Cache creek, near the Wichita mountains. He did not suggest the acquisition of this tract either by deed or lease. But for some reason the Choctaws and Chickasaws were unwilling to cede. The preamble recites that the United States were desirous to make provision within the Choctaw country for permanent settlement of the Wichitas and certain other tribes or bands of Indians. They evidently had no home at this time. They were prairie Indians, says Superintendent Neighbors. They had no habitation recognized by the Government or by the Choctaws and Chickasaws or by any other Indian tribe. "They were without a local habitation and a name," for the name which they bore was a mere term of description applied by the Osages a few generations before (see report of Special Agent Townsend, p. 47; Ex. Doc. 13, 48th Cong., 1st session). Superintendent Neighbors said in his letter, "for the colonization of the Wichitas and such other prairie Indians as may be convenient to that location." The preamble then goes on to recite the purpose for which the Choctaws and Chickasaws are willing to lease on reasonable terms to the United States the tract described. It was clear, therefore, that the Choctaws and Chickasaws intended to retain and did retain the title to the tract and the right of property in the soil.

A.R. 109

Now this is made, if possible, still more manifest by first rticle of treaty of 1855, which we quote as follows: A.R. 24

Article 1. The following shall constitute and remain the oundaries of the Choctaw and Chickasaw country, viz: eginning at a point on the Arkansas river, one hundred aces east of old Fort Smith, where the western boundary ine of the State of Arkansas crosses the said river, and runing thence due south to Red river: thence up Red river o the point where the meridian of one hundred degrees west ongitude crosses the same; thence north along said meidian to the main Canadian river; thence down said river to ts junction with the Arkansaw river; thence down said iver to the place of beginning.

And pursuant to an act of Congress approved May 28th, 830, the United States do hereby forever secure and guarntee the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and uccessors, to be held in common, so that each and every nember of either tribe shall have an equal undivided interst in the whole: *Provided, however*, no part thereof shall ver be sold without the consent of both tribes, and that said and shall revert to the United States if said Indians and heir heirs become extinct or abandon the same.

This embraces the whole of the country described in the atent, includes the leased district, and, of course, the and in controversy as a part thereof. It is now described or the first time as Choctaw and Chickasaw country. It is new recognition of title under the act of Congress of May A.R. 40 8, 1830 (4th Stat., 411), now first mentioned in any of the reaties of the Choctaws, and it guarantees the lands within he limits named, not to the Choctaw or Chickasaw Nation, ut to the members of the Choctaw and Chickasaw tribes, heir heirs, to be held in common, so that each and every nember of either tribe shall have an equal and undivided nterest in the whole, provided, however, no part thereof and this, of course, includes the leased district and the land n controversy) shall ever be sold without the consent of oth tribes, and that said land shall revert to the United

States if said Indians and their heirs become extinct or abandon the same.

Here is a provision made for a future sale, in addition to the special guarantee of this land to the Choctaws and Chickasaws. Such a provision excludes the idea that the lease was to be so permanent that the lands could not be otherwise disposed of.

Now, for what purpose was the lease made? "For the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein." These are the same Indians whom Superintendent Neighbors describes as "the Wichitas and other prairie Indians." It is to be noted that he mentions the Wichitas as prairie Indians. The Choctaws and Chickasaws were particular as to who should be their neighbors. There was therefore inserted in the lease language both of exclusion and inclusion, language excluding certain Indians, and language specifically including certain other described Indians; so that it was declared that the tract was leased to the United States "for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein; *excluding*, however, all the Indians of New Mexico and also those whose usual ranges at present are north of the Arkansas river and whose permanent locations are north of the Canadian river, but *including* those bands whose permanent ranges are south of the Canadian or between it and the Arkansas; which Indians shall be subject to the exclusive control of the United States, under such rules and regulations not inconsistent with the rights and interests of the Choctaws and Chickasaws as may from time to time be prescribed by the President for their government. Provided, however, the territory so leased shall remain *open to settlement by* Choctaws and Chickasaws *as heretofore*."

Now, it will be seen that under this contract of lease the Government did not acquire the right to locate any Indians

might desire on this tract, but only such Indians as were
ceptable neighbors to the Choctaws and Chickasaws.
ho they were is clearly defined in the terms of the con-
ct. Secondly, it is clear that while the Indians located
accordance with this contract were to be subject to such
les and regulations as the Government might prescribe,
t it was provided that these rules and regulations were
t to conflict with the rights and interests of the Choctaws
d Chickasaws in said leased district; and, thirdly, not-
thstanding this lease and the rights acquired by the
ited States to settle certain Indians on said tract, it was
stinctly understood that the territory so leased should
main open to settlement by Choctaws and Chickasaws as
retofore—that is to say, that the right of the Choctaws and
ickasaws to settle in this district was in newise and in
manner to be abridged by the execution of this lease,
d it is a fact which must not be overlooked that the
octaws and Chickasaws were located in the leased district.
was, moreover, under the jurisdiction of the Choctaw
tion, as agreed upon at or immediately after the time of
severance of the governments of the two nations. (See
ticles 1, 2, and 3, treaty of 1855, 11 Stat., 611.)

We have already quoted article 1.

Article 2 of the treaty defined the Chickasaw district.
is was placed immediately west of the eastern district of
Choctaws and east of the 98th degree of west longitude.
The third article of the treaty then describes the Choctaw
trict, which is the remainder of the country held in common
the Choctaws and Chickasaws, which is the country de-
ibed in the first article, and which included the eastern
trict of the Choctaws and the leased district, and as the
ickasaw district lay between these two divisions, it is pro-
ded that the officers and people of the Choctaws shall at all
nes have the right of safe conduct and free passage through
Chickasaw district.

And the Choctaws proceeded to exercise government and

control over the leased district, in accordance with this third article of the treaty of 1855.

The constitution of the Choctaw Nation prescribes the following provisions:

A.R. 44

"For the convenience and good government of the people of the Choctaw Nation we do make, ordain and establish four districts, in this nation, to be known by the following names and boundaries, viz: Mosholatubbe district, Pushamataha district, Apuckshunnubbe district, and Hotubbe district. * * *

"The boundaries of Hotubbe district shall be embraced within the limits of the ninety-eighth and one hundredth degree of west longitude, and between Red river and Canadian river, known as leased land."

ARTICLE 4—JUDICIAL DEPARTMENT.

"Until Hotubbe district shall be duly organized and officers elected therein, under this constitution the supreme court shall be composed of three supreme judges, one to be chosen from the Apuckshunnubbe district, one from the Pushamataha district, and one from the Mosholatubbe district, one of whom shall be styled chief justice, and two of whom shall constitute a quorum to do business."

ARTICLE 7—GENERAL PROVISIONS.

"SECTION 1. Until Hotubbe district shall be duly organized the principal chief of the Choctaw Nation shall exercise such authority *over the citizens of the nation living in that district* as he may deem expedient for the protection of person, life, and property" (Choctaw Laws, 1869; Constitution of 1861, pp. 7, 8, and 13).

It is clear, therefore, from the treaty of 1855 not merely that the territory known as the leased district remained open to settlement by the Choctaws and Chickasaws as the right existed previous to that treaty, but that the said leased district, by the third article of the treaty, was made a part of the Choctaw country. It is clear, too, from these pro-

sions that it was made subject to the Choctaw government and that citizens of that nation lived in that district. It was not merely, therefore, owned by the Choctaws and Chickasaws under the treaty, but clearly was in the actual occupation of Choctaw citizens and had been settled by Choctaws and Chickasaws.

Besides, if we examine the respective interests of the two nations we must see that the leased district necessarily formed a part of the Choctaw country. The recognized division of their interests was that the Chickasaws held one-fourth and the Choctaws three-fourths. The eastern district of the Choctaws contained 6,688,000 acres, the Chickasaw district 4,650,935 acres, and the leased district 7,713,239 acres, making a total of 19,052,174 acres. It is only by assigning the leased district to the Choctaws that we can give them the three-fourths interest to which they are entitled. The leased district and the eastern district together amount to 14,401,239 acres, which approximately form the three-fourths interest which they have a right to claim; but if we leave out the leased district, their proportion is about 6 to 4 instead of 3 to 1.

It is clear, therefore, that the district known as the leased district was, under the treaty of 1855, leased by the Choctaw and Chickasaw Nations for certain special purposes therein mentioned; that it nevertheless remained Choctaw and Chickasaw country, open to settlement by Choctaws and Chickasaws; that it was a part of the Choctaw district, subject to its government, and occupied by its citizens, placed under the special protection of the principal chief of the Choctaw Nation, and continuing open to settlement by Choctaws and Chickasaws under the treaty of 1855 as it had been prior to that time.

Most unquestionably the leased district was owned and occupied by the Choctaw and Chickasaw Nations.

In a few years war broke out between the North and South. The five civilized nations were originally from the South. Many of these Indians—a great many of them were slave-holders—allied themselves with the South, their sympathies being naturally with the South in that great struggle. Many of them afterwards alleged that they at the time were without governmental protection. Mr. Cooley, Commissioner of Indian Affairs, in his report for 1865, pages 38 and 40, explains this want of governmental protection. To a very large extent they joined their fortunes with the South and fought on the side of the Confederacy during the war. Congress on the 5th of July, 1862, passed an act (12th Statute, 528 ——) providing that in case where the tribal organization of any Indian tribe shall be in actual hostility to the United States the President is hereby authorized to declare all treaties with such tribes to be abrogated if, in his opinion, the same can be done consistently with good faith and legal and national obligations.

This power was never exercised by President Lincoln and the treaties remained in full force (Report 262, part 2, House of Representatives, 50th Congress, 1st session, Book of Doc. B). Whatever the motive in permitting the obligations of Indian treaties to remain in effect, the fact cannot be obscured that the close of the war found every obligation with the civilized tribes unimpaired, just as if they had not taken up arms against the Government. (See Decision of Court of Claims, p. 50; Transcript of Record, pp. 398 and 399.)

RECONSTRUCTION.

We have seen that the Indian Territory had been appropriated for Indians, mainly for the five civilized tribes.

The war closed. It became necessary to rehabilitate these tribes. There were many Indian tribes from Kansas and elsewhere who had to be provided with reservations and homes. Slavery was abolished in the Indian Territory. Provision had to be made for these freedmen among the five civilized tribes. (See decision of Judge Parker in U. S. *vs.* Payne, decided at Fort Smith, Ark., May, 1881, annexed as Exhibit W, Report No. 3147, H. of R., 51st Congress, 1st session, No. 1, Book of Doc. B; also 2 McCrary, 290.) The necessities of the situation demanded more land for these tribes from Kansas and elsewhere and for the freedmen.

As early as 1864 the Commissioner of Indian Affairs, anticipating these necessities, in his annual report, page 34, had said: A.R. 240

"*I cannot too strongly urge the importance of preserving the Indian country (the Indian Territory) for the use of Indians alone, and in all treaties or other arrangements which may hereafter be made with its former owners insisting upon, and if need be, enforcing such terms, as will secure homes within that country for all such tribes, as from time to time it may be found practicable and expedient to remove thereto.*"

Says Judge Parker, in 2d McCrary, 290: — - - A.R. 68

"It is a matter of public history, that a number of tribes, which have been moved to the Indian country (since 1866) taking advantage of the embarrassment of the Government growing out of the war of the rebellion, had gone on the war path.

"The Government was desirous of securing peace with them, and of settling them upon reservations, where they could be civilized.

"Then, again, the white people in other localities were pressing on other tribes and demanding their removal. To

get them out of the way of the white settlements, and to locate them where they would be free from intrusion by the whites, they were removed to the Indian country (Indian Territory)."

Again he says:

"We find that the colored people were held in slavery in all the civilized tribes of the Indian Territory. The Government was desirous of protecting these freedmen, and securing them homes. It was feared that prejudice growing out of their former conditions as slaves and of race would be so strong against them that they would not be protected by the Indians. The Government had given them the boon of freedom, and it was in duty bound to secure it in all that the term implied to them. The Government feared *that to do this* it *might be necessary to settle them in a colony by themselves.* This purpose of the Government, *should it become necessary*, was manifested by the terms of the Choctaw treaty of April, 1866."

Judge Parker says further on the provision did not apply to colored persons who had been held in slavery elsewhere than in the Indian Territory.

"Henceforth it became the policy of the Government not to confine the Indian Territory to the five civilized tribes, but to locate in said Territory *other Indian tribes*, without regard to their previous abodes, and to make suitable provision for the freedmen of the five civilized tribes, as might become necessary."

This new policy led to

NEGOTIATIONS IN 1865 WITH THE FIVE TRIBES AND OTHER INDIANS.

The President appointed a commission to meet representatives of the different tribes. On that commission were D. N. Cooley, Commissioner of Indian Affairs; Hon. Elijah Sells, superintendent of the southern superintendency of Indians; Gen. W. S. Harney, of the United States Army, and Col.

y S. Parker, of General Grant's staff. The council as-
mbled at Fort Smith, Arkansas, September 8th, 1865, and
ntinued in session twelve days. Representatives of the
erokees, the Creeks, Seminoles, Choctaws and Chickasaws
ere in attendance.

The Osages, Senecas, Shawnees, Quapaws, Wyandottes,
ichitas, and Comanches were also represented (p. 34, A.R. 155
eport of Commissioner of Indian Affairs for 1865).

Those who were present on the part of the Choctaws and
hickasaws at the commencement of the conference were
yal Choctaws and Chickasaws; for it must be remem-
ered that the Indians of the five tribes, as well as other
ndian tribes, were divided into two classes—those who were
yal and those who had been disloyal to the Government.
t the commencement of the conference, on the 8th of Sep-
mber, the disloyal Indians had not arrived. United States
ndian agents were also present representing Osages, Qua-
ws, Senecas, Shawnees, Cherokees, Creeks, Seminoles,
octaws, Chickasaws, and also a United States agent rep-
senting the Wichitas and other affiliated bands.

In the first address which President Cooley delivered at
e opening of the conference he expressed the hope that
e dissensions which existed among them would be healed,
d that they would become a united people (p. 297).

The report of the Commissioner (Report of Commissioner
Indian Affairs 1865, p. 34) then proceeds: A.R. 155

Immediately upon the opening of proceedings the tribes
ere informed generally of the object for which the
mmission had come to them; that they, for the most part
tribes, had by violating their treaties, by making treaties
th the so-called Confederate States, forfeited all rights
der them, and must be considered *as at the mercy of the*
overnment; that there was every disposition to treat them
iently, and above all a determination to recognize in a
qual manner the loyalty of those who had fought upon
e side of the Government, and endured great sufferings
its behalf. On the next day the delegates were informed

that the commissioners were empowered to enter into treaties with the several tribes, upon the basis of the following propositions:

1st. That each tribe must enter into a treaty for permanent peace and amity among themselves, each other as tribes, and with the United States.

2d. The tribes settled in the Indian country to bind themselves, at the call of the United States, to assist in compelling the wild tribes of the plains to keep the peace.

3d. Slavery to be abolished, and measures to be taken to incorporate the slaves into the tribes, with their rights guaranteed.

4th. A general stipulation as to final abolition of slavery.

5th. A part of the Indian country to be set apart, to be purchased for the use of such Indians from Kansas or elsewhere, as the Government may desire to colonize thereon.

6th. That the policy of the Government to unite all the Indian tribes of this region into one consolidated government should be accepted.

7th. That no white person, except Government employés, or officers or employés of internal improvement companies, authorized by Government will be permitted to reside in the country, unless incorporated with the several nations.

We have three different reports of the proceedings of the council at Fort Smith. They are in the main alike, but here and there they differ somewhat in form, and in so important a matter we will present them as they appear in each form. The first form is as they appear in the report made by the Commissioner of Indian Affairs for 1865. The form just presented is as he states them on page 34 of his report as Commissioner. But Mr. Cooley was not only the Commissioner of Indian Affairs at the time, but he was a delegate to the Fort Smith council, and he was the president of that council. Accompanying his report as Commissioner of Indian Affairs is his report as president of the Southern Treaty Commission, which appears on page 296 *et seq.* of his report as such Commissioner. Also accompanying his report as Commissioner of Indian Affairs, on page 313 *et seq.* is a third report, entitled "Official report of the proceedings

G.R.159

he council with the Indians of the West and Southwest,
l at Fort Smith, Arkansas, in September, 1865."

his report is signed by Charles E. Mix as secretary.

he report as president of the Southern Treaty Commis-
will be found on page 298 of the Report of Commissioner
ndian Affairs for 1865. It is the same with the report
he official proceedings of the council, to be found on page
of the same report, with one exception, to which we will
et attention.

'he president of the council is reported as saying:

fter considering your speeches made yesterday, the
missioners have decided to make the following reply
l statement of the policy of the Government: Brothers,
are instructed by the President to negotiate a treaty, or
ties, with any or all of the nations, tribes, or bands in
Indian Territory, Kansas, or of the plains west of the
lian Territory and Kansas.

* * * * * * *

'he President is anxious to renew the relations which ex-
d at the breaking out of the rebellion. We, as repre-
tatives of the President, are empowered to enter into new
ties with *the proper delegates* of the tribes located within
so-called Indian Territory, and others above named, liv-
west and north of the Indian Territory.

ech treaties *must* contain substantially the following
ulations:

. Each tribe must enter into a treaty for permanent
ce and amity, with themselves, each nation and tribe, and
United States.

. Those settled in the Indian Territory must bind them-
es, when called upon by the Government, to aid in com-
ling the Indians of the plains to maintain peaceful rela-
ns with each other, with the Indians in the Territory,
l with the United States.

. The institution of slavery, which has existed among
eral of the tribes, must be forthwith abolished and meas-
s taken for the unconditional emancipation of all persons
d in bondage and for their incorporation into the tribes
an equal footing with the original members or suitably
vided for.

A.R. 166

4. A stipulation in the treaties that slavery or involuntary servitude shall never exist in the tribe or nation, except in punishment of crime.

5. A portion of the lands hitherto owned and occupied by you *must be set apart* for the friendly tribes *now* in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government.

6. It is the policy of the Government, unless other arrangements be made, that all the nations and tribes in the Indian Territory be formed into one consolidated government, after the plan proposed by the Senate of the United States in a bill for organizing the Indian Territory.

7. No white person except officers, agents, and employés of the Government or of any internal improvement authorized by the Government will be permitted to reside in the Territory unless formally incorporated with some tribe according to the usages of the band.

Brothers, you have now heard and understand what are the views and wishes of the President, and the commissioners, as they told you yesterday, will expect definite answers from each of you upon the questions submitted."

* * * * * * *

The president then stated that the agents will be supplied with printed copies of the address, and are requested to go with an interpreter to *their respective tribes* for the purpose of fully explaining what is said therein.

This shows that definitive treaties were not then expected to be made.

The only difference between this official report and that which appears on page 298 in Mr. Coolly's report as president of the Southern Treaty Commission is in the fifth stipulation, the word *now* being prefixed to the words "in Kansas and elsewhere" in the official report and omitted in the report of the president of the Southern Treaty Commission.

The fifth stipulation in the report of the president of the Southern Treaty Commission reads:

"A portion of the lands hitherto owned and occupied by you, must be set apart for the friendly tribes in Kansas and

ewhere, on such terms as may be agreed upon by the rties, and approved by the Government, or such as may be ed by the Government."

In the official report it reads:

"A portion of the lands hitherto owned and occupied by n, must be set apart for the friendly tribes *now* in Kansas d elsewhere on such terms as may be agreed upon by the rties, and approved by the Government, or such as may fixed by the Government."

It is clear that none of these three reports were steno-aphic reports, but we have incorporated each of them in ur brief, in order that the court may have them before it early and distinctly.

Gen. Paine, in his brief, p. 27 (p. 75 of Transcript of Record), ys:

"This address, in manuscript, in the Indian office, beas.a e following inscription:

"We propose to renew the treaty stipulations that existed revious to or at the breaking out of the rebellion, so far as gards the annuities.

"The Government will insist on purchasing a portion of eir lands for the settlement of friendly Indians."

This was unquestionably the understanding of the Com-issioner of Indian Affairs. (See fifth stipulation as stated him on page 34 of his report for 1865.) But while this as the understanding of Mr. Cooley, who delivered the ldress at the time, and as he understood it, it certainly uld not have been otherwise understood by the Indians whom it was addressed.

On behalf of the loyal Choctaws W. T. Patton and Robert Patton, they being the delegates then present, responded:

"In answer, therefore, to your propositions to the several ibes of Indians, we say that the first, second, third, fourth, fth and sixth articles meet our approval" (Ind. Com. Rep't 865, p. 320).

We call special attention to the third, fourth, and fif propositions:

The third and fourth propositions related to negroes fo merly held in slavery. The third proposition contemplate not merely that slavery should be abolished, but that mea ures should be taken to incorporate the slaves into the tribe with their rights guaranteed, or, as is elsewhere expresse in this proposition, page 298 of this report, they should b suitably provided for. It will be recollected that slaver existed among all the five civilized tribes of the Indian Te ritory, and that there were very large numbers of slave among the Choctaws and Chickasaws. As Judge Parke expressed it in the decision we have just quoted (2d Mc Crary, 290), the Government had given these slaves th boon of freedom, and it was in duty bound to secure it i all that the term implied to them. The fourth proposition provided for a stipulation as to the final abolition of slav ery—that is, that the abolition should be final and the in stitution never revived.

But the fifth proposition was the most important in the whole series. It was an absolute and unconditional re quirement that a part of the Indian Territory must be set apart for the colonization thereon of friendly tribes of In dians from Kansas and elsewhere. Without going into inquiry as to the terms upon which the land so set apart was to be acquired, it was to be acquired for the location thereon of friendly tribes now—at that time—in Kansas or elsewhere. It was in accordance with the policy recom mended by the Commissioner in 1864, page 34 of the Indian Report of that year:

"I cannot too strongly urge the importance of preserving the Indian country (the Indian Territory) for the use of In dians alone, and in all treaties or other arrangements, which may hereafter be made with its former owners, insisting upon, and if need be enforcing such terms as will secure homes within that country for all such tribes as from time to time, it may be found practicable and expedient to re move thereto."

The fifth stipulation was the mode provided for the enforcement of this long, carefully studied policy. It related to the colonization only of friendly tribes *now* in Kansas and elsewhere. This would have included not merely friendly tribes resident in Kansas, but other friendly tribes, who might happen to have been in Kansas at the time or elsewhere, thus including the Wichitas, who, according to their counsel, pages 55 and 56 of their brief in the Court of Claims, were not occupants of the leased district in 1866, having left there during the war, and not returning until 1868. Now, for all these various tribes of friendly Indians, whether in Kansas or elsewhere, homes were to be secured in the Indian Territory. But in whatever form the fifth proposition be stated, whether as stated by Mr. Cooley in his capacity as Commissioner of Indian Affairs, page 34 of his report, or as stated by him in his report as president of the Southern Treaty Commission, page 298, or as stated in the official report, page 319. There is one thing clear, distinct, and manifest, that the United States did not propose to acquire such land as they might acquire for any other purpose than the location of friendly tribes from Kansas and elsewhere on the land so acquired. So the United States commissioners declared and so the Indians with whom they proposed to treat must have understood them. This was one of the conditions on which they stated they were empowered to treat with the several tribes there assembled at Fort Smith—Cherokees, Creeks, Seminoles, Choctaws, and Chickasaws—all alike. This was the demand of the Government. It was acceded to by all these tribes alike, without discrimination, and upon this requirement all the subsequent treaties were made. Certainly the United States understood that the land to be acquired was not for any and every purpose, but only for the special purpose mentioned, and the Indians could not possibly have otherwise understood it.

The same propositions were for each tribe. There was

not a proposition of one kind to the Cherokees and anothe
and a different proposition for the Choctaws and Chicka
saws. These seven propositions were to be the basis of al
the treaties with all the tribes. Now, here was the Unite
States, the superior, the guardian, negotiating with the inferior
the ward. Under every principle of equity it was bound t
disclose to the inferior all that the ward ought to know in con
ducting such a negotiation. In the language of Presiden
Cooley's address to them, "*they were at the mercy of the
Government*" which was then negotiating with them. The
Government agents knew that these people had been in
duced to leave their ancient homes east of the Mississipp
and remove to a new and distant land, now occupied by them,
to get rid of the white man. Their main inducement for
removal had been to get rid of the white man's government,
and they had gone under the solemn assurance of the
Government—made in various treaties, to which we have
hitherto called attention—that they would be protected
from the intrusion of the white man and from any State or
Territorial government. It is utterly inconceivable that at
that time they would have parted with these lands for the
settlement of white men thereon. If the Government had
any purpose whatever to use these lands for the settlement
of the white man, it was bound, as a superior dealing with
an inferior, to have disclosed it. The Government did not
seek them for any such purpose, and the Indians—Chero
kees, Creeks, Seminoles, Choctaws, and Chickasaws alike—
never understood that they were to part with them for any
such purpose.

It certainly did not enter into the contemplation of the
parties that the country to be purchased from these Indians
under the treaties which should be made with them should
be used for any purpose other than the colonization thereon
of friendly tribes of Indians from Kansas or elsewhere, o
possibly, under cases of extreme necessity, Indian freedmen
whom the Government might desire to locate thereon. N

one could possibly have imagined that the lands so purchased were to be used for homestead or white settlement.

These propositions were considered for several days during the council. During one of the sessions the Choctaws and Chickasaws submitted their answer. They were the loyal Choctaws and Chickasaws, present upon invitation of the agent of these tribes. But they had not been appointed regularly under authority of acts of the legislatures of their nations. Upon some points the Chickasaws were not prepared to rely. The Choctaws present were willing to accept all the propositions except the seventh. As to the seventh proposition, the answer of the Choctaws and Chickasaws was substantially the same. They both desired that the seventh proposition should be so modified as to provide that no person of African descent, except their former slaves or free persons of color, who are now or have been residents of the territory, should be permitted to reside therein, unless formally incorporated with the tribe, according to the usages of the band (pp. 320, 321).

Before the close of the conference, on the 8th day of its session, the 16th of September, regular delegates from the Choctaw and Chickasaw Nations appeared. The Choctaw delegates had been appointed under an act of the Choctaw Council, passed September 6, 1865. (See Choctaw Laws, edition of 1869, p. 405.) I presume a similar act had passed the Chickasaw council. When they arrived, what was known as the preliminary treaty of peace was under consideration. This was a treaty prepared under the first of the seven propositions. It read: "That each tribe must enter into a treaty for permanent peace and amity among themselves, each other as tribes, and the United States."

Commissioner Parker, of the United States commission, had said to the conference (p. 327, Report of Commissioner of Indian Affairs, 1865): "This treaty of peace is an essential preliminary to the adjustment of any and all questions and interests under any old treaty." It can be found on

pages 330 and 331. It had already been signed by the loyal Choctaws and Chickasaws, who had been present at the commencement of the conference.

On the ninth day of the conference the regularly appointed delegates of the Choctaws and Chickasaws signed this treaty of peace (p. 346).

On the same day Commissioners Sells and Parker were appointed to confer with committees of the Choctaws and Chickasaws in relation to the *subject-matter* of additional treaties (p. 347).

This was the extent of their authority, according to the official report. They do not seem to have had authority to negotiate a treaty. The Choctaw delegates clearly had not (Choctaw Laws, edition of 1869, p. 405). Nevertheless the United States commissioners prepared a treaty which was an embodiment of their views.

On the 12th day, the last day of the session, President Cooley announced that the United States commissioners had prepared a treaty—that is, an additional treaty—for the consideration of the Choctaw and Chickasaw delegations, which they proposed to submit to them.

On the same day, being the last day of the session, Commissioner Parker announced, just before adjournment, that the commissioners had considered certain modifications of the proposed treaty, which had been submitted by the Choctaws and Chickasaws, but which he said the commission had declined to entertain.

We have no record of the modifications suggested; but we have the draft of the unsigned treaty. It can be found in Choctaw Laws, edition of 1869, p. 410. We have also in the report of Commissioner Cooley (Report of 1865, p. 36) a statement concerning this treaty. He says with the Choctaws and Chickasaws a treaty was agreed upon, upon the basis of the seven propositions heretofore stated, and in addition to which those tribes agreed to a thorough and friendly reunion among their own people, and forgetfulness of past

A.R. 151

reuces; to the opening of the leased lands to the settle-
t of any tribe, whom the Government of the United
es may desire to place thereon, and to the cession of one-
d of their remaining area *for the same purpose*; the United
es to restore these tribes to their rights forfeited by the
ll'on. This treaty, after its approval by the councils of
Choctaws and Chickasaws, is to be signed in this city by
e delegates from each nation sent here for that purpose.
he commission was mistaken in reporting that the treaty
agreed upon. The evidence discloses it was not ulti-
ely executed. (See decision Court of Claims, p. 53; Rec-
, p. 402.) The Indians present disclaimed any authority
nter into such a treaty. But this treaty shows clearly
t the commissioners understood by the seven proposi-
s, and especially as regards these leased lands. It will
ecollected that under the ninth article of the treaty of
5 these lands had been leased to the United States for
purpose of locating thereon certain tribes, especially
tioning certain tribes. Clearly these lands were held
rust for this purpose. So far as these lands were con-
ed, the Government simply desired an enlargement of
trust.

he fifth proposition required that "a portion of the lands
ed and occupied by you must be set apart for the
ndly tribes now in Kansas and elsewhere." Under the
th article of the treaty of 1855 many of these tribes
e excluded from these leased lands. The commissioners,
arrying out the fifth stipulation, demanded an enlarge-
t of the trust and proposed to incorporate into this un-
ed treaty the fifth article, which reads as follows:

The Choctaw and Chickasaw tribes agree to a modi-
tion of the ninth article of the treaty concluded in the
of Washington the 22d of June, A. D. 1855, by which
agree that all that portion of their common territory,
t of the 98th degree of west longitude, leased to the
ted States, may be used for the permanent settlement of
Wichita, and such other tribes or bands of Indians as

the Government may desire to locate thereon, without ex-
ception or restriction as to the character of the tribes."

Now, as we shall hereafter see, these lands were the only lands acquired from the Choctaws and Chickasaws under the treaty of 1866.

"There is nothing in the record," as remarked by the Court of Claims (page 55 of its decision and page 403 of Transcript of Record) "to indicate that the Choctaws and Chickasaws had any information as to the purpose of the Government except as embraced in the fifth proposition and the fifth article of the unsigned treaty submitted at Fort Smith. These gave the Indians to understand that the purpose was only to extend the rights of the United States in the land beyond the treaty of 1855, and this purpose was also understood by the United States." So much concerning the lands embraced in the leased district, and it is a portion of the leased district which constitutes the subject-matter of controversy in this case.

Article 4 of the unsigned treaty related to making provision for the settlement of friendly Indians from Kansas and elsewhere east of 98° upon such terms as may hereafter be agreed upon by the respective parties and approved by the Government. But this related to other lands than the leased district. It was additional land to be provided for Indians. But this article was not consummated by the treaty of 1866, as we shall hereafter see, it being made dependent upon the assent of the Choctaw and Chickasaw legislatures by the eleventh article of the treaty of 1866. It then became a conditional enlargement of the areas for Indian purposes; but as to the purpose, Mr. Cooley tells us on page 36 of his report, of the opening of the leased district to the settlement of any Indian tribes whom the Government may desire to place thereon—and this (proposed additional cession east of 98° was for the same purpose—that is, all the lands acquired were for the settlement of Indians thereon.

We submit herewith a copy of this unsigned treaty.

DRAFT OF TREATY SUBMITTED BY THE UNITED STATES COMMISSIONERS AT FORT SMITH. (NOT SIGNED.) A.R. 151

Articles of agreement and convention between the United States and the Choctaw and Chickasaw tribes of Indians, made and concluded at Fort Smith, Arkansas, the — day of September, A. D. 1865, by D. N. Cooley, Elijah Sells, Ely S. Parker, and Thomas Wistar, commissioners on the part of the United States, and the delegates of the Choctaw and Chickasaw tribes of Indians, signing this instrument.

Art. 1. Peace and friendship are hereby firmly established between all the citizens of the United States and all the individuals comprising the aforesaid tribes; and all the friendly relations that existed between them before the rebellion, shall be and the same are hereby renewed.

Art. 2. The Choctaw and Chickasaw tribes of Indians do hereby bind themselves to use their influence, and whenever called upon by the Government to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians of the Territory and with the United States.

Art. 3. The Choctaw and Chickasaw tribes of Indians, hereby admit, that the institution of slavery is abolished, and that slavery or involuntary servitude shall never hereafter exist in either tribe, except in punishment of crime, whereof the party shall have been duly convicted, and they promise and agree that measures shall be immediately taken by their respective national councils, to properly provide for such emancipated slaves as may have belonged to the members of the respective tribes; such provision to be subject to the approval of the President of the United States.

Art. 4. The Choctaw and Chickasaw tribes of Indians, hereby agree to open their country to the settlement of friendly Indians from Kansas and elsewhere, *upon such terms as may hereafter be agreed upon* by the respective parties and approved by the Government, and the Government may settle such friendly Indians on a portion of said Territory east of the ninety-eighth degree of west longitude, not necessary for the use of said Choctaw and Chickasaw tribes, as it

may desire, not exceeding one-third of the whole remai
Territory, for a fair and equitable consideration, to be
by the Government.

Art. 5. The Choctaw and Chickasaw tribes agree
modification of the 9th article of the treaty concluded a
city of Washington, the 22d day of June, A. D. 185
which they agree that all that portion of their commo
ritory west of the ninety-eighth degree of west longi
leased to the United States, may be used for the perma
settlement of the Wichita and such other tribes or ban
Indians as the Government may desire to locate ther
without exception or restriction as to the character of
tribes.

Art. 6. The Choctaw and Chickasaw tribes of Ind
promise and agree to submit and recommend, at the
meeting of their respective general councils, the adoptio
the plan proposed in the Senate bill 459, 38th Congres
session, to provide for the consolidation of the Indian tri
and to establish civil government in the Indian Territo
it being understood to be the settled policy of the Gov
ment of the United States that all the nations and tribes in
Indian Territory be formed into one consolidated gov
ment, after the plan proposed in the bill above referred
adopted by the United States Senate, 1865, the Governm
of the United States reserving said right.

Art. 7. The United States, in the event of the adoption
the Choctaw and Chickasaw and other Indian tribes of
Government proposed to be established in the Indian Te
tory, referred to in the preceding article, promise and ag
that no white person except officers, agents, and emplo
of the Government, and of any internal improvement
thorized by the Government, will be permitted to go i
and settle in said Territory, unless formally incorpora
and naturalized into one of the resident tribes, according
their laws, customs and usages.

Art. 8. The Choctaw and Chickasaw tribes of India
anxious for the restoration and preservation of kind
friendly feelings among themselves, do hereby declar
general amnesty of all past offenses, either against th
government or the Government of the United States,
no Indian or Indians shall be proscribed, or any act of
feiture or confiscation passed against those who may h
remained friendly and loyal to the United States, but t

shall all enjoy equal privileges with other members of said tribes.

Art. 9. The United States hereby promise and agree to restore the Choctaw and Chickasaw tribes of Indians to all their rights and privileges in lands and annuities, that they were possessed of, and entitled to, and they shall be applicable to the same objects as existed at the breaking out of the rebellion, except such part or parts of annuities and moneys as have been expended by the President in providing for the relief of destitute Indians, who were reduced to want on account of their friendship to the Government of the United States, which shall not be refunded.

Art. 10. It is hereby mutually agreed, that all of the provisions of the treaty of June 22d, 1855, between the United States and the Choctaw and Chickasaw tribes of Indians not inconsistent with the foregoing articles are hereby adopted and made a part of this instrument.

Art. 11. The Choctaw and Chickasaw tribes of Indians expressly agree, that any amendment to this treaty, which the Senate of the United States may make, shall be taken and held as a part of the same, and as binding in every respect as if it had, after being made, been formally submitted to and ratified by such parties.

Laws of the Choctaw Nation, p. 410 *et seq.*

The council adjourned on the 21st of September, 1865, subject to the call of the Secretary of the Interior.

This draft was nothing more than a submission of a series of propositions, through the delegates of the Choctaws and Chickasaws then present, to be transmitted by them for the consideration of the Choctaw and Chickasaw councils and as information to them of the basis on which it was proposed by the United States to make a new treaty and upon which the Choctaw and Chickasaw councils acted when they authorized their delegates to come to Washington for the purpose. It was submitted on the 12th and last day of the conference, and shortly before its adjournment. Manifestly, it could not have been expected to be concluded at that time; but had it been complete in all essential parts and had there been ample time for its consideration, the

delegates present were entirely without authority to negotiate a treaty of any such scope and character. Even the United States Commissioners Parker and Sells were only appointed to confer with committees of the Choctaw and Chickasaw delegates in *relation to the subject-matter* of additional treaties (Report of Commissioner of Indian Affairs 1865, p. 347). I have no copy of the acts under which the Chickasaw delegates were appointed. I presume, however, as I have already stated, they have been appointed under an act similar to the act of the Choctaw council. They were tenants in common so far as the leased district was concerned, and their rights and interests were to a great extent in common; but the powers of the Choctaw delegates were expressly limited by the act already cited (Choctaw Laws, edition 1869, p. 405). Under that act they were empowered simply to meet the commissioners of the United States for the purpose of negotiating a treaty of peace, and in the event they succeeded in negotiating such a treaty they were immediately to submit the same to the general council of the Choctaw Nation. They had succeeded in negotiating such treaty and had signed the same. Their powers were now exhausted. Any modifications which they might have suggested were therefore mere suggestions of theirs as private citizens. All they could do was to take this draft home with them and exhibit it to the council of their nation as a series of propositions for its consideration. Confirmatory of this is the evidence of General Bussey, filed in this case, who was in command at Fort Smith at the time the conference was held there in September, 1865.

8 Q. Did the commissioners, with your knowledge, reach any agreement as to the main points to be embraced in the proposed treaty between the United States and the Indian nations?

Ans. The council reached an agreement, so far as a treaty of peace was concerned, but the Indians there present disclaimed authority to enter into any specific agreement about

ag else, and asked time to report to their people, say-
t when they did so commissioners would be appointed
e further treaty. That, I believe, was the final agree-
eached.
Record, p. 47.

United States commissioners did not expect at this
nce at Fort Smith to conclude treaties with any of
es embracing all seven of the propositions which had
here submitted. The president of the commission,
oley, at the close of his address on the second day, in
the seven propositions were set forth, had said:

agents will be supplied with printed copies of the
s, and are requested to go with an interpreter *to their*
ve tribes for the purpose of fully explaining what is
erein.
Page 319, Ind. Com. Report, 1865.

from the whole proceedings and from the unsigned
it is manifest "that the whole land to be acquired was
equired for one and the same purpose, and that pur-
is the settlement of Indians on the lands to be ac-
without opening any of it to white occupation under
eral land laws of the United States."
draft of the unsigned treaty followed, says the Court
us (p. 54 of the decision, p. 403 of the Transcript of
cord), the submission of the seven propositions. In
e commissioners for the United States evidently under-
express their meaning of the propositions previously
ted. If the contention of the counsel of the defend-
to the precise language used be correct, the fifth
tion was a demand that the treaty was to be so framed
gard to the lands "that a portion of them *must* be
rt for friendly tribes." The fifth article of the un-
treaty provides that all the lands of the leased dis-
ay be used by the United States without exception or
ion as to the character of the tribes; and as the com-

missioners submitting the ultimatum understood it, doubtless the Choctaws and Chickasaws also understood it.

At the time the council at Fort Smith was held the affairs of the five tribes were in a most unsettled condition. Many of them were wanderers from their homes. Many of them had been in the service of the Confederate States. They were entirely ignorant of the policy which the Government would pursue towards them. There were large numbers of freedmen—their former slaves—resident among them. Census Bulletin No. 25, of the census of 1890, shows now a vastly greater number of persons of African descent in proportion to the Indian population among the Choctaws and Chickasaws than among the Cherokees, Creeks, and Seminoles. And even in the case of the Choctaws and Chickasaws there was a very great difference. While among the Choctaws the persons of African descent were about one-half of the Indians, among the Chickasaws the persons of African descent outnumbered the Chickasaw population. These facts greatly increased the difficulties of their situation, but in some cases the difficulties were more readily overcome than in others. After the conference at Fort Smith the Indians gradually returned to their homes, peaceful relations with the Government were maintained, the preliminary engagements of amity entered into by members of the tribes who were present at Fort Smith were faithfully adhered to, their councils were held and delegates were appointed to execute the final treaties of reconstruction. During the spring of 1866 these delegates repaired to Washington city.

THE TREATIES OF 1866.

The delegates came to Washington in pursuance of the council held at Fort Smith, where commissioners on the part of the United States had explained to them what would be required of them. A treaty was made with the Choctaws and Chickasaws April 28, 1866, with the Seminoles March

6, with the Cherokees July 19, 1866, and with the June 14, 1866. They were all proclaimed in July ust, 1866. The treaties were substantially the same, all of them were substantially the requirements set n the seven distinct propositions submitted at the held at Fort Smith in the previous month of Sep-, 1865. For the different treaties see Revision of Treaties, Choctaw and Chickasaw, p. 285, 14th Stat., eminole, p. 810, 14th Stat., 756; Cherokee, p. 85; p. 114, 14th Stat., 785.

proposition in reference to a cession of land for purposes is clearly intended in each one of these s. The sixteenth article of the Cherokee treaty pro-hat the United States may settle friendly Indians part of their Territory west of the 96th degree of west ide, on certain terms and conditions therein named. treaties with the five tribes were very similar. There ession of land in the case of the Creeks, the Seminoles, ioctaws, and the Chickasaws, and an agreement to the case of the Cherokees. (See art. XVI, Cherokee of 1866.)

third article of the Creek treaty reads:

A. R. 37

mpliance with the desire of the United States to locate ndians and freedmen thereon, the Creeks hereby cede nvey to the United States, to be sold to and used as for such other civilized Indians as the United States noose to settle thereon, the west half of their entire , * * * and in consideration of said cession, esti-to contain 3,250,560 acres, the United States agree to e sum of 30 cents per acre, amounting to 975,168

is not the same land which Mr. Cooley, in his report 5, p. 36, said was agreed to be ceded at the Fort Smith nce. He therein says that the Creeks agreed to cede use of friendly Indians from Kansas and elsewhere r lands north of the Arkansas river and one-half of

their lands south of that river. Why the change was m
is not explained.

The third article of the Seminole treaty reads:

a.R.37

In compliance with the desire of the United State
locate other Indians and freedmen thereon, the Semin
cede and convey to the United States their entire dom
In consideration of said grant and cession of their la
estimated at 2,169,080 acres, the United States agree to
said Seminole Nation, the sum of 325,362 dollars, said
chase being at the rate of 15 cents per acre.

The Choctaws and Chickasaws, under their treaty of 1
cede to the United States the territory west of the 98th deg
of west longitude, known as the leased district, being
same territory leased to the United States by the Choctaw a
Chickasaws, as hereinbefore mentioned under the treaty
June 22, 1855.

It will be recollected that under the 9th article of the tre
of 1855 this land had been already leased to the United Sta
for the permanent settlement thereon of certain tribes of
dians therein described and specially excluding other trib
It will also be recollected that at the Fort Smith council
1865, after the submission by the United States commission
of the seven propositions on which they were empowered
negotiate treaties with the Indian tribes—all the same pro
sitions being submitted alike to all the tribes—they submitt
what is known as the unsigned treaty to the Choctaw a
Chickasaw delegates, embodying their understanding of s
propositions, the fifth included, in which they required
modification of said ninth article of the treaty of 1855, so th
said leased land might be used for the permanent settlem
thereon of any Indian tribes as the Government might
sire to locate thereon, without exception or restriction as
the character of the tribes.

Now, a distinction is sought to be drawn between
Creek and Seminole treaties of 1866, and the Choctaw
Chickasaw treaty of that year, because the purpose of cess

is expressed in the former and not in the latter. Upon this point I cannot refrain from quoting what Judge Wilson said in reply in the Court of Claims to the counsel for the Government on this point: "Mr. Binney says the purpose is not expressed in the instrument—that is, in the treaty of 1866. He claims that since it is not so expressed, that is the end of the argument. I do not need to more than mention that an instrument may be a deed absolute on its face, yet a court of equity will decree it to be a mortgage, and for reasons too well known to need to be stated. And precisely the same principle must apply in this case, where the purpose of the conveyance was avowed, where no consideration was paid, and where the friendly Indians were paying nothing to anybody. But it is urged that, since it was expressed in the Seminole treaty and in the Creek treaty and not in the Choctaw and Chickasaw treaty, the principle above alluded to cannot apply. Why it cannot is not apparent. The preliminary negotiations were with all the Indians assembled at Fort Smith; at the same time, the propositions and demands of the Government were submitted to all alike, but the treaties were made separately, and there is no reason why it should have been left out of one and inserted in the other. There were *no new negotiations with the Choctaws by which any new or different purpose was suggested or agreed upon*, and therefore, since by express agreement everything must be construed most favorably to the Choctaws, and as every intendment or inference is to be in their favor, the conclusion must be that it was left out of this treaty by inadvertence. Mr. Binney in effect admits that the cessions in the Creek and Seminole treaties were *in trust*. And why? Because in those treaties it is expressed that it is in compliance with a desire of the United States to locate other friendly Indians and freedmen thereon. That made it a trust. That made it all right for the United States to pay the Creeks and Seminoles the value of their equity when that trust was violated; but he contends that it is all

wrong to pay the Choctaws anything, because there is such expression in the instrument by which their cess was made. If if had been it would be a trust, and t should be paid. That is the irresistible logic of his positi But whether it is so expressed or not can make no differe in equity, for we know what the intention was, and equ will respect and enforce the intention of the parties. A this is why Congress, representing the conscience of nation, after being fully informed, declared that it wa *trust*, and that the Choctaws have an equity, an equity are here asserting in this court. The soundness of thi unquestionable, and unless something can be found in way of facts or conditions that will take the case out of principle above asserted, this principle will be applied."

The five treaties were all made in compliance with same seven propositions, all alike, addressed to each of five tribes, for the same purposes, and in compliance w the same requirements.

Again, the Government pursues toward these five tri in their reconstruction the same policy as it had observ toward them the same policy under their treaties with the in their original location in the Indian Territory. The reconstruction treaties are, *in pari materia*, to be constru together, as forming one homogeneous system, so that ea of them explains and elucidates every other part of the co mon system to which they severally belong. Again quote Endlich on the Interpretation of Statutes, § 43, p.

On the 17th of October, 1865, an act was passed by t Legislative Assembly of the Choctaw Nation providing the appointment of commissioners to proceed to Washi ton city, at such time as may be agreed on with the co missioners on the part of the Chickasaw Nation, for t purpose of *completing* negotiations with the Government the United States commenced at Fort Smith, Arkansas, the 15th of September, 1865. The fifth section of the provided that no agreement into which the commission

entered should be binding until ratified by the general council of the Choctaw Nation (Laws of the Choctaw Nation, edition 1869, p. 420).

This act recognized that negotiations had been commenced, that they were in an incomplete state, and that the business of the delegates who were to be appointed was to complete the negotiations thus begun.

On November 18, 1865, the Chickasaw council passed a similar act providing for the appointment of delegates to visit Washington city during the next session of Congress to reconstruct or enter into new treaties with the United States of America (Constitution, Laws, and Treaties of the Chickasaws, Fort Smith, Ark., 1867, p. 100).

This brings us to a special consideration of the Choctaw and Chickasaw treaty of April 28, 1866, proclaimed by President Johnson July 10, 1866 (Revision of Indian Treaties, 285, 14 Stat., 769).

THE CHOCTAW AND CHICKASAW TREATY OF 1866.

a.R. 30

The treaty is so multifarious that it is almost impossible to present an analysis of it. It embraces no less than 51 articles, covering a great variety of subjects. As to the seven stipulations presented at Fort Smith, and which are required to be substantially incorporated in the treaties, the first and second are embodied in article 1 of the treaty. The third and fourth of these stipulations are in articles 2, 3, and 4; the fifth stipulation is in article 3; the sixth stipulation is in article 8, and the seventh in article 43.

The third article relates to the cession of the leased district for Indian purposes, and the third and fourth articles to the provisions to be made for freedmen of African descent. The fifth article relates to a general amnesty for past offenses as therein stated. The sixth article relates to granting the right of way to railroads which may be authorized to be constructed through the Territory. Article

8 relates to the establishment of an Indian territorial government in the Indian Territory, as provided for in the sixth stipulation at Fort Smith. Article 9 relates to educational purposes. Articles 10 and 45 relate to the reaffirmance by the United States of all their former obligations to the Choctaws and Chickasaws.

Commencing with article 11 and ending with article 37, both inclusive, and including all intervening articles, elaborate provision is made for a survey of all the Choctaw and Chickasaw lands east of the ninety-eighth degree, and division of the lands into severalty, with a right of selection first by the Choctaws and Chickasaws, then by Indians known by the general name of Kansas Indians, not exceeding ten thousand in number, and then after they have made their selections, as provided, by persons of African descent, mentioned in the third article of the treaty as therein provided. The whole scheme fell through, however, because it was made dependent upon the Choctaw and Chickasaw legislatures giving their assent to it, as was provided in the eleventh article, the first of the articles which related to the scheme, and this assent was never given. It has no connection with the fifth stipulation at Fort Smith: First, because that was an absolute requirement, whether as stated by claimants or defendants in this cause, and this scheme was conditional; and, second, because no such scheme was ever suggested in the fifth stipulation.

Article 38 defines who are members of the Choctaw and Chickasaw nations.

Articles 39 and 40 refer to trading purposes.

Article 41 relates to the competency of Choctaws and Chickasaws as witnesses.

Article 42 relates to the delivering up of criminals.

Article 43 relates to the exclusion of white men from the Indian Territory.

Article 44 to the establishment of post-offices.

rticle 45 I have already mentioned in connection with cle 10.

rticle 46 relates to an advance of money to Choctaws l Chickasaws.

rticle 47 relates to certain provisions concerning their ds and annuities, in the event that they request it, after ir lands have been assigned in severalty.

rticle 48 relates to payment of the Choctaw and Chicka- commissioners.

rticle 49 relates to awards to loyal Choctaws and Chicka- rs.

rticle 50 relates to payments to loyal citizens of the ited States for losses.

rticle 51 provided for an abrogation of all treaties and rts of treaties inconsistent with this treaty.

If the treaty of 1866 simply intended to provide for the solute and unqualified cession of the leased district, what s the necessity for incorporating so much matter in this aty? Why did it not provide for the cession of the district so much money and stop there? Certainly something e was intended by one party or the other or by both. In order that the rights and equities of the parties in erest may be determined, we invite the attention of the rt to the entire treaty, but we will quote certain articles ich we ask may be specially considered.

The third article of the treaty, which is the article of ces- n, reads as follows:

The Choctaws and Chickasaws in consideration of the sum hree hundred thousand dollars, hereby cede to the United tes the territory west of the 98th degree of west longitude, own as the leased district, provided, that the said sum ll be invested and held by the United States at an interest less than five per cent. in trust for said nations, until the islatures of the Choctaw and Chickasaw Nations respect- ly shall have made such laws, rules and regulations as y be necessary to give all persons of African descent ident in the said nations, at the date of the treaty of Fort

Smith, and their descendants heretofore held in sla
among said nations, all the rights, privileges and immuni
including the right of suffrage of citizens of said nati
except in the annuities, moneys and public domain, clai
by, or belonging to, said nations respectively; *and als*
give to such persons who were residents as aforesaid, and t
descendants, forty acres each of the lands of said nations, on
same terms as the Choctaws and Chickasaws to be selected on
survey of said land, after the Choctaws and Chickasaws
Kansas Indians have made their selections, as herein provi
and immediately on the enactment of such laws, rules, and r
lations, the said sum of three hundred thousand dollars, sh
be paid to the said Choctaw and Chickasaw nations, in
proportion of three-fourths to the former and one-fourth
the latter, *less such sum at the rate of one hundred dollars*
capita as shall be sufficient to pay such persons of Afri
descent before referred to, *as within ninety days after*
passage of such laws, rules, and regulations shall elect
remove, and actually remove from the said nati
respectively. *And should the said laws, rules,* and regu
tions not be made by the legislatures of the said nati
respectively, within two years from the ratification of t
treaty, then the said sum of three hundred thousand dol
shall cease to be held in trust for the said Choctaw and Chi
asaw nations, and be held, for *the use and benefit of such*
said persons of African descent as the United States shall
move from the said territory in such manner as the Uni
States shall deem proper; *the United States agreeing with*
ninety days from the expiration of said two years to remo
from said nations all such persons of African descent as m
be willing to remove; those remaining or returning af
having been removed from said nations to have no bene
of said sum of three hundred thousand dollars, or any p
thereof, but shall be upon the same footing as other citiz
of the United States in the said nations.

The fourth article, relating to suitable provision for t
negroes, in the case the survey provided for in the sub
quent part of the treaty is not made, reads as follows:

Article 4. The said nations further agree that all negr
not otherwise disqualified or disabled shall be competen
witnesses in all civil and criminal suits and proceedings

the Choctaw and Chickasaw courts, any law to the contrary notwithstanding; and they fully recognize the right of the freedmen to a fair remuneration on reasonable and equitable contracts for their labor, which the law should aid them to enforce. *And they agree, on the part of their respective nations, that all laws shall be equal in their operation upon Choctaws, Chickasaws, and negroes, and that no distinction affecting the latter shall at any time be made, and that they shall be treated with kindness and be protected* against injury; and *they further agree* that while the said freedmen now in the Choctaw and Chickasaw nations remain in said nations, respectively, they shall be entitled to as much land as they may cultivate for the support of themselves and families, in cases where they do not support themselves by hiring, not interfering with the existing improvements without the consent of the occupant, it being understood that in the event of the making of the laws, rules, and regulations aforesaid, the forty acres aforesaid shall stand in place of the land cultivated as last aforesaid.

We next call special attention to the following articles, providing for a survey of the lands east of 98 degrees. All the articles, from 11 to 37, inclusive, together with the intervening articles, relate to this survey. We quote what we think are necessary to a clear understanding of the proposed survey and of references to the same in other articles of the treaty:

Article 11. Whereas the land occupied by the Choctaw and Chickasaw Nations, and described in the treaty between the United States and said nations, of June the twenty-second, eighteen hundred and fifty-five, is now held by the members of said nations in common, under the provisions of the said treaty; and whereas it is believed that the holding of said land in severalty will promote the general civilization of said nations, and tend to advance their permanent welfare and the best interests of their individual members, it is hereby agreed that, *should the Choctaw and Chickasaw people, through their respective legislative councils, agree to the survey and dividing their land on the system of the United States*, the land aforesaid east of the ninety-eighth degree of west longitude shall be, in view of the arrangements here

inafter mentioned, surveyed and laid off in ranges, townships, sections, and parts of sections; and that for the purpose of facilitating such surveys and for the settlement and distribution of said land as hereinafter provided, there shall be established at Boggy Depot, in the Choctaw territory, a land office; and that in making the said surveys and conducting the business of the said office, including the appointment of all necessary agents and surveyors, the same system shall be pursued which has heretofore governed in respect to the public lands of the United States, it being understood that the said surveys shall be made at the cost of the United States and by their agents and surveyors, as in the case of their own public lands, and that the officers and employés shall receive the same compensation as is paid to officers and employés in the land offices of the United States in Kansas.

Article 12. The maps of said surveys shall exhibit, as far as practicable, the outlines of the actual occupancy of members of the said nations, respectively; and when they are completed, shall be returned to the said land office at Boggy Depot for inspection by all parties interested, when notice for ninety days shall be given of such return, in such manner as the legislative authorities of the said nations respectively, shall prescribe, or, in the event of said authorities failing to give such notice in a reasonable time, in such manner as the register of the said land office shall prescribe, calling upon all parties interested to examine said maps to the end that errors, if any, in the location of such occupancies, may be corrected.

It is seen clearly that the whole scheme of the proposed survey is dependent on the will of the Choctaw and Chickasaw people, expressed through their respective legislative councils. Without this expression of their will, there could be no survey. If this assent should be given and the survey made, then ninety days' notice was to be given, as provided for in article 12th. Then the 15th article provided:

Art. 15. At the expiration of the ninety days' notice aforesaid the selection which is to change the tenure of the land in the Choctaw and Chickasaw nations from a holding in common to a holding in severalty shall take place, when

every Choctaw and Chickasaw shall have the right to one quarter section of land, whether male or female, adult or minor, and if in actual possession or occupancy of land improved, or cultivated by him or her, shall have a prior right to the quarter section in which his or her improvement lies; and every infant shall have selected for him or her a quarter section of land in such location, as the father of such infant, if there be a father living, and if no father living, then the mother or guardian, and should there be neither father, mother nor guardian, then as the probate judge of the county, acting for the best interests of such infant, shall select.

Art. 25. During ninety days, from the expiration of the ninety days' notice aforesaid, the Choctaws and Chickasaws shall have the exclusive right of selection as aforesaid.

Art. 30. The Choctaw and Chickasaw Nations will receive into their respective districts, east of the ninety-eighth degree of west longitude, in the proportion of one-fourth in the Chickasaw and three-fourths in the Choctaw Nation, civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory, not exceeding ten thousand in number, who shall have in the Choctaw and Chickasaw Nations, respectively, the same rights as the Choctaws and Chickasaws, of whom they shall be the fellow-citizens, governed by the same laws and enjoying the same privileges, with the exception of the right to participate in the Choctaw and Chickasaw annuities and other moneys, and in the public domain, should the same, or the proceeds thereof, be divided *per capita* among said Choctaws and Chickasaws, and among others the right to select land as herein provided for Choctaws and Chickasaws, after the expiration of the ninety days during which the selections of land are to be made, as aforesaid, by said Choctaws and Chickasaws; and the Choctaw and Chickasaw Nations pledge themselves to treat the said Kansas Indians in all respects with kindness and forbearance, aiding them in good faith to establish themselves in their new homes, and to respect all their customs and usages not inconsistent with the constitution and laws of the Choctaw and Chickasaw Nations respectively. In making selections after the advent of the Indians and the actual occupancy of land in said nation, such occupancy shall have the same effect in their behalf as the occupancies of Choctaws and Chickasaws;

and after the said Choctaws and Chickasaws have made their selections as aforesaid, the said persons of African descent mentioned in the third article of the treaty shall make their selections as therein provided, in the event of the making of the laws, rules and regulations aforesaid, after the expiration of ninety days from the date at which the Kansas Indians are to make their selections as therein provided, and the actual occupany of such persons of African descent shall have the same effect in their behalf as the occupancies of the Choctaws and Chickasaws.

Article 31. And whereas some time must necessarily elapse before the surveys, maps, and selections, herein provided for, can be completed, so as to permit the said Kansas Indians to make their selections in their order, during which time the United States may desire to remove the said Indians from their present abiding places, it is hereby agreed that the said Indians may at once come into the Choctaw and Chickasaw Nations, settling themselves, temporarily, as citizens of the said nations, respectively, upon such land as suits them and is not already occupied.

Art. 37. In consideration of the right of selection hereinbefore accorded to certain Indians other than the Choctaws and Chickasaws, the United States agree to pay to the Choctaw and Chickasaw Nations, out of the funds of Indians removing into said nations respectively, under the provisions of this treaty, such sum as may be fixed by the legislatures of said nations, not exceeding one dollar per acre, to be divided between the said nations in the proportions of one-fourth to the Chickasaw Nation and three-fourths to the Choctaw Nation, with the understanding that at the expiration of twelve months the actual number of said immigrating Indians shall be ascertained, and the amount paid that may be actually due at the rate aforesaid; and should still further immigrations take place from among said Kansas Indians, still further payments shall be made accordingly from time to time.

The contention of the counsel for the Government is that the fifth stipulation, submitted to the Indians at Fort Smith, is fully complied with in articles 30, 31, and 37 of the treaty. Justice Peele, of the Court of Claims, takes the same view in his dissenting opinion; but both counsel and Justice

utterly ignore the fact that articles 30, 31, and 37 are
ly dependent upon articles 11 and 12, and also articles
125; indeed, all the articles of the treaty from 11 to
clusive, together with all intervening articles. Arti-
l to 37, inclusive, proposed a scheme of survey, under
the land east of 98 degrees was to be surveyed and
d into severalty; but this was not to be done unless
ioctaw and Chickasaw people through their legislative
ils gave their assent to such survey and such division
everalty.

fifth stipulation was an absolute and unconditional
rement of the five tribes—that a portion of the lands
rto owned and occupied by you *must be set apart* for the
dly tribes now in Kansas and elsewhere. But here
scheme of survey proposed of land east of 98°, under
, if it took place, Choctaws and Chickasaws were to
their lands in severalty after 90 days' notice (art. 12),
hen during 90 days thereafter (art. 25), and after the
ation of said 90 days these Indians—*not tribes*, but civ-
Indians *from the tribes*, generally known by the name
nsas Indians—were to be admitted as fellow-citizens of
ioctaws and Chickasaws, with the right to select land
ein provided for Choctaws and Chickasaws, and at
xpiration of 90 days from the date at which the
s Indians are to make their selections these persons
frican descent, mentioned in the third article of
reaty, are to make their selections, in the event
e making of the rules, laws, and regulations as
ded in the third article of the treaty. But, as we
is whole scheme of survey was dependent on the
of the legislative councils of the Choctaws and
asaws. It is utterly impossible that this scheme, con-
al on the assent of the Choctaws and Chickasaws,
l be in compliance with the unconditional require-
of the fifth stipulation. Besides the fifth stipulation
ed that the land set apart must be for friendly tribes.

This scheme under article 30 ~~merely~~ merely contemplated a settlement of Indians *from tribes* who were not to settle in their tribal capacity, but were to become fellow-citizens of the Choctaws and Chickasaws. The articles 11 to 37, inclusive, with intervening articles, are utterly and absolutely irreconcilable with the fifth stipulation submitted at Fort Smith. Any attempt to reconcile them must result in utter failure. The whole scheme was made dependent upon the assent of the Choctaw and Chickasaw legislative councils, and their assent never having been given, the whole scheme fell through, and all the articles of the treaty from 11 to 37, both inclusive, became utterly null and void.

I herein incorporate and call attention, in connection with these articles, to what General Paine says in his reply brief in the Court of Claims in reference to the charge of the defendant Indians that the fifth proposition submitted at Fort Smith was embodied in the fourth article of the unsigned treaty, and that this was rejected by the Choctaws and Chickasaws, and also to the contention of the counsel for the Government that the fifth proposition was virtually embodied in articles 30, 31, and 37 of the treaty of 1866. General Paine says:

4. In amplification of their objection to my eighth proposition, the counsel for the Wichitas repeat the erroneous assertion, that the Choctaws and Chickasaws rejected article 4 of the treaty submitted, for subsequent consideration, to the delegates, at the adjournment of the Fort Smith council of 1865, which article provided for the settlement of friendly Indians in their country east of the 98th meridian. They think that this article embodied the fifth of the seven Fort Smith propositions, and that its rejection left the cession of 1866 unaffected by that fifth proposition. On the other hand, the counsel for the United States contends that the substance of the fifth proposition was actually embodied in articles 30, 31 and 37 of the treaty of 1865.

The counsel are all mistaken. The fifth proposition was neither abandoned in the treaty of 1866 nor incorporated into articles 30, 31 and 37 of that treaty. It was, by impli-

, incorporated into the third article of the treaty. the representatives of the United States and of the aw and Chickasaw nations met, in council, at Wash-, in 1866, the Choctaws and Chickasaws did not reject urth article of the treaty submitted at the adjourn- of the Fort Smith council. As to this article, a com- ise was made by the parties. The article, submitted rt Smith, contemplated a definitive agreement, by the aws and Chickasaws, to admit friendly Indians to their ry east of the 98th meridian. But the agreement, was made at Washington, on this subject, was not a tive agreement. It was only a conditional agreement, was to be a part of the scheme embraced in sections 37, inclusive, of the treaty of 1866, and was not to effect before the occurrence of events, which never oc- d, viz., the decision of the Choctaw and Chickasaw atures to survey and divide their lands, and the com- on of the surveys and of the maps thereof. No provis- ontained in either of the 24 articles, 14 to 37, inclusive, took effect. So far as those articles are concerned, the is mere blank paper. /3

ither article 30, nor article 31, nor article 37, nor any article between the 13th and the 37th, was to become tive until (1) the Choctaw and Chickasaw legislatures decided to survey and divide the lands, (2) the surveys been completed, (3) maps of the surveys, including not the ordinary subdivision lines, but also, "*as far as icable, the outlines of the actual occupancy of members of id nations, respectively,*" had been completed and filed land office, and (4) notice had been given, for 90 days, the filing of the maps, "calling upon all parties inter- to examine said maps."

See article 11 of treaty of 1866.
Also article 11 of treaty of 1866.
Article 12 of said treaty.
Artiele 12 of said treaty.

neral Paine then quotes article 31 of the treaty already d by us and proceeds:

hat, then, was the meaning of the words "may at once into the Choctaw and Chickasaw nations"? Did they

mean that they might "come" as soon as the treaty was signed, on the 28th of April, 1866? Certainly not. Did they mean that they might "come" as soon as the treaty was proclaimed, on the 10th of July, 1866? Certainly not. The preceding words clearly indicate their meaning. They meant that when the Choctaw and Chickasaw legislatures should decide to survey and divide the Choctaw and Chickasaw lands east of the 98th meridian, these Kansas Indians might at once enter the land, without waiting two, three, or four years for the completion of the surveys, maps, and selections provided for. This article was so understood by the Government of the United States. The Choctaws and the Chickasaws did not decide to survey and divide their lands, and, *therefore, not a single Kansas Indian was located east of the 98th meridian.* But the counsel have discovered that the United States possessed the right to settle Indians east of the 98th meridian as soon as the treaty of 1866 was ratified, *and have waived its exercise for thirty years.*

But great stress is laid on the words "hitherto owned and occupied by you" in the fifth stipulation. We again quote the fifth stipulation from the official proceedings, p. 319, Indian Commissioner's Report, 1865.

"A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes now in Kansas and elsewhere."

The counsel for the Government contends that the lands east of 98° can only be included under the description "hitherto owned and occupied by you," the lands west of 98° having been leased to the United States Government by the treaty of 1855. This is equivalent to saying that the lands from which the portion to be set apart was taken must not only be owned, but actually occupied. The Choctaws and Chickasaws were as much the occupants as well as owners of the leased district at the time as they were of the far greater portion of the land east of 98°, as illustrated by General Paine in his Supreme Court brief (p. 36). The Chickasaw district, which is east of 98°, contains

,650,935 acres. But in 1866 the Chickasaws, including
ien, women, and children, numbered less than 4,650. There
ust have been at that time less than 1,500 Chickasaw fami-
es. If each family had occupied 500 acres, they would have
ccupied less than 750,000 acres, less than one-sixth of the
istrict. But in fact they must have occupied less than
ne-twelfth of the land. And yet, upon the assumption of
he counsel for the United States, the portion to be set
part for friendly Indians must be taken from the one-twelfth
hich they occupied, and not from the eleven-twelfths
hich they did not occupy.

The land west of 98°—known as the leased district—
as still owned by the Choctaws and Chickasaws. We have
en that it was defined as a part of the Choctaw and Chick-
saw country by the first article of the treaty of 1855, and
hat it was made a part of the Choctaw district by the third
rticle of said treaty, with free passage across the interven-
g district of the Chickasaws by Choctaws to and from the
ased district and the eastern Choctaw district, and that by
he ninth article of said treaty the said leased district re-
ained open to settlement by Choctaws and Chickasaws as
retofore.

This clearly showed that there had been settlements of
hoctaws and Chickasaws within the limits of the leased dis-
ict prior to 1855, and that the right of settlement therein
as to continue after the lease just as it had existed *prior*
reto. Under the Choctaw constitution of 1860 it had been
rganized into a political and judicial district of the Choc-
w country and its citizens placed under the special pro-
ction of the principal chief of the Choctaw Nation. We
ink, therefore, that the argument that the "lands hitherto
rned and occupied by you" apply only to the lands east of
e 98° of west longitude fails, the description applying
st as much to the leased district as to the land lying east
98°. It is certainly clear that the fifth stipulation is not

embodied in the provisions of the 30th, 31st, and 37th articles of the treaty.

According to counsel of defendant Indians in Court of Claims, the Wichitas were not in the leased district in 1866, having left there in 1862, and did not return until 1867. (Def't's Ind. Brief, p. 56).

The fourth article of the treaty was in compliance with the third proposition submitted at Fort Smith, requiring suitable provision to be made for the negroes, in case the survey was not made, and they allowed to make selection of land, as provided in article 30, after the Kansas Indians had made their selections. This provision was made for the negroes, but no similar provision was incorporated for the Kansas Indians.

In the event the scheme of survey had been carried out, the United States agreed to pay to the Choctaws and Chickasaws, out of the funds of the Indians removing, such sum as may be fixed by the legislatures of said nations, not exceeding one dollar per acre. (See article 37.) Now, the land of the leased district was contiguous to this land east of 98°. We may fairly conclude that at that time it was of equal value for Indian purposes. Even if the $300,000 provided for in the third article of the treaty of 1866 was intended as payment of the land, it must strike every fair and candid mind as a remarkable contention to hold that this was a just compensation for 7,713,239 acres.

The eighth article of the treaty of 1866 provided for an Indian council, consisting of delegates elected by each nation or tribe, lawfully resident within the Indian Territory, to be annually convened in said Territory, with elaborate provisions for an Indian government. It was in compliance with the sixth stipulation submitted at Fort Smith, which was in these words:

"It is the policy of the Government, unless other arrangements be made, that all the nations and tribes in the Indian Territory be formed into one consolidated government after

the plan proposed by the Senate of the United States, in a bill for organizing the Indian Territory."

If anything had been wanting to confirm the Choctaws and Chickasaws in ceding part of the lands to the United States, in the understanding that they were ceded in trust, as stated in the fifth stipulation, for the settlement of friendly tribes from Kansas and elsewhere, it would have been the insertion of these provisions in the treaty. But they already so understood, and these provisions simply confirmed that understanding. These Indians had all been told that they must surrender a part of their land for the location thereon of friendly tribes from Kansas and elsewhere, and now they were informed that it was the policy of the Government to consolidate all the Indian tribes in the Indian Territory, not only the five tribes already there, but the new tribes to be located on the lands which they ceded. How was it possible for the Choctaws and Chickasaws to conceive that they were ceding their lands absolutely to the Government to open them under the general land laws to white settlement?

We next call special attention to article 43 of the treaty, which relates to the exclusion of white persons from the Indian Territory. It reads as follows:

Art. 43. The United States promise and agree that no white person, except officers, agents, and employés of the Government, and of any internal improvement company, or persons traveling through or temporarily sojourning in, the said nations, or either of them, shall be permitted to go into said Territory, unless formally incorporated and naturalized by the joint action of the authorities of both nations into one of the said nations of Choctaws and Chickasaws, according to their laws, customs or usages; but this article is not to be construed to affect parties heretofore adopted, or to prevent the employment temporarily of white persons who are teachers, mechanics, or skilled in agriculture, or to prevent the legislative authorities of the respective nations from authorizing such works of internal improvement as they may deem essential to the welfare and prosperity of the community, or be taken to interfere with or invalidate

any action which has heretofore been had in this connection by either of the said nations.

This was in conformity with the seventh stipulation submitted at Fort Smith, which provided:

7. That no white person, except officers, agents and employés of the Government, or of any internal improvement authorized by the Government, will be permitted to reside in the Territory, unless formally incorporated with some tribe, according to the usages of the band.

It is clear that all whites except those excepted were to be excluded from the Indian Territory, the purpose being that the Indians were to remain outside of the presence and influence of the white man, and without any State or Territorial government, in accordance with the object of their original removal.

I next quote article 46. This relates to a loan to the Choctaws and Chickasaws, $150,000 to the former and $50,000 to the latter. It will be seen that this loan was amply secured. The Government could reimburse itself either out of the moneys which might become due to these nations, if any should become due under the provisions of the third article of this treaty, or out of the moneys which might become due on account of the admission of Kansas Indians east of 98 degrees, under the provision of the 37th article of the treaty; or, if these sources failed, then out of any other moneys of said nations in the hands of the United States. The last security in itself was ample, for the United States had in hand abundant funds of these nations out of which it could reimburse itself for this loan. (See Decision, pp. 56 and 57; Transcript of Record, p. 406.)

The condition put into this article for the repayment of the money was also made to depend upon the consent of the Choctaws and Chickasaws to the survey and dividing of their lands, and their agreeing to adopt their freedmen. The United States was unwilling to take any risks as to

r being done; hence the security required for the ad-
e of the sums mentioned in article 46. (See Decision,
; Transcript of Record, p. 420.)

t. 46. Of the money stipulated to be paid to the Choc-
and Chickasaws under this treaty *for the cession of the*
l district, and the admission of the Kansas Indians among
, the sum of one hundred and fifty thousand dollars shall
'anced and paid to the Choctaws, and fifty thousand
rs to the Chickasaws, through their respective treas-
, as soon as practicable after the ratification of this
y, to be *repaid out of said moneys* or any other moneys
id nations in the hands of the United States; the resi-
not affected by any provision of this treaty, to remain
e Treasury of the United States at an annual interest
ve per cent., no part of which shall be paid out as an
ity, but shall be annually paid to the treasurer of said
ns, respectively, to be regularly and judiciously ap-
, under the direction of their respective legislative
cils, to the support of their government, the purposes
ucation, and such other objects as may be calculated to
ote and advance the welfare and happiness of said
ns and their people respectively.

e now come to the consideration of the third article of
eaty of 1866, under which the cession was made of
is known as the leased district, and the only cession
ver which was made under the treaty.

e attempt has been made to construe this article as an
ute cession by the Choctaws and Chickasaws to the
d States of all their territory west of the ninety-eighth
e of west longitude, generally known as the leased dis-
for the consideration of $300,000. The article can be
nstrued only if we read the first clause in these words:
Choctaws and Chickasaws in consideration of the sum
ee hundred thousand dollars hereby cede to the United
, the territory west of the 98th degree west longitude,
n as the leased district." If we read only this much of
ticle, stopping with the word district, and absolutely
nating all the rest of the article, then and then only

2

would the article be susceptible of such construction
would confine us to the ceding clause of this artic
and all the rest of the article, as well as all the re
treaty, might be eliminated. It would have been
unnecessary to have passed the jurisdictional act to
gate and determine the rights and equities of the p
this construction is to be maintained. Such a cons
would not only be inequitable, but unconscionable.
are certainly not restricted to the ceding clause to a
the meaning of the parties to this treaty. The inte
gathered, says the Court of Claims, page 58 (Trans
Record, p. 407), from the words must control, and
tire instrument must be examined in order that
intention may be ascertained (1 Kent Com., 174; *Is*
140 U. S., 453; U. S. *vs.* Texas, 162 *th.*, 36). Con
the court says:

"Aside from the act which requires that everything
necessary by the court to aid in determining the q
presented, and tending to shed light on the cla
equities of the parties, the intent must be gathered
from the language of the instrument, but attend
surrounding circumstances may be resorted to as aid
ascertainment of the meaning and intent of the
(Decision, p. 58; Transcript of Record, p. 407).

The rule is established by abundant authority,
ordinary transactions between men standing on a
footing with each other, and where only *locus tides* is
to be observed between them, that parol evidence is
ble to show a resulting trust in a deed absolute on
or to show that an absolute conveyance is a conditio
(Babcock *vs.* Wyman, 19th How., 289, p. 300, citing
McLean, 1st John. Ch'y Rep., 582, where it is said t
sulting trust might be established by parol proof,
against the face of the deed, but in opposition to the
of the nominal purchasers denying the trust, and ev
the death of such purchasers; 4th Kent; 142, 4th K
where it is said there are resulting trusts implied
from the manifest intention of the parties and the

and justice of the case, and such trusts are expressly excepted from the operation of the statute of frauds).

In Russell *vs.* Southland, 12 Howard, 139, the court says, page 147:

"The question is whether this transaction was a mortgage or a sale. It is insisted on behalf of the defendants that this question is to be determined by inspection of the written papers alone, oral evidence not being admissible to contradict, vary or add to their contents. But we have no doubt extraneous evidence is admissible, to inform the court of every material fact known to the parties when the deed and memorandum were executed. This is clear both upon principle and authority."

The court further on say:

INADEQUACY OF CONSIDERATION.

"In examining this question it is of great importance to inquire whether the consideration was adequate to induce a sale. Where no fraud is practiced and no inequitable advantages taken of pressing wants, owners of property do not sell it for a consideration manifestly inadequate, and therefore, in the cases on this subject great stress is justly laid upon the fact, that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold" (numerous authorities cited).

In Peugh *vs.* Davis, 96th U. S., p. 336, the court say:

"In equity, where the court acts on the real character of the transaction, any evidence written or oral tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument, has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the objects of the parties in executing or receiving the instrument. The object of the parties will be considered by a court of equity. It constitutes a ground for the exercise of its jurisdiction which will always be asserted to prevent fraud or oppression, and to promote justice."

See also Brill *vs.* Brill, 98th U. S., 514; 15th Wall., 105; 107 U. S., 20.

We further quote here from General Paine's Supre
Court Brief, p. 5.

In Mead *vs.* Randolph, 8th Texas, 191, the court said

"It seems, then, now to be beyond question that pa
evidence is admissible to prove that a deed or instrume
absolute on its face, was executed and delivered upon a
tain trusts not reduced to writing, and which the grant
promised to perform, and that the same may be establishe

The court, after referring to Carter *vs.* Carter, 5 T. R
Stamper *vs.* Johnson, 3d T. R., and other cases, said th
although the question whether a deed absolute on its fa
was a mortgage had arisen oftener than the questi
whether such a deed was a deed in trust, the principle
both cases was the same.

The same rule obtains in reference to treaties.

Public treaties are to be interpreted like other laws an
contracts. Such is the inevitable imperfection and am
biguity of all human language that the mere words alone
any writing literally expounded will go a very little wa
towards explaining its meaning (Wheaton's International
Law, part 2, c. 2, s. 17).

Treaties of every kind are to receive a fair and liberal in
terpretation, according to the intention of the contracting
parties, and to be kept with the most scrupulous good faith
Their meaning is to be ascertained by the same rules o
construction and course of reasoning which we apply to th
interpretation of private contracts (1 Kent, Comm., 174).

To the same effect are the authorities quoted by the Co
of Claims in their decision, pp. 58, 59, and 60; Transcript
of Record, pp. 407, 408, and 409.

In re Ross, 140 U. S., 475, Justice Field, pronouncing th
opinion of the court, said:

"It is a canon of interpretation to so construe a law or
treaty, as to give effect to the object designed, and for that
purpose, all of its provisions must be examined in the light
of attendant and surrounding circumstances. To ascer

terms and expressions a literal meaning will be given, and to others a larger and more extended one. The reports of adjudged cases and approved legal treatises are full of illustrations of the application of this rule. The inquiry in all such cases is as to what was intended in the law by the legislature, and in the treaty by the contracting parties."

Thus justified by these authorities in the law, we have referred to the history of these tribes antedating this treaty of 1866, to the policy of the Government when they were first settled in the Indian Territory, to the change of policy announced in 1864, to the subsequent proceedings of the council at Fort Smith in 1865, and the negotiations which finally resulted in the execution of the treaties of 1866, followed up by an examination of certain sections of the treaty of 1866, to which we invited special attention, all for the purpose of ascertaining the intention of the parties in framing the treaty of 1866. We shall proceed now to examine not merely the balance of the third article of the treaty, but all subsequent history which will throw light in ascertaining the intentions and objects of the parties and in determining their rights and equities. These authorities certainly sustain the position that we must go beyond the ceding clause. The ceding clause is the first clause of the third article of the treaty of 1866. It is in these words:

"The Choctaws and Chickasaws in consideration of the sum of three hundred thousand dollars hereby cede to the United States, the territory west of the 98th degree west longitude, known as the leased district."

If we read, as we have already said, only this much of the article, stopping with the word "district" and absolutely eliminating all the rest of the article, then and then only would the article be susceptible of such a construction. But if we read the balance of the article we find that the language of the article following the word district is unconditionally repugnant to any idea whatever of an abso-

lute cession of this land for the consideration of three hundred thousand dollars. The two ideas, the absolute cession and the payment of the consideration of three hundred thousand dollars, co-exist together. If there was an absolute cession it was an absolute cession for and in consideration of three hundred thousand dollars. If no consideration of three hundred thousand dollars was paid for the land, then under the terms of this article there was no absolute cession of this land. Now, the subsequent part of the article shows that the three hundred thousand dollars was to be retained by the United States and held *in trust*. If the Choctaws and Chickasaws passed laws within two years conferring on persons of African descent, resident among them, all the privileges of citizenship, including the right of suffrage, which privileges carried rights of property, as the Indians hold lands in common, together with forty acres of land to be assigned to each of them, and the persons of African descent remained among them, then and only then the three hundred thousand dollars was to be paid to the Choctaws and Chickasaws. Manifestly this sum was not to be paid for the land. It was the consideration to be paid to the Choctaws and Chickasaws for the provision, including 40 acres of land to be assigned to each of them, herein required to be made for persons of African descent resident among them.

This provision for the rights of citizenship for persons of African descent, including the 40 acres of land for each of them, was the *sine qua non* for the three hundred thousand dollars. With this provision the three hundred thousand dollars went to the Choctaws and Chickasaws; without it the three hundred thousand dollars did not go to them. With this provision it was theirs; without it, it was not theirs. How, then, can it be said the three hundred thousand dollars was paid for the land? Again, how can the three hundred thousand dollars be said to be a payment for land west of the 98th degree when the United States insists

ion to conferring on all persons of African descent
among them, and their descendants heretofore held
ry, all the rights, privileges, and immunities, includ-
right of suffrage, of citizens of said nations, that said
n *shall have forty acres each of the lands of said nations*
me terms as the Choctaws and Chickasaws, to be selected
urvey of said land, after the Choctaws and Chickasaws
saw Indians have made their selection as herein pro-
which lands, so surveyed, were to be east of the 98th

t the amount originally advanced as a loan, and
he Choctaws received under the arrangement of
irly chargeable to the lands which the Choctaw freed-
e occupying and cultivating under the fourth article
y of 1866"?

purpose of this provision relating to the $300,000 was
ay for the land. Its object was to cover the cost of
oval of the freedmen.

* * * * * *

sum was fixed at $300,000 because it was estimated
ime that there were 3,000 freedmen, and it was
that each freedman, in case of removal, should re-
r expenses incident to emigration the sum of $100
Report 552, 52d Cong., 1st session, p. 11).

e freedmen did not remove, and the Choctaws and
saws conferred the privileges and assigned the forty
each of them, then they were to receive the $300,000,
for the land.

can it be said that a single dollar was ever paid for
l west of the 98th degree? It is true that they have
ived forty acres each east of the 98th degree, accord-
the survey, because the Choctaws and Chickasaws
sented to the survey; but they are allowed as much
they can cultivate, provided for them under the
rticle of the treaty, in the event the scheme of sur-
s not carried out.

But even if the Choctaws and Chickasaws complied with this provision, the whole three hundred thousand dollars were not to be paid to them unless all such persons of African descent remained among them. If any of such persons, within 90 days after the passage of such laws, removed from the said nation, then $100 *per capita* was to be deducted from the said sum of three hundred thousand dollars for such persons as might remove. Not a dollar was to be paid of said sum of three hundred thousand dollars in exchange for an acre of this leased district; but upon the happening of a second contingency, the failure of these nations to make the required provisions for persons of African descent within two years, then it was provided that the said sum of three hundred thousand dollars was no longer to be held for the Choctaws and Chickasaws, but was to be held in trust for the benefit of such of said persons of African descent as might remove from said nations within ninety days from the expiration of said term of two years.

But there was a third contingency in which the three hundred thousand dollars was to be held, neither for the benefit of the Choctaws and Chickasaws, nor for the persons of African descent resident among them. If these laws, rules, and regulations were not passed within the prescribed time, and if these persons of African descent remained among the Choctaws and Chickasaws or returned after having been removed from among them, they were to lose all interest in said sum of three hundred thousand dollars. In that event the United States were to retain the said sum of three hundred thousand dollars. It is certainly clear that not a dollar of the three hundred thousand dollars was to be paid in exchange for an acre of this land. The latter part of the article is wholly repugnant to the idea that there was an absolute cession of this land, as stated in the first clause in the article, in consideration of the sum of three hundred thousand dollars. When in a statute there are several clauses which present, as compared with each other, an in-

cilable conflict, the one last in order of date or local
on must, in accordance with this rule, prevail, and the
s be deemed abrogated to the extent of such repug-
r, whether the conflicting clauses be sections of the
act or merely portions of the same section (Endlich
terpretation of Statutes, § 183; see also § 185).

cannot avoid the conclusion that there is nothing in
article of the treaty which shows that this land was
for three hundred thousand dollars. *On the contrary,*
amination of the entire article itself shows that there was
sion for three hundred thousand dollars, as stated in the
lause of the article, or for any other sum whatever.

then, the money was not paid for the land, what then
he consideration; what the inducement which moved
Choctaws and Chickasaws to cede the land? Most un-
ionably it was their belief that the land was to be used
e purposes for which they had been told at Fort Smith
the Government desired it—*the location of Indian tribes*
n. The main inducement to remove west had been
val to a country where they would be free from the
nce of the white man. They *saw in the erection of an*
n colony on their border a protection against the intrusion
white man.

hen the fifth stipulation was submitted to them at Fort
they understood that a portion of their land was to
apart for the colonization of friendly tribes thereon.
the unsigned treaty drafted by the commissioners
gain submitted to them, at the close of the proceedings
Fort Smith conference, they understood that the treaty
55 was to be so modified that the Government might
, as it might desire, any tribes, without exception or
ction as to the character of the tribe, on the so-called
l district. When they saw incorporated in the treaty
66 provisions for the establishment of an Indian gov-
within the Indian Territory, with delegates from all
ibes in the Territory, and from which Territory white
s

men would be excluded, how could they understand of
wise than that an Indian colony was to be erected in
leased district, and what could have been a greater ind
ment to them to cede the leased district than the estab
ment of an Indian colony thereon, protecting them aga
the intrusion of the white man and guarding them aga
a white man's government?

And, if possible, this was made still more manifest n
by the insertion of articles 10 and 45 of this tre
These articles reaffirmed all the obligations of the G
ernment to them under former treaties and acts of legi
tion prior to the rebellion and restored them to all th
rights and privileges under the same. The most preci
of all these rights, the most highly prized of all these obli
tions, was the solemn covenant of the Government that
Territory or State should ever pass laws for the governme
of the Choctaw Nation of red people, and that no part
the land granted them should ever be embraced in a
Territory or State. Articles 10 and 45 are perfectly co
sistent with a cession of this land for Indian purpos
If it was an absolute cession they have no place in th
treaty whatever, and any other construction means confi
cation.

Again, article 30 of said treaty provides for the admi
sion of civilized Indians, generally known as Kans
Indians, east of 98 degrees, and for their incorporation amon
the Choctaws and Chickasaws. Article 37 provides fo
the compensation to Choctaws and Chickasaws for th
lands which might be occupied by the Indians so introduce
and incorporated among them. In the draft of a propos
treaty submitted on the last day of the conference at Fo
Smith in September, 1865, for the consideration of the Choct
and Chickasaw legislatures, but which appears never to ha
been considered, there were two cessions contemplated. O
related to the country east of 98 degrees. It was not to e
ceed one-third in area of the Choctaw and Chickasaw cou

try. The other was the cession of the leased district west of 98 degrees. The first cession was in express terms for "the settlement of friendly Indians from Kansas and elsewhere." The Commissioner, in his report for 1865, p. 36, says that the leased lands and this one-third area east of 98 degrees were for the same purpose. Now, when the treaty of 1866 was framed in lieu of a cession of land east of 98 degrees, there was substituted article 30, which provided for the admission of Kansas Indians east of 98 degrees, and their incorporation among the Choctaws and Chickasaws as their fellow-citizens; and this article 30, as well as 31 and 37, were all dependent upon the Choctaws and Chickasaws agreeing to a survey, as provided for in the eleventh article. They were a part of the scheme of survey and division of the lands in severalty, and the scheme having failed, articles 30, 31, and 37 became wholly inoperative and void, the United States lost the privilege of locating the Kansas Indians east of the 98th degree of west longitude, and by the contention of counsel for the United States the fifth proposition was brought to nought. The other cession of the leased district remained, but the purpose for which it was ceded was in no wise changed. There is no reference to any change of purpose for the acquisition of the leased district. It does not anywhere appear that the United States expressed any desire to change the purpose for which the land was ceded under the treaty of 1866, from what was declared to be the purpose under the fifth stipulation at Fort Smith and under the unsigned treaty of 1865. The Indians were obliged to conclude that they ceded the leased district in 1866 for the same purposes which were mentioned in the draft of the unsigned treaty of 1865. The main purpose of preserving the entire Indian Territory for the settlement of Indians, or in some cases Indian freedmen, and the exclusion of whites, is everywhere preserved throughout the negotiations and in all the treaties. Again, in 1866, after the various treaties with the Cherokees, the Creeks, the Seminoles, and with the

Choctaws and Chickasaws had been executed, Commi
Cooley, of the Indian Office, who had been president
United States Commission at Fort Smith, and who ha
Commissioners Sells and Parker, negotiated these
treaties of 1866, made a report concerning them. On

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8, 9, and 10 of the Report of the Commissioner for
Affairs for 1866, Mr. Cooley says:

We now come to the series of treaties made with the
or nations resident in the Indian country south of K
In the annual report of this office for 1865, a very ful
ment and report was made of the conference at Fort
Arkansas, resulting in a primary treaty with those
[by which general terms of peace were establishe
having to a greater or less extent engaged in the reb
against the Government and it was agreed that del
should be sent to Washington for the purpose of conc
formal treaties with each tribe or nation for the settl
of all questions of difference arising from the war, a
re establishing the Indians upon their lands, under c
defined provisions, applying to all classes of their p
tion.] With this purpose in view, the Cherokees,
Seminoles and Choctaws and Chickasaws, appeared in
ary, 1866, by their representative delegates duly c
there being double delegations in some cases, respec
representing two parties in each nation—those wh
remained loyal to the Government and true to their
stipulations, and those who had taken part in the rebe
These negotiations were carried on, on the part of the
ernment, by the Commissioner of Indian Affairs in co
tion with Colonel E. S. Parker, and Superintendent
Four principal points came up for settlement, to wit:

[The proper and just method of adjusting affairs be
the loyal and disloyal, this point applying especially
Cherokees where confiscation laws, passed by the na
council, had taken effect upon the property of those
were disloyal.

The proper relations which the freedmen should hen
hold towards the remainder of the people.

A fair compensation for losses of property occasion
those who remained loyal by the disloyal party.]

Cession of lands by the several tribes to be used for the

ment thereon of *Indians whom it is in contemplation to remove from Kansas.* [*The first tribe with which arrangements were consummated was the Seminoles:* Concluded March 21, 1866; ratification advised July 19, 1866; proclaimed August 16, 1866. By this treaty renewed pledges of peace and friendship are made and a complete amnesty for all offenses arising from the rebellion. Slavery is entirely abolished, and the freedmen placed upon an equal footing with the remainder of the people. This equality was the more easily accomplished in the case of the Seminoles, since there had already been a considerable intermingling of the races before the tribe removed from Florida, and several of the interpreters accompanying the delegation representing the tribe appeared to be of purely African blood. *The Indians cede to the Government the entire domain secured to them by the treaty of* 1856, amounting to (estimated) 2,169,080 acres, for which they receive the sum of $325,362. They receive a new reservation of 200,000 acres at the junction of the Canadian river with its North fork, for which they pay $100,000, and the balance (of $225,362) is to be paid as follows: $30,000 to establish them on their new reservation; $20,000 to purchase stock, seeds and tools; $15,000 for a mill; $50,000 to be invested as a school fund; $20,000 as a national fund; $40,362 for subsistence, and $50,000 for losses of loyal Seminoles, to be ascertained by a board of commissioners. A right of way for railroads is granted through the new reservation, and $10,000, or so much as is necessary, is to be expended for agency buildings. The Indians agree to the establishment, if Congress shall so provide, of a general council in the "Indian country," to be annually convened, consisting of delegates from all the tribes in the proportion of their numbers, respectively, and to have power to legislate upon matters relating to the intercourse and relations of the several tribes resident in that country, the laws passed to be consistent with treaty stipulations and the Constitution of the United States. This council is to be presided over by the superintendent of Indian affairs. (It will be seen hereafter that this plan is more fully carried into effect in the treaty with the Choctaws and Chickasaws.) The Seminoles ratify the diversion of annuities made during the war for the support of refugees, but the payments due under their former treaties are to be renewed and continued as heretofore. They grant six hundred and forty acres of

land to each society which will erect mission or school buildings, to revert, however, to the tribe when no longer used for its proper purpose (Report on Indian Affairs, 1866, pp. 8 and 9).]

The next treaty in this series was made with the confederated nations of Choctaws and Chickasaws concluded April 28, 1866; ratification advised, with an amendment, June 28, 1866; amendment accepted July 2, 1866, and proclaimed July 10, 1866.

[This treaty, in its careful attention to all details deemed necessary, is the most complete of the series, and when its various provisions are brought into full operation will establish the confederated tribes upon a basis of enduring prosperity. It contains, of course, the usual provisions for the re-establishment of peace and friendship, of amnesty, and the abolition of slavery in every form. *The Indians cede to the Government the whole of that tract of land known as "Leased lands," which have been long held (rented by the Government) for the use of Indians removed from Texas, and amounting to* 6,800,000 *acres.* For this the Government is to pay $300,000, to be invested at five per cent. interest until laws are passed by the Choctaws and Chickasaws providing full rights, privileges, and immunities, and grants of forty acres of land each for their freedmen, which laws are to be passed within two years. If so passed, that sum, with its accumulated interest, is to be paid, three-quarters to the Choctaws and one-quarter to the Chickasaws. If such laws are not passed, then the $300,000 to be kept and used by the Government for the benefit of the freedmen.]

The point of contention is for what purpose the leased district was ceded. We say for the settlement thereon of friendly tribes of Indians from Kansas and elsewhere, and possibly and contingently Choctaw and Chickasaw Indian freedmen. The defendants say the cession was an absolute and unconditional cession, "unencumbered by any understanding as to occupancy of the ceded district." Defendants say (p. 215 of brief of def't Indians) "that one of the principal points which came up for settlement in all of the treaties was" (quoting from this report) "cession of lands by the several tribes to be used for the

Hin Court of Claims)

settlement thereon of Indians whom it is in contemplation to remove from Kansas;" but they say that object "has nothing to do with the 3d article of the treaty." Why, it was under the third article of the treaty the leased district was ceded; and the Commissioner, after referring to the appearance in this city, in January, 1866, of the Cherokees, Creeks, Seminoles, and Choctaws and Chickasaws, by their representative delegates duly chosen, proceeds to say that negotiations were carried on, on the part of the Government, by the Commissioner of Indian Affairs, in connection with Col. E. L. Parker and Superintendent Sells. He then proceeds to say that four principal points came up for settlement, and after mentioning three points he reaches the fourth, and states it, just as I have quoted it from defendants' brief, as follows:

"Cession of lands by the several tribes to be used for the settlement thereon of Indians whom it is in contemplation to remove from Kansas."

It is to be noted here that this point of settlement came up with all the tribes—the Cherokees, Creeks, Seminoles, and Choctaws and Chickasaws—and though he may not have used in this report the precise language of the fifth stipulation at Fort Smith, yet it cannot be doubted that these cessions were required in conformity with that stipulation.

After stating the four points in connection with the negotiations carried on with all the tribes, the Cherokees, Creeks, Seminoles, and Choctaws and Chickasaws, he next proceeds to give an account of the arrangements made with the Seminoles, and then states what they ceded to the Government. Then he proceeds to say: "The next treaty in the series was made with the confederate nations of Choctaws and Chickasaws," and he then, as in the case of the Seminoles gives an account of the arrangements made with the Choctaws and Chickasaws, and states what was ceded by them in these words:

"The Indians cede to the Government the whole of that tract of land, known as the 'Leased lands,' which have been long held (rented by the Government) for the use of Indians removed from Texas, and amounting to 6,800,000 acres."

Now, throughout the whole text of the report no passage can be found expressive of the purpose for which the lands were ceded, except when the Commissioner states the fourth point, which came up in the negotiations for settlement "in all of the treaties."

What was this fourth point?—"cession of lands by the several tribes to be used for the settlement thereon of Indians, whom it is in contemplation to remove from Kansas." Manifestly this was the only purpose, as stated by the Commissioner in his report for the cession of the leased district, just as it was the only purpose in the case of the Seminoles, for which they ceded their entire domain secured to them by the treaty of 1856. (See page 214 of defendant Indians' brief.) No other purpose is named by the Commissioner for either cessions.

Nowhere in this report of the final negotiations which resulted in the treaty of 1866 is there to be found the slightest evidence of any change of purpose on the part of the Government from the purpose set forth in the fifth stipulation at Fort Smith in September, 1865, when the negotiations began, nor from the fifth article of the unsigned treaty submitted for their consideration at that time. Neither does the record anywhere disclose that any information on the subject of the uses which were to be made of the leased district was imparted to the Choctaws and Chickasaws, save as set forth in the fifth article of the unsigned treaty, and we cannot but conclude that the Commissioner, when he says that one of the points which came up for settlement was cession of lands for the settlement thereon of Indians, and he afterwards gives an account of the cession of the leased district, means to be understood as saying that said cession was made

nformity with said fifth stipulation and said fifth article
id unsigned treaty.

it we are not yet quite through with what we desire to
oncerning what the defendants urge, in addition, to
that the cession of lands by the several tribes to be
for the settlement thereon of Indians whom it is in
emplation to remove from Kansas has nothing to do
the third article of the treaty of 1866. Notwithstand-
the third article of the treaty of 1866 has only reference
he leased district, and notwithstanding the Commis-
er mentions no other cession than the cession of the
d district, and mentions this after stating, as the fourth
t to be considered, which came up for settlement in all
treaties, "*the cession of lands by the several tribes to be
for the settlement thereon of Indians, whom it is in con-
plation to remove from Kansas*," defendants say that this
nothing to do with the third article, and that the settle-
t of Indians from Kansas is fully provided for in the
tieth article of the treaty. Now, this thirtieth article
es to the incorporation of a certain number of Kansas
ians with the Choctaw and Chickasaw tribes, east of 98
rees, of whom they were to become fellow-citizens, and
whom they were to acquire homes. Now, if this was
cession referred to by the Commissioner for the settle-
t of the Kansas Indians, why did he not say so?
Why does he confine himself in this connection to a men-
of the leased district as the lands ceded to the Govern-
t? It was because there was no other cession by the
ctaws and Chickasaws under the treaty of 1866, except
he third article thereof, of the leased district.
The truth is there was *no cession under the thirtieth* article
he treaty. There was a provision in the thirtieth article
he treaty for the admission of a limited number of Kan-
Indians east of 98 degrees. When so admitted they were
be privileged to acquire homes among them; they were
be made fellow-citizens of these tribes, and they were to

become Choctaws and Chickasaws, but there was no cession of land. The thirtieth, thirty-first, and thirty-seventh articles are wholly inoperative and void. They have no connection with the fifth stipulation submitted at Fort Smith. They are altogether dependent on the assent of the Choctaws to a survey provided for in the eleventh article. That assent never having been given, they fail. They were altogether conditional. *The fifth stipulation was absolute in its terms, whether quoted as stated by Commissioner of Indian Affairs in his report to the Secretary of the Interior, or substantially as it appears in his report as president of the commission at Fort Smith or in the journal of proceedings, and the only cession which is in compliance with the fifth stipulation is the cession of the leased district for the purposes set forth in the said fifth stipulation and in the report of the Commissioner for* 1866.

In the draft of the unsigned treaty, in the fourth article thereof, we find that it was then contemplated by the Government that it should acquire one-third of the territory east of 98 degrees for the settlement thereon of Indians from Kansas (Choctaw Laws, p. 411). But this proposition never was assented to by the Choctaw and Chickasaw Nations. There was no cession of lands in the treaty of 1866 for the settlement of Indians from Kansas, save the cession of the leased district. It is the only cession mentioned by the Commissioner in his report, as quoted by the defendants, and the only purpose of any cession whatever is the purpose set forth in the fourth point for settlement in the negotiations with the several tribes, to wit, cessions of lands by the several tribes to be used for the settlement thereon of Indians whom it is in contemplation to move from Kansas. If it had been an absolute and unqualified cession, why did not the Commissioner so report? If there had been he would have so reported in terms which would have admitted of no mistake. The reason he did not so report was because there was no such cession.

We take the liberty here of incorporating as a part of our

ment some remarks of Senator Dawes, of Massachu-
in the debate on this question in Congress, and in
nse to the charge that the subject was not understood
ngress. Senator Dawes said:

nceive for a moment that the chairman of that com-
ion had succeeded not only in getting the land for In-
s, which he said was so indispensable that it ought to
btained, if necessary, by force; that he not only got
a grant as that, but he got a grant for white people
when he came to report to the Government his success;
ld he have forgotten to communicate to the Government
chiefest of all his successes, if it had been one? No,
President, if Mr. Cooley, who thought it was so import-
to keep this Indian Territory for Indians alone, that in
troubled state of things there he thought it might be
cult, if not impossible, to bring the Indians to even that
ession, that it might be necessary to use force to bring
n there, had succeeded in not only bringing them there,
had got a grant that he felt at liberty to tell this Gov-
ment was a grant open to white men, he would have
it.
he idea of putting white men into the Indian Territory
hat time was as wide from the plans and desires and
poses of the Government as it was of the Indians them-
es. The Government not only had no desire, but the
ernment was opposed at that time to putting white men
that territory (Cong. Record, vol. 23, part 5, 52d Cong.,
session, p. 4086).

We submit that there was no difference in the purposes
which the land was ceded under the Seminole treaty and
purposes for which the land was ceded under the Choc-
and Chickasaw treaty, and if equity and good con-
ence required the United States to purchase the absolute
e of the Seminoles and Creeks in 1889 to the lands ceded
them in 1866 for Indian purposes before opening the
ne to white settlement, equally does equity and good con-
ence demand that the Government should pay now for
absolute title to the lands in controversy a fair equiv-

alent for the same which the Government likewise acquire
for Indian purposes in 1866.

This brings us to the final execution of the treaties wi
the five tribes in 1866. Now, it must be recollected that
the cession by the Choctaws and Chickasaws they merel
opened to the settlement of additional tribes, and possib
to Choctaw and Chickasaw freedmen, land already held
the Government for Indian purposes under the lease
1855. These lands, it will be recollected, had been alread
leased to the United States for the settlement of certain trib
specially excluding some and specially including others, p
vided, however, that the lands should remain open to set
ment by Choctaws and Chickasaws as heretofore prior to 18
Now, while we find in the history of the negotiations at Fo
Smith reference to opening these lands for the settlement
Indians generally, it does not anywhere appear that a sug
word was ever spoken or written either during the ne
tiations at Fort Smith nor in any subsequent negotiatio
in Washington or elsewhere calculated to awaken
slightest suspicion in the Indian mind that the lands to
ceded were to be opened to white settlement, or to be u
for any other purpose than the colonization thereon of I
dian tribes, or possibly for making some suitable provis
for the Choctaw and Chickasaw freedmen should these
tions refuse to adopt them. When it is borne in mind t
they had exchanged their original homes east of the M
sissippi for their present homes in the Indian Territory
order that they might be remote from the presence and
fluence of the white man, *the slightest suggestion that the la
to be ceded were to be absolutely ceded would not merely h
aroused the deepest suspicion, but have awakened the most
found resentment.* If the Government had any such int
tion or purpose, or intended to secure the right to use th
lands for any such purpose hereafter, it was bound to
close it in these negotiations. Under every rule wh
governs a contract between a guardian and a ward, betw

a superior and an inferior, as we shall hereafter see when we examine the rules governing the interpretation of Indian treaties, it was bound to have disclosed that such was the purpose of the cession, and having failed so to disclose it, it cannot now use the lands for any such purpose.

In the face of the fifth stipulation at Fort Smith, of the fifth article of the unsigned treaty, of article 8 of the treaty of 1866, establishing an Indian government for the Indian Territory, and of the sixth stipulation at Fort Smith, and of article 43 of this treaty, and of the absence of any other injunction concerning the purposes of the Government, it was utterly impossible for the Choctaws and Chickasaws to have imagined that they were making a cession under which the Government would be permitted to open the leased district to white settlement. We think the evidence already adduced clearly establishes that the cession of the leased district, under the treaty of 1866, was made to the United States *in trust* for the colonization thereon of friendly tribes of Indians from Kansas and elsewhere, and was never to be divided in severalty, nor opened to white settlement, unless thereafter agreed upon.

There is much additional extrinsic testimony remaining yet to be considered confirmatory of this position, but before we proceed to refer to it we desire to call attention to the action of the Choctaw and Chickasaw Nations in their legislative assemblies relative to the treaty of 1866, adopted at an early date subsequent to its execution.

LEGISLATIVE ACTS OF THE CHOCTAWS AND CHICKASAWS RELATIVE TO THE TREATY OF 1866.

a R. 42

The act of the Choctaw council, approved December 21, 1866, is found in Laws of Choctaw Nation, edition 1869, pages 450 and 451.

It is as follows:

Whereas, the Senate of the United States did, on the 28th day of June, A. D. 1866, advise and consent to the

ratification of the articles of agreement and conventio
tween the United States and the Choctaw and Chick
commissioners, and the same having been confirmed b
President of the United States on the 10th day of Jun
lowing; and

Whereas, the same having been submitted to the ge
council of the Choctaw Nation, and having been interp
and fully explained; therefore,

SECTION 1. *Be it enacted by the general council of the
taw Nation assembled*, That the report of the Choctaw
missioners and all their acts respecting the negotiatio
the late treaty made and concluded at Washington
between the United States and the Choctaw and Chick
Nations of Indians be, and the same is hereby, receive
approved.

SEC. 2. *Be it further enacted, That the propositions con
in the 3d and 8th articles of said treaty are hereby deferred
the next regular session of the general council*, and the
and 47th articles are hereby referred to the people at
to be declared through their legal representatives in co
at the October session, A. D. 1867, and the principal
is hereby required to issue his proclamation, when he
think expedient, calling the votes of the people, the spe
article above.

SEC. 3. *Be it further enacted*, That this act take effec
be in force from and after its passage.

A.R. 43

The act of the Chickasaw legislature approved Nove
9, 1866, is as follows (constitution, laws, and treaties
Chickasaws, Fort Smith, Arkansas, 1876):

AN ACT CONFIRMING THE TREATY OF 1866.

SECTION 1. *Be it enacted by the legislature of the Chic
Nation*, That whereas, a treaty was concluded at Washi
city on the 28th of April, 1866, by commissioners du
pointed on the part of the Chickasaws, Choctaws, an
United States Government, which treaty was ratified
amendments by the United States Senate and confirm
the President, the Chickasaw legislature does hereby
its assent, and confirm the said treaty and amendments
by the Senate of the United States.

SEC. 2. *Be it further enacted*, That the Chickasaw legislature does hereby give its assent to the sectionizing and allotment of the lands in severalty, under the system of the United States, as is provided for in the treaty of April, 1866, and the President of the United States is hereby requested to cause the same to be done as soon as may be practicable.

SEC. 3. *Be it further enacted*, That the provisions contained in article 3d of the said treaty, giving the Chickasaw legislature the choice of receiving and appropriating the three hundred thousand dollars therein named for the use and benefit of the Chickasaws, or passing such laws, rules and regulations, as will give all persons of African descent, certain rights and privileges, be, and it is hereby, declared to be the unanimous consent of the Chickasaw legislature, that the United States shall keep and hold said sum of three hundred thousand dollars for the benefit of the said negroes. And the governor of the Chickasaw nation is hereby requested to notify the Government of the United States, that it is the wish of the legislature of the Chickasaw nation, that the Government of the United States remove the said negroes beyond the limits of the Chickasaw nation, according to the requirements of the 3d article of the treaty of April 28, 1866.

Approved November 9, 1866.

Now, it is to be observed in reference to both of these acts that neither of them absolutely and unqualifiedly ratify the treaty of 1866. Both nations clearly understood that the three hundred thousand dollars provided to be paid under the third article of the treaty of 1866 was not to be paid for the leased district. Both clearly understood that they had the choice of receiving this three hundred thousand dollars in consideration of conferring on persons of African descent resident among them, their former slaves and their descendants, the rights and privileges named in said articles, including the right of suffrage, together with giving to such persons and their descendants forty acres each of the lands of said nations, within two years from the ratification of the treaty or of refusing the same, and in the event of such refusal that they were not to receive a dollar of said sum of

three hundred thousand dollars, but that the same should then be used for the benefit of such persons of African descent as within ninety days after the expiration of the two years would remove from the said Choctaw and Chickasaw Nations, and in the further event, if they did not remove, that the United States would retain the said sum of three hundred thousand dollars. This was the proposition. This was the election they were to make. Now, it will be recollected that the Choctaws numbered in the neighborhood of between 14,000 and 15,000 people, of whom 10,000 were Indians, and about 4,500 were persons of African descent, while the Chickasaws numbered about 7,000, of whom about 3,400 were Indians and 3,700 were persons of African descent. Among the Choctaws the Indians were about double the number of the negroes, while among the Chickasaws the negroes considerably outnumbered the Indians.

The Indians in both tribes were very hostile to conferring these privileges, especially the right of suffrage, on the negroes. But it will be seen by the proportions which existed between the two classes of population in the two nations that the Choctaws incurred much less risk in conferring these rights and privileges than did the Chickasaws. Hence, the Choctaws did not refuse absolutely to confer these rights, but merely postponed action on the subject. But the Chickasaws at once and promptly exercised the choice given them, refused to confer the rights and promptly rejected the bid of three hundred thousand dollars. It is to be noticed further that in the event of conferring these privileges the Choctaws were to receive $225,000 for conferring these privileges on less than half of their population, while the Chickasaws were to receive but $75,000 for conferring the same privileges on a majority of their population. Neither nation conferred these rights within the two years allowed by the treaty. The Chickasaws have never yet conferred them, and the freedmen among them have never been removed. Finally, under legislation passed by Congress in 1882, the

Choctaws adopted their freedmen, and, so far as the Choctaws are concerned, this vexed question has been settled. It has been charged that these nations were paid $200,000 on account of these lands. It is not so. They received $200,000 agreeably to article 46 of the treaty of 1866, of which the Choctaws received $150,000 and the Chickasaws $50,000. But, as we have heretofore seen, it was simply a loan, amply secured under the terms of said article 46, for the Government was to reimburse itself out of the three hundred thousand dollars, in the event these nations earned this amount by the adoption of their freedmen, in accordance with the provisions of the third article of the treaty of 1866, and if not out of this money, then out of such money as they might become entitled to for the admission of Kansas Indians east of 98 degrees, and if not out of that fund, then out of other moneys belonging to said nation which were in the hands of the United States. This advance was, in effect, only a loan, and a loan most amply secured.

When the Choctaws adopted their freedmen under the legislation of 1882, then, so far as they were concerned, it ceased to be a loan—the amount became a payment to them, and the balance of their share was entered as a credit to the Choctaws on the books of the United States Treasury (article 46, treaty of 1866; Report of Commissioner of Indian Affairs, 1887, p. lxii; letter of R. V. Belt, acting Commissioner of Indian Affairs, to the Secretary of the Interior, September 13, 1890, to be found in House Report No. 3147, 51st Cong., 1st session, pp. 14 and 15 of said report). The amount advanced the Chickasaws still remains a charge against them. Could anything establish it more conclusively that the $300,000 was not to be paid for the land, but for the adoption of the freedmen in accordance with the provisions of said third article of the treaty of 1866?

We thus see it was long before the Choctaws could be induced to adopt their freedmen, and we see that the Chickasaws still refuse to do so. Both nations were apprehensive

of negro domination. This feeling prevailed everyw
throughout the South, and it was, of course, strongo
those States where the negroes outnumbered the w
We all know that great uncertainty prevailed in the
state of political excitement as to what would be
There was a great struggle going on between what wa
derstood to be the policy of President Johnson and
was the congressional policy. The same feeling must
existed to a greater extent among the former slave-ho
Indian tribes. They all knew that the seven propos
which were presented at Fort Smith constituted the ba
the treaties of 1866, and one of these was that—

The institution of slavery, which had existed amon
eral of the tribes, must be forthwith abolished, and
ures taken for the unconditional emancipation of all p
held in bondage, and for their incorporation into the
on an equal footing with the original members, or su
provided for.

It was clearly seen by the Indians at Fort Smit
while there was no intention to provide homes for
men in the new lands to be acquired by the Gover
the new policy of the Government contemplated pro
in these new lands for homes for the Indians from I
and elsewhere, *and also, if necessary, for the Indian fr*
of African descent. This is most strikingly states
speech made by *one of the head men of the Osages,* in
to the *speech of President Cooley, of the commission,* w
he says:

"*You told them also that no white men except officers*
be allowed in the Indian country. Now, you have prohib
white man, and why do you say the negro may come i

So, also, Judge Parker afterwards, in his review o
treaties of 1866, 2 McCrary, 290, says:

"The Government was desirous of protecting thes
men, and of securing them homes. *It was not kno*

well the several Indian tribes who had held them in slavery would observe their pledges to secure them the same rights they had enjoyed. It was feared that the prejudice growing out of their former condition as slaves and of race would be so strong against them that they would not be protected by the Indians. The Government was in duty bound to secure them their freedom. The Government feared that to do this it might become necessary to settle them in a colony by themselves. The purpose of the Government, *should it become necessary*, was manifested by the terms of the Choctaw treaty of April 15, 1866."

That purpose was contingently, under certain circumstances, the establishment of a negro colony, and where else were the Choctaw and Chickasaw freedmen to be located except in the leased district? The apprehension of the Choctaws and Chickasaws was the establishment of a negro colony on their border. The Government feared that the creation of this negro colony might become necessary. The leased district was unoccupied, at least to a very great extent. The treaty locating the Kiowas and Comanches in the leased district was not proclaimed until August 10, 1868. The Cheyennes and Arapahoes were not located in the leased district until by executive order of August 10, 1869. Under these circumstances, and while in this state of uncertainty and apprehension, the Choctaw council passed the act of November 20, 1867. This was "An act entitled an act to authorize the national attorney to attend to the claims set up against the nation under the 49th and 50th articles of the treaty of April 28, 1866, and for other purposes." The act is nothing more or less *than the instructions of the Choctaw council, put in the form of a legislative enactment and directed to their national attorney, as to the course he is to pursue in Washington city.* There is but one section of the act which it is material to this question to quote, and that is section 3, which is in these words:

SEC. 3. *Be it further enacted*, That the national attorney be and he is hereby instructed to respectfully bring to the notice

of the Commissioner of Indian Affairs, that this nation will not consent to give the freedmen residing among them the forty-acre lots of land, including the right of suffrage, mentioned in the third article of the treaty of April 28th, 1866, where they have humbly to submit to the forced sale of the leased district, lying west of 98th degree west longitude, for about 2½ cents per acre for objects of negro colonization upon their borders, and he shall also request the said Commissioner of Indian Affairs to provide in due time for said freedmen, for their removal to some country, and remove Kansas Indians here in their stead, if they are willing to be removed.

Great importance is placed on this act by the counsel for defendants in their brief. They claim that it is an admission by the Choctaws that there had been a sale, under which the Government acquired the right to use the leased district for purposes of colonization of negroes thereon, and the argument is that if they had a right to use this district for that purpose, they have the right now to open the lands to white settlement. We have already seen the circumstances under which this act was passed, the uncertainty then existing, and the apprehension of the Choctaws—their fear of negro domination and their apprehension of a negro colony on their border—and we have seen that in fact while the white man was expressly excluded from the territory, there were special provisions for the Indian freedmen looking to providing homes for them, in case of necessity, in lands which had been ceded for Indian purposes, and the statement of the Choctaw council that it was a "*forced sale*" grew out of the *demand* brought to Fort Smith in 1865 by the United States commissioners for such a cession.

While under the fifth stipulation the land set apart was for the location of friendly tribes now in Kansas and elsewhere, yet they knew that under the third stipulation the negroes formerly held in slavery were to be suitably provided for. It was natural, therefore, considering the power of the Government, and in view of the uncertainty as to

at would be done concerning the negro, and when no dian tribes had been removed to and located in the leased strict, that they should have been apprehensive of the es-blishment of a negro colony on their border. But they not even then refer to the sale as an absolute sale, but a le in trust, which would include in the purposes of the ust the colonization of negroes in the leased district; and en then they express their desire for the location of negroes ewhere, and the removal to this leased district of Kansas dians, showing clearly that even at such a time and der such pressure they regarded the establishment friendly tribes on their border as the special purpose of e trust for which the lands were ceded. In the uncertain ndition of the country at that time, with the power of the nited States Government, with the requirement in the ird stipulation that suitable provision should be made r persons heretofore held in bondage, and with the three ndred thousand dollars provided for in the third article the treaty in the hands of the United States with which remove them, they had good reason to apprehend that eir former slaves might be colonized west of ninety-eight grees. The Court of Claims (p. 77; Transcript of Record, 427), of the decision say:

"The inconsistency of this act with any other understand-g is diminished by the time of its passage, and the pre-ous and subsequent conduct of the Choctaws. It is com-etely contradicted by the conduct of their immediate ighbors and coadjutors, the Chickasaws, and being acted with reference to exigencies and the probable re-oval of freedmen to the land, either threatened or sup-sed to be, we attach no unnecessary importance to it. nd being in the face of what we believe was the under-nding as to the uses to which the lands were to be put, en they were called on to make the cession the depart-ental construction must be held to be what the Govern-nt intended, and with that kind of understanding by e and conscientious officials of the Government, the dians likewise must have understood this act as they ege."

We protest that under such circumstances no such c
struction can be drawn from the passage of this act
opposing counsel seek to maintain; on the contrary, t
act was consistent with the purposes of the cession, as
forth in the report of the committee of the Senate of
United States, No. 552, 52d Cong., 1st session, p. 11, a
which maintained that these lands were ceded in trust—

(1.) To locate upon these lands Indians like these Ch
ennes and Arapahoes, whose ranges were not within t
limits designated by the treaty of 1855, and whom prior
the treaty of 1866 the United States had no right to loca
upon the lands.

(2.) To locate thereon Choctaw and Chickasaw freedme

(3.) To deprive the Choctaws and Chickasaws themselv
of the right to settle thereon.

While not concurring in full with these views, yet the
are sufficient to show that in the early days after the w
they might have been actuated by well-grounded fears an
apprehensions in the passage of the act, and this must de
prive the act of the importance to which counsel on th
other side attach to it.

Having considered the only acts of the Choctaw and
Chickasaw legislation which affect this investigation, to
gether with the testimony antedating the treaty of 186
and the facts and circumstances which surrounded it at the
time of its execution, we propose now to consider such

ADDITIONAL CONTEMPORANEOUS TESTIMONY

as sheds light on the purposes for which the treaty wa
made. We first call attention to the admissions of the Gov
ernment in a treaty made with the Delawares 4th of July
1866 (Revision of Indian Treaties, 362, 14 Stat., 109). Thi

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treaty was concluded immediately after the execution of the treaty with the Creeks, June 14, 1866; with the Seminoles, March 21, 1866, and with the Choctaws and Chickasaws, April 28, 1866. The treaty with the Cherokees was concluded July 19, 1866.

This treaty with the Delawares may be said to have been contemporaneously executed with the treaties of 1866 with the Creeks, Seminoles, Choctaws, and Chickasaws, and with the Cherokees. It has direct reference to those treaties, and makes mention of the three treaties with the Creeks, Seminoles, Choctaws, and Chickasaws. The preamble recites:

Whereas, Congress has by law made it the duty of the President of the United States to provide by treaty for the removal of the Indian tribes from the State of Kansas, and whereas the Delaware Indians have expressed a wish to remove from their present reservation in said State to the Indian country, located between the States of Kansas and Texas, and whereas the United States have by treaties negotiated with the *Choctaws and Chickasaws*, with the Creeks and with the Seminoles, Indian tribes residing in said country, *acquired the right to locate other Indians within the limits of the same, then*

Art. 4. The United States agree to sell to the said Delaware Indians a *tract of land ceded to the* Government by the Choctaws and Chickasaws, the Creeks or the Seminoles, or which *may be ceded* by the Cherokees in the Indian country to be selected by the Delawares, etc.

The natural conclusion from this reading is that the United States had lately acquired from the Creeks, Seminoles, and Choctaws and Chickasaws distinct tracts of land; that by the cession of these tracts the Government had acquired the right to locate other Indians on them, and that in pursuance of this right the United States proposed to sell a tract to the Delawares on any one of the tracts acquired from those several tribes. Now, here is a contemporaneous declaration by the Government that the same right was acquired under the Choctaw and Chickasaw treaty which was

acquired under the Creek and Seminole treaties, and this was a right to locate other Indians within the limits of the tract ceded to the Government by these tribes.

ACTION OF THE GOVERNMENT UNDER THESE TREATIES.

If we can ascertain what the Government did, we can arrive at a just conclusion as to what were the rights which the Government acquired under these treaties, and for what purpose they were executed.

The necessity of providing for other Indian tribes had been presented to the attention of the Government long before the conference at Fort Smith in 1865. The report of the Commissioner of Indian Affairs, in his annual report for 1864, before the close of the war, declares this policy. (See Report for 1864, pp. 33, 34.) He says:

The Cherokees, Creeks, Choctaws and Chickasaws should be required to receive within the limits of their country, west, other tribes with whom they are on friendly relations.

What was actually done is succinctly stated in the case of The U. S. *vs.* Payne, 2d McCrary, 290.

The court, in deciding this case in 1881, say:

We find that in the year 1866 the Government entered upon the policy of settling tribes of Indians other than the five civilized tribes in the Indian country. Since that time, by treaties, laws, and executive orders of the President, it has settled upon reservations in the Indian country, the Cheyennes and Arapahoes, the Kiowas, the Comanches, the Wichitas, the Pawnees, the Sacs and Foxes, the Nes Perces, the Poncas, the Modocs, the Kansas, the Osages, the Pottawatomies, Absentee Shawnees, as well as some smaller tribes. This shows," says the court, "that the Government not only had a desire to locate other Indians in the Indian Territory, but to a great extent it has consummated that desire.

Further on in same decision the court say:

In construing the treaty—one of the treaties of 1866—have a right to take into consideration the situation of parties to it, at the time it was made, the property which the subject-matter of the treaty, and the intention and purpose of the parties in making the treaty. To get at this intention we have a right to consider the construction, the parties to the treaty, and who were to be affected by it, have been it, and what has been their action under it. The action of the United States which I have cited is sufficient to show its construction of the treaty. It is a matter of public notoriety that the other party to the treaty has agreed with the United States in its construction. Then we have both parties agreeing upon the same construction.

In the country acquired from the Choctaws and Chickasaws by lease in 1855, and by cession in 1866, the Government located the Cheyenne and Arapahoes, the Wichitas and affiliated bands, and the Kiowas, Comanches, and Apaches. (See report of John H. Oberly, Commissioner of Indian Affairs, Senate Ex. Doc. No. 78, 51st Congress, 1st session, in my book of Docs. A.)

We thus see that under the treaties of 1866, after their execution, the Government located on the lands which it acquired from the Cherokees, the Creeks, Seminoles, Choctaws and Chickasaws, *Indian tribes* from Kansas and elsewhere. *It did not open them to white settlement.* It settled on these lands Indian tribes, just as it had declared through the commissioners at Fort Smith it would do; and it pursued the same policy in the execution of the treaty of 1866 with the Choctaws and Chickasaws which it pursued in the execution of the treaties of 1866 with the Cherokees, the Creeks, and Seminoles. These treaties were all alike in the causes out of which they originated, alike in the history of the negotiations which preceded their execution, alike in the objects for which they were framed, and alike in the way in which the Government carried them into practical operation. Four years after their execution, in 1870, Mr.

Cox, Secretary of the Interior under General Grant (Indian Office Reports 1871), said in his report:

The policy of preserving the Indian Territory, as far as possible from intrusion by white settlers in any form, has been hitherto regarded as firmly established in this country. Negotiations for the removal of Indians from the small reservations in Kansas and Nebraska to the Indian Territory have been based upon this policy, and in order to carry it out with any degree of success, it is necessary to adhere to it as firmly as possible.

The history of the action of the Government in carrying out the provisions of these treaties is in perfect conformity with the construction which we have placed on them. What was done specially under article 3 of the treaty of 1866, concerning the consideration of $300,000 therein mentioned, is just what we said was intended by the treaty to be done. We said it was clear that not a dollar of this $300,000 was to be paid for the land ceded; not a dollar of it was paid for the land ceded. We said that it was to be paid to the Choctaws and Chickasaws, under the terms of this article, only in payment for rights and privileges conferred on freedmen of African descent. The only money of this $300,000 paid to either of these tribes was paid to the Choctaws years after the land had been transferred, and only in payment to them for conferring certain rights and privileges on these freedmen. If anything was advanced to the Chickasaws, the Government claims that they are now indebted for such advance. (See p. 15, H. of R. Report 3147, 51st Cong., 1st session.)

The Government, though often petitioned to remove the Choctaw and Chickasaw freedmen from among the Choctaw and Chickasaw Indians, never removed them. Petitions to this end came from both the Indians and the freedmen; but the petitions were not heeded by Congress (Report of Commissioner of Indian Affairs 1887, pp. LX and LXI). On the contrary, whether adopted, as they finally were, by the

octaws, or refused adoption, as they were by the Chicka-
s, they continued to reside among the Choctaws and
ickasaws.

The apprehensions entertained by the Government con-
ning the treatment of the freedmen by the Indians, as
ntioned by Judge Parker in 2 McCrary, 290, were les-
ed in time, and the Government no longer felt that it
s necessary to settle the freedmen in a colony by them-
ves. But in the meanwhile the whole of the leased dis-
ct was settled by Indians under the authority and direc-
n of the Government. The Wichitas and affiliated bands
re located therein, pursuant to the treaty of 1855, in the
ar 1859. They removed in 1862 and did not return to
is location until 1868 (Brief of Counsel for Wichitas, in
ourt of Claims, p. 56); and under the treaty of 1866 the
heyennes and Arapahoes, the Kiowas, Comanches, and
paches were located in the residue of the leased district
cept Greer county. The acts of the Government, to adopt
e language of Judge Parker in the same case just cited,
ainly indicated its purpose in agreeing to the 3d article
the treaty of 1866 and for what purpose the lands were
quired:

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"This action of the United States is sufficient to show its
onstruction of the treaty. It is a matter of public notoriety
hat the other party has agreed with the United States in
s construction. Then we have both parties to it agreeing
pon the same construction. That is the construction to
e taken as the true one, unless the parties to it were mu-
ally led into this construction by fraud, accident or mis-
ake."

The Government having placed this construction on the
hird article of the treaty of 1866 by its location of other In-
lians in the leased district, we are led naturally to inquire
what construction has been placed on this article by the
officers of the Government since these Indians were located
herein.

CONSTRUCTION OF THE CHOCTAW AND CHICKASAW TREATY BY GOVERNMENT OFFICIALS.

The construction by Government officials of this treaty, as well as of the other treaties with other members of the five tribes, arose out of the attempts of white men to enter upon these lands and make settlements thereon. President Hayes and President Arthur were both compelled to issue proclamations warning white intruders off of these lands, on the ground that these lands were Indian country and reserved for Indians only. (For these proclamations see Report H. of R. 3147, 51st Cong., 1st session, pp. 19 and 25; see President's Proclamation, March 16, 1896.)

President Hayes' Secretary of the Interior, the Hon. Carl Schurz, in a letter to the Secretary of War, dated May 1, 1879, says:

"The lands ceded by the Choctaws and Chickasaws were by article 9 of the treaty of June 22, 1855, leased to the United States for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate thereon. Immediately after the treaty of 1866 the Government located on the lands in question the Kiowas, Comanches, Apaches, Cheyennes, and Arapahoes, which all seemed to be in furtherance of the declared policy of the Government, prior to and at the time the said treaty of 1866 was made. *The treaty of* 1866 *substituted a direct purchase for the lease, but did not extinguish or alter the trust.*"

We also refer, in support of the same view, to official communications as follows:

Hon. C. W. Holcomb, acting Commissioner General Land Office, April 25, 1881.

Hon. H. M. Teller, Secretary of Interior, February 14, 1884.

Hon. S. J. Kirkwood, Secretary of Interior, February 17, 1882.

Hon. Hiram Price, Commissioner of Indian Affairs, January 31, 1884.

Hon. Hiram Price, Commissioner of Indian Affairs, January 26, 1885.

Hon. H. M. Teller, Secretary of Interior, January 26, 1885.

Commissioner Holcomb quotes from all the treaties with the five tribes, and, after referring to the Choctaw and Chickasaw treaties of 1855 and 1866, he says:

The Choctaw and Chickasaw cession of April 28th, 1866 (14th Stat., 769), was by the 10th section thereof made subject to the conditions of the compact of June 22d, 1855 (11th Stat., 613), by the ninth article of which it was stipulated that the land should be appropriated for the permanent settlement of such tribes or bands of Indians as the United States might desire to locate thereon.

Again he says:

In pursuance of *stipulations of the foregoing compacts, and in the exercise of the trusts assumed by the United States under the several treaties*, and in accordance with specific provision of law, and the lawful order of the President, all the lands in the Indian Territory, to which the United States has title have been permanently appropriated, and definitely reserved for the uses and purposes named.

And still further on he adds:

The title of the United States to the lands in the Indian Territory is as heretofore shown—*subject to specific trusts*, and it is not within the lawful power of either the legislature or executive department of the Government to annihilate such trusts or to avoid the obligation arising thereunder.

To the same effect are the opinions of Commissioner Price referred to, as also the opinions of Secretary Teller, quoting the previous opinions of Secretary Schurz and Com-

missioner Holbcomb, and endorsing the same. Secre
Teller says:

The status of the lands as thus determined has been
hered to by this department, and April 26th, 1879,
ruary 12th, 1880, and July, 1884, proclamations were is
by the President, warning unauthorized persons ag
going upon these lands.

Commissioner Price, of Indian Affairs, in his report d
January 31, 1884, in response to a resolution of the S
shows how the lands acquired under the treaties of
were then occupied by different Indian tribes. Whe
comes to consider the leased district acquired from
Choctaws and Chickasaws, he proceeds to show on
tracts of said districts the different Indian tribes
Wichitas and affiliated bands, the Cheyennes and A
hoes, the Comanches, Kiowas, and Apaches—have
located. He says the whole of the leased district is
occupied, except the then disputed tract known as
county, Texas, but which, under a late decision of th
preme Court of the United States, has been decided
under the jurisdiction of the United States.

He then concludes:

No part of said territory remains free from appropri
either to a *direct trust assumed by treaty*, or by reserva
for tribes thereon under executive order, except tha
tion still claimed by the State of Texas, and lying be
Red river and the North fork of the same.

The Hon. H. M. Teller, Secretary of the Interior,
ary 14, 1884, in a communication to the Senate in re
to the lands in the Indian Territory, other than
claimed and occupied by the five civilized tribes, say
this, of course, includes the lands acquired from the
taws and Chickasaws, generally known as the leas
trict):

These lands were acquired by treaties with the vario
dian nations or tribes in that Territory in 1866, *to be h*

Indian purposes, and to some extent for the settlement of the former slaves of some of said nations, or portions thereof. Such are the purposes for which said lands are now being used or held according to the common understanding of the objects of the treaties by which they were acquired, and from these arise the necessity for, or obligation to keep said lands in their present condition of occupancy or otherwise.

Again, on the 26th of January, 1885, Secretary Teller made another report in reference to the status of lands in the Indian Territory. He says, "the status of these ceded lands was considered by one of my predecessors, Mr. Secretary Schurz."

We have already quoted from Mr. Schurz what he specially said in reference to the lands ceded by the Choctaws and Chickasaws in 1866. Mr. Teller proceeds to state the general conclusion that no part of said Territory remains free from appropriation *either to a direct* trust, *assumed by treaty*, or by reservation for tribes thereon under executive order, except that portion still claimed by the State of Texas, and lying between Red river and the North fork of the same.

(See the various treaties, agreements, and executive orders from 1866 to the present time.)

He then says:

This status of the land, as thus determined, has been adhered to by this department; and on April 26, 1879, February 12, 1880, and in July, 1884, proclamations were issued by the President, warning unauthorized persons against going upon these lands.

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And further on he adds:

Objections will be made to the occupation of any part of the Indian Territory by other than Indians, on the ground that the Government set apart the territory for the exclusive use of the Indians and covenanted that no others should reside therein. It is not denied that treaties so provide. It is, however, within the power of the Government, with the consent of the Indians interested, to change this provision of the treaties so

that these desirable unoccupied lands may be plac
the lawful reach of the settlers.

Commissioner Price, January 26, 1885, also m
port as to the status of lands in the Indian Terri
than those held by the five civilized tribes. He,
from the letter of Secretary Schurz, already r
Quoting from this letter, he says:

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The title acquired by the Government, by the
1866, was secured in pursuance and furtherance o
purpose of Indian settlement, which was the fou
the original scheme. That purpose was the rem
dian tribes from the limits of the political State
torial organizations, and their permanent loca
other lands, sufficient for the needs of each tribe

In conclusion, Commissioner Price says:

The status of the unoccupied lands of the In
tory, of which those mentioned in the resolution f
as viewed by this department is so fully set forth
partment letter above quoted, fortified by judicia
already referred to, that it appears unnecessary t
thing on the subject beyond remarking, that, as
been shown, it has been the established policy of
ment *in performance of the conditions mentioned in*
by which the Government acquired lands, or the
them in the Indian Territory, for Indian purposes
the best interest of the Government and the India
it, to appropriate such unoccupied lands for the
of Indian tribes, when their removal to the India
is not prohibited by existing treaty stipulations

We also refer in this connection to House R
Fifty-first Congress, first session, in a discussion
tion, and where the reports to which we have
very fully quoted. See report of Acting Commi
therein, and the copies of official communicatio
pages 6 to 30; and we further refer to Senate
552, first session, Fifty-first Congress, where the
tion is most fully and ably presented.

Opposing counsel in their briefs attempt to impair the force and effect of these official communications by seeking to show that they do not mean what their plain words import; but it is unnecessary further to submit any argument in reply to this contention by defendants' counsel. We, fortunately, have an answer from one who is thoroughly familiar with the rulings of the department on this question, who filled with great ability the office of Secretary of the Interior, who himself was called while occupying that position to pass judgment on the meaning of this treaty of 1866 and he has told us, in clear and unmistakable language which admits of no possibility of error, that the construction which we have placed on these official communications interpreting the Choctaw and Chickasaw treaty of 1866 is absolutely and unqualifiedly correct. The Senate of the United States had this question under consideration in the months of April and May, 1892, when it was most elaborately discussed. At that time, on the 9th day of May, 1892 (see Congressional Record, vol. 23, part 5, 52 Cong., 1st session, pp. 4091 and 4092) the Hon. Henry M. Teller, then a Senator from Colorado, and formerly Secretary of the Interior, thus expressed himself:

It is true that these remarks were made in debate and are not admissible as evidence of the meaning of the treaty, but they relate to rulings of the department, of which the Senator had been once the head, and it seems to me that they are admissible as showing the true meaning of those rulings here disputed, and they are further admissible to refute the charge which counsel have made that Congress was not acquainted with the subject-matter of discussion. Besides, we introduce them as argument, which we adopt as our own.

Mr. TELLER: I take issue with the Senator from Iowa, when he says these Indians have been paid for this last so-called cession. In 1855, they sold whatever rights they had to another tract of land. They granted leasing privileges

to the United States, reserving to themselves certain rights. In 1866, they entered into a contract with the Government of the United States by which they would do certain things with reference to the freedmen of these two tribes. In consideration of what they were to do for the freedmen, they were to be paid $300,000. Although the draftsmen of the bill did say that it was in consideration of the cession of the land, no man can read the whole context of that treaty and not know that it was not for that purpose, but was for the purpose of compensating them for their treatment of the freedmen, *and the Government dealing with them from that day to this hour has been in line with that suggestion and with that theory.* It has never been contended for one minute until within the last two years, *at least by anybody in the department, that they had been paid a single cent for the land.* We provided that they should make the freedmen citizens of that country. We provided then if they did make them citizens we would give them $300,000, and we said, *ex industria*, if you do not make them citizens, the $300,000 goes to the freedmen. How can it be said that was in consideration of the cession? Let me read this clause, which the Senator from Connecticut evidently overlooked:

"And should the said laws, rules, and regulations not be made by the legislatures of the said nations, respectively within two years from the ratification of this treaty, then the said sum of $300,000 shall cease to be held in trust for the said Choctaw and Chickasaw Nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said Territory in such manner as the United States shall deem proper."

How can it be said that this was a payment in purchase for that land and that the Chickasaws and Choctaws proposed to donate $300,000 to the Government of the United States to remove people, that they were under no legal obligation whatever to maintain within their borders? The Chickasaws received $55,000, and they have negotiated with the Government from time to time and proffered to return that to the United States if the United States would remove these freedmen, showing that it has been the understanding not only of *the Government of the United States but of the Indians themselves that the* $300,000 was not for cession of the land, but for the purpose I have mentioned.

Mr. President, in dealing with these Indians we must deal

with them as the Supreme Court said we should. We must give them the benefit of a construction that seems to be in accordance with what was then the intent. It may be, as the Senator from Connecticut has said, that the Government has the legal title; but the Government *got the legal title for a particular purpose*, and the Government, if it did not become the trustee by the implied trust, held it in such a shape that if the transaction had been between two men instead of between two nations, a court of equity would have decreed and declared what the trust was for and how it should be applied.

I repeat that the department has held, from the time this treaty was made, beginning with the declaration of the Commissioner of Indian Affairs who made the treaty when the council was called, that the purpose of the cession of the land was to put Indians on it and not white men, and when he reported to Congress after the treaty was made he declared that that was the treaty. It was the intention on the part of the Government of the United States that the treaty should so declare, and that was the intention of the Indians who thus treated with the Government of the United States.

It probably is true that we have a technical advantage of these wards of ours, and it is possible, considering that there are eight or nine or ten millions of money at stake, that we may repudiate our plighted faith to these people, and that we may do that which we would not dare to do with a nation of great strength and importance; but does it become this great Government to fall back upon a technicality and say: "By the words of your treaty we are the owners and we decline to recognize any title in you," when everybody understands that the policy of the Government was at that time not only to the Chickasaw and Choctaw Indians, but to all other Indians within the Territory; and that was to acquire their land for a particular purpose, and for no other purpose than that which was declared in all the treaties save this by exact and express words?

We might introduce numerous other quotations from the rulings of the executive officers of the Government, but they will be found more extensively quoted in House Re-

port No. 3147, Fifty-first Cong., first session, and in General Paine's Supreme Court Brief, p. 47 *et seq.*

We here take leave of this part of the case. We can only add in conclusion on this point:

For years subsequent to the execution of the treaties of 1866 the executive department of the Government adhered to the construction that the lands ceded by the Choctaws and Chickasaws under the treaty of 1866, like the lands ceded by the Creeks and Seminoles of that year, were ceded on certain specific trusts for the location thereon of friendly tribes of Indians, from Kansas and elsewhere, that the Government desired to locate thereon. The time when these opinions were pronounced imparts to this testimony the added force of contemporaneous exposition.

A construction thus established is not to be lightly departed from. In U. S. *vs.* Moore, 95th U. S., 760, the court say the construction given to a statute by those charged with the duty of executing it * * * ought not to be overruled without cogent reasons. The officers concerned are usually able men and masters of the subject. So also 12th Wheat., 206; U. S. *vs.* Pugh, 99th U. S., 265; Hahn *vs.* U. S., 107 U. S., 406. These authorities, adapting the language of the Supreme Court in 113th U. S., 571, to the case before us, justify us in adhering to the construction adopted by the officers of the executive department of the Government.

These constructions were placed on the treaty very soon after its execution.

Commissioners Cooley, Sells, and Parker, who were delegates at the Fort Smith conference in 1865, were the commissioners who represented the United States in the framing of the treaties of 1866. They knew the purposes and objects of the treaty, and they were then alive, and would have corrected these constructions had they not been correct.

Those who negotiated and signed said treaty were contemporaneous with the most of those who made this execu-

ive construction, and the officers making the construction hereinbefore recited could easily have obtained information as to the intention of the parties as expressed at the time of framing said treaty, and it is reasonable that if the construction made by the Government officials had not been in accordance with the intention of the parties as expressed and understood at the time that some mention would have been made of it.

THE OPENING OF LANDS TO SETTLEMENT.

But in course of time the Government desired to change its policy of preserving the Indian Territory exclusively for Indians and Indian freedmen. For years organized bands of white men had sought to enter the Indian Territory for the purpose of effecting a settlement on lands ceded for Indian purposes under the treaties of 1866. The Government became desirous now of opening these lands to white settlement. But the officials of the Government recognized that under its treaty obligations it was impossible to do this. Secretary Teller, in a communication to the President January 26, 1885, says:

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It is not denied that the Government set apart the Indian Territory for the exclusive use of the Indians, and *covenanted* that no others should reside therein. It is, however, within the power of the Government, *with the consent of the Indians interested*, to change this provision of the treaties so that these desirable unoccupied lands may be placed within the lawful reach of settlers. But until this is done the integrity of the treaties, heretofore made with the Indians, should be maintained, and the powers of the Government to the extent necessary should be exercised to keep intruders and all unauthorized persons off the lands (Report No. 3147, H. of R., 51st Cong., 1st session, pp. 25 and 26; Book of Docs. B).

From this it is apparent, as it is from the whole history of the question, that not a portion but the entire Indian

Territory had been set apart for the exclusive use of the Indians, and the Government had covenanted that no others should reside therein.

There were four treaties in existence, which were obstacles in the way of so changing this policy as to prevent the settlement of the western part of the Indian Territory by white men. They were the treaties with the Seminoles, the Choctaws and Chickasaws, the Creeks and the Cherokees. From all these tribes the Government acquired under these treaties the right to locate Indians on the lands, either ceded or agreed to be ceded, described in the treaties, and located in the western part of the Indian Territory. They were all four made, says Senator Dawes, "upon the same stipulated basis to which all these four tribes previously assented. One of the stipulations was that no white man, except Government officials and the like, should ever be permitted to enter this Territory to reside. But these treaties are all unlike in their phraseology. * * *" Further on he says:

> The reason why these deeds differ in language, under a common basis and for a common purpose, is because they had to deal with different Indians and with different reservations, different subject-matters, and they accommodated their language to those they were dealing with, the Government clearly understanding themselves, and the Indians also, that the purpose was to apply this land to the settlement of friendly Indians alone (Cong. Record, vol. 23, part 5, 52d Cong., 1st session, pp. 4086, 4087).

Now, in 1889, the United States, desiring to change its former policy so as to open these lands to white settlement, but recognizing that it could not do so under the binding force of these treaties "*without*," says Secretary Teller, "*the consent of the Indians interested*," proceeded to obtain this consent.

With this end in view, negotiations were opened with the Creeks, which resulted in an agreement whereby the Creeks agreed that the lands ceded under the treaty of 1866 should

entirely free from any limitation in respect to the use
l enjoyment thereof, and whereby the Creeks surrendered
d extinguished all claims of every kind and character to
d lands. This agreement was ratified by act of Congress
arch 1, 1889 (25th Stats., p. 757). The Government had
id the Creeks, at the rate of 30 cents an acre, for the land
quired under the treaty of 1866, $975,168. It now paid
em, under this agreement for this release, $2,280,857.19.
he agreement was made on a basis of an allowance of
.25 per acre for all lands wholly unassigned, $1.05 per
re for lands occupied by the Indians but not sold, and
educting in both cases the amount formerly paid of 30
ents per acre. (See Report House of Reps. 3147, 51st Cong.,
st session, pp. 13 and 14.)

Congress passed an act March 2, 1889 (25th Stat., 1004), providing for the acquisition of all equitable interest of the Seminoles, buying the same interest as that of the Creeks in the Seminole lands acquired *in trust* under the treaty of 1866. Under this act the Government acquired from the Seminoles these lands free from any limitation as to their use and enjoyment. The United States had paid for these lands in 1866, for use for Indian settlement, estimated at that time at 2,169,080 acres, 15 cents an acre, $325,362. The Government now paid for freeing these lands from any limitation as to use $1,912,942.02 on the same basis as that adopted in the Creek agreement. (See Report last cited. p. 14.)

By agreement with the Cherokees in 1891, the Government purchased all their interest, legal and equitable, in their lands in what was known as the Cherokee outlet, and paid for the same over eight million dollars, being at the rate of $1.42 per acre.

In March, 1891, Congress appropriated $2,991,450 to pay the Choctaws and Chickasaws for all their right, title, interest, and claim in and to that part of the leased district occupied by the Cheyennes and Arapahoes south of the

Canadian river, embracing, with the allotment of 96,000 acres of said tract to the Cheyennes and Arapahoes, 2,489,160 acres of said leased district. This was at the rate of $1.25 per acre.

The Choctaws and Chickasaws executed a satisfactory deed to this land, and the Government has paid the amount appropriated for the same. The Government has thus repeatedly recognized that on freeing these lands from the limitation as to their use for Indian purposes there remained to the grantors an equitable interest in the same, for which the Government must pay before the lands could be opened to white settlement. By agreements with the Creeks, Seminoles, Choctaws, and Chickasaws, $1.25 per acre has been recognized as a fair compensation for the title to these lands, and from the value so ascertained have been deducted the sums previously paid these nations for the acquisition of these lands for Indian purposes. Now, in the case of the purchase of these lands, the lands of the leased district, which had been occupied by the Cheyennes and Arapahoes, *no deduction was made on account of any such previous payments.*

There was a deduction from the number of acres in the leased district occupied by the Cheyennes and Arapahoes. The total number of acres so occupied was 2,489,160. It was agreed that there should be deducted from this amount the number of acres which were allotted to the Cheyennes and Arapahoes. It was estimated at the time the appropriation was made to pay the Choctaws and Chickasaws that there were 600 Cheyennes and Arapahoe allottees; and allowing each 160 acres, there would be 96,000 acres. This was deducted from the 2,489,160 acres, leaving 2,393,160 acres to be paid for by the Government. Subsequently it was ascertained that there were 844 allottees instead of 600, being an excess of 244 over and above the original estimate of 600. Allowing each of them 160 acres, at a valuation of $1.25 per acre, and we have the further sum of $48,800,

which was subsequently deducted from the amount paid the Choctaws and Chickasaws for their land. This error in the computation was corrected by a resolution passed by the fifty-second Congress. These deductions were assented to by the Choctaws and Chickasaws in the spirit of compromise; but, allowing these deductions, the Choctaws and Chickasaws were paid for so much of the leased district as had been occupied by the Cheyennes and Arapahoes at the same rate as had been paid the Creeks and Seminoles, of $1.25 per acre; but, we repeat, there was no deduction on account of any previous payments made to the Choctaws and Chickasaws for this land for Indian purposes, or in the case of the Creeks and Seminoles.

Here was a clear recognition, not only that there had never been any absolute cession of the leased district, but also an equally clear recognition that there *had never been a dollar paid for a cession of the leased district land.* If there had been, there would have been a deduction on account of the $300,000 mentioned in the third article of the treaty of 1866.

It is to be observed that the United States sold and conveyed tracts of land in the lands acquired under the treaties of 1866 from the Cherokees, Creeks, and Seminoles. The United States did not sell and convey any of the lands in the leased district acquired from the Choctaws and Chickasaws to any Indian tribe. They located Indian tribes and set apart for their use certain portions of this leased district. This was the case with the Cheyennes and Arapahoes. We have seen that this was the case with the Wichitas and affiliated bands; and it was equally true with the Kiowas, Comanches, and Apaches, as appears from the treaty of 1867 made with these tribes. (See Revision of Indian Treaties, pp. 312 and 318; 15th Stat., title treaties, 91 and 99.) The United States did not sell and convey, or pretend to sell and convey, a single foot of the leased district. They did not sell and convey because they had not paid for the cession,

neither $300,000 or any other sum. They did not sell and convey to these Indians, or any other *tribe of Indians, because, as the whole history of the negotiations and treaties in reference to the leased district shows, they had not paid a dollar for the cession of this land.* This shows why the Government paid the Choctaws and Chickasaws for the land occupied by the Cheyennes and Arapahoes, without any deduction whatever for previous payments, at the rate of $1.25 per acre, and why it must yet, in strict justice, pay at the same rate for the reservation of the Wichita and affiliated bands and the reservation of the Kiowas, Comanches, and Apaches.

But this appropriation to pay the Choctaws and Chickasaws for that portion of the leased district had not passed without some opposition. This opposition came from Secretary Noble, Secretary of the Interior under President Harrison. Contrary to all the previous rulings of his department, he took the ground that the lands ceded by the Choctaws and Chickasaws under the third article of the treaty of 1866 had been absolutely ceded; that they had been fully paid for the same, and that they were not entitled to any further compensation. His opinion in this respect was cited during the discussion pending the consideration of the appropriation, but notwithstanding this influence thus exerted by a high official of the administration, Congress, after full discussion, overwhelmingly repudiated his views and passed the bill, making appropriation for the payment of these lands. The bill containing this appropriation was approved March 3, 1891. That this opinion was entirely antagonistic to the history of the negotiations which resulted in the execution of the treaty of 1866 and to the previous rulings of the department, we have already clearly shown. But in order that there may be no mistake whatever on this point, we again refer to the remarks made by Mr. Teller, former Secretary of the Interior, who was entirely familiar with the whole matter. They were made on the 9th of May,

more than fourteen months after the passage of the priation bill of March 3, 1891. The remarks we have quoted in a previous part of this brief, but in the of these remarks he said:

repeat that this department had held from the time eaty was made, beginning with the declaration of the Com- ner of Indian Affairs, who made the treaty when the l was called, that the purpose of the cession of the lands put Indians on it, and not white men."

d again he said:

had never been contended for one minute, until within st two years, at least by anybody in the department that the Choctaws and Chickasaws) had been paid a single cent e land" (Cong. Record, vol. 23, part 5, 52d Cong., 1st on, pp. 4091 and 4092).

ese were two ex-Secretaries of the Interior, members of Senate at the time—ex-Secretary Vilas and ex-Secretary er—and they voted together, recognizing that the ctaws and Chickasaws should be paid for the land.

he right of the Choctaws and Chickasaws to payment for land had already been considered in the House of resentatives. The Committee on Indian Affairs in that use had reported a bill for the purchase of the absolute e of the Choctaws and Chickasaws to the entire leased trict, except Greer county, Texas, $6,211,714.65, the said trict, except Greer county, being ascertained by survey to ntain 6,201,663 acres. The discussion took place on the of December, 1890 (Cong. Record, vol. 22, part 1, 51st ng., 2d session, p. 183 *et seq.*).

The House did not at that time come to a vote on the ll. Acting Commissioner Belt, in his report on this very ll, found in House Report No. 3147, 51st Cong., 1st session, d said the claim for payment was presented prematurely. e took the ground, while admitting the justice and equity f the Choctaw and Chickasaw claim, that it did not accrue ntil it was proposed to open the lands to settlement under

the general land laws of the United States, and at that time the whole of the leased district was still used for Indian purposes; but afterwards, during the same session of Congress, the Cheyenne and Arapahoes agreement came up for consideration. It was then proposed to open to settlement so much of the leased district as was occupied by the Cheyennes and Arapahoes. The right of the Choctaws and Chickasaws to payment for so much of the leased district as was thus occupied then accrued. It was then proposed to amend this agreement by appropriating the necessary amount to pay the Choctaws and Chickasaws for an absolute title to these lands, so as to free them from any limitation as to the use to be made of them. It was to be expected that the opposition of the Secretary of the Interior would at least have some support; but after a very full and elaborate discussion the appropriation for the payment of the Choctaws and Chickasaws was carried in the Senate by a vote of 36 to 23, and on a test vote in the House it was carried by a vote of 102 to 70. Thus the opinion of Secretary Noble was fully and thoroughly repudiated.

But Congress did not merely appropriate money for the payment of the Choctaws and Chickasaws. The bill

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passed read:

And the sum of two million nine hundred and nine one thousand four hundred and fifty dollars, be, and the same is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to pay the Choctaw and Chickasaw Nations of Indians for all the right, title, interest and claim, which said nation of Indians may have in and to certain lands now occupied by the Cheyenne and Arapahoe Indians, under executive order; said lands lying south of the Canadian river, and now occupied by the Cheyenne and Arapahoe Indians; *said lands have been ceded in trust by article three of the treaty between the United States and the Choctaw and Chickasaw Nations of Indians*, which was concluded April twenty-eighth, eighteen hundred and sixty-six, and proclaimed on the tenth day of August of the same year, and whereof, etc.

Now, in this form the bill passed the Fifty-first Congress and was approved March 3, 1891. Now, what were the lands ceded by the third article of the treaty? The lands of the leased district, of which the land in controversy was a part. These lands were here acknowledged to have been ceded *in trust* by the Fifty-first Congress, and the act was approved by the President of the United States.

The President of the United States on the 17th of February, 1892, sent a message to the Senate and House of Representatives, to a *new* Congress, *the Fifty-second Congress*, giving his reasons for delaying the payment of said money, and in the course of his message expressing the opinion that said lands had not been ceded *in trust*.

"The declaratory act of 1891," says General Paine in his Supreme Court brief (pages 65 and 66), "is not merely conclusive as a legislative construction of the treaty of 1866, but also conclusive as an express acknowledgment of the trust by the trustee. Let us suppose that the statute of frauds is applicable to the case. The statute will be satisfied if the trust can be manifested or proved by any subsequent acknowledgment by the trustee, or by an express declaration or any memorandum to that effect, or by a letter under his hand, or by an affidavit, or by a recital in a bond or deed, or by a pamphlet written by the trustee, or by an entry in a bank-deposit book. The trust upon which the leased district was ceded to the United States is expressly acknowledged by the trustee in the act of 1891. The acknowledgment is made by those departments of the Government which are invested with the exclusive power to make such acknowledgments. It takes the form of an act of Congress approved by the President of the United States. It is impossible to conceive of a stronger case of the proof of a trust by the acknowledgment of the trustee. This acknowledgment was not revocable by any subsequent inconsistent action of Congress, and especially of a new Congress. It

permanently fastened upon the United States the character of trustee."

The message was referred to the Committee on Indian Affairs in the Senate and to the Committee on Indian Affairs in the House. The committee in the Senate submitted a lengthy report in answer to the President's views known as report No. 552, Fifty-second Congress, first session, and with the report the following resolution:

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Resolved: That for reasons set forth in the report of the Committee on Indian Affairs, upon the President's message of February 17th, 1892, upon the appropriation of March 3d, 1891, for payment to the Choctaw and Chickasaw Nations for their interest in the Cheyenne and Arapahoe reservations in the Indian Territory submitted with this resolution, that it is the opinion of the Senate that there is no sufficient reason for interference in the due execution of the law referred to.

The report of the committee after full investigation was unanimous, with one single exception.

After a most thorough, deliberate, and exhaustive discussion, commencing on the 27th of April and extending to the 9th of May, 1892, the Senate on the last-named day came to a vote. A compromise proposition was submitted in which, after declaring that it was the opinion of the Senate that there was no sufficient reason for interference with the due execution of the law, there was annexed a proviso in the following words:

Provided, however, That in the opinion of the Senate, the President should require the leases and the conveyances which shall be executed by the Choctaw and Chickasaw Nations of Indians mentioned in said appropriation, to contain a full and complete relinquishment of all the right, title, interest and claim of said nation of Indians in and to all the lands between the ninety-eighth and one hundredth meridian of west longitude, formerly owned by them, and of all claim to reimbursement and compensation for and on account of the same.

Here was a proposition that the amount provided under the act of the Fifty-first Congress to be paid for that portion of the leased district hitherto occupied by the Cheyennes and Arapahoes should be paid on condition that the Choctaws and Chickasaws should receive the same in full payment for the leased district. The proposed substitute was rejected by a vote of, yeas, 13; nays, 41. Two ex-Secretaries of the Interior, Messrs. Teller and Vilas, voted with the nays. Here was a distinct recognition that the Choctaw and Chickasaw Nations of Indians retained a right, title, interest, and claim to the balance of the leased district, as they had to that portion of the district which had been occupied by the Cheyennes and Arapahoes.

The object of this proviso was to prevent the Government from being committed to further payments on account of the balance of the leased district. It merely left that question an open question, so far as the Fifty-second Congress could make it so; but it could not in any wise impair the legal effect of the act of March 3, 1891. The act of March 3, 1891—the act of the Fifty-first Congress—still remains as an acknowledgment that the Government as trustee held the lands of the leased district *in trust*, nor could any action of the Fifty-second or any subsequent Congress impair this acknowledgment.

Before proceeding further, we beg respectfully to invite the attention of the court to Senate Report No. 552, Fifty-second Congress, first session. This is the report made on the President's special message of February 17, 1892, giving his reasons for delaying the execution of the law.

General Paine has quoted very extensively in his brief, pages 36 to 44, from it, but it is so full and exhaustive, both in its reply to the objections set forth in the President's message, and so forcibly presents the rights and claims of the Choctaws and Chickasaws in and to the leased district, that we would do injustice to the court and ourselves if we simply presented extracts from it. The large vote by which the

appropriation was carried, as well as the large vote by which the resolution on the President's message was adopted, is the highest tribute to its merit. We respectfully invite the careful consideration of the court to this very able report.

However eminent lawyers might differ—as Senator George of Mississippi, who held that the interest of the Choctaws and Chickasaws was a legal interest, or Senator Dawes of Massachusetts, who held that their interest was an equitable interest—these differences did not prevent a concurrence in the opinion that good conscience required that they should be paid for this land.

I have felt that the court should have this brief statement of the action of Congress first on the subject of the appropriation, and, secondly, of the subsequent action before payment was finally made. The sum and substance of what the defendants say in their brief concerning this congressional action is that it was based on error, and that Congress did not know what they were doing (p. 102 *et seq.*; Record, p. 566).

The question then recurred on the resolution reported by the Committee on Indian Affairs, and the vote was announced—yeas, 43; nays, 13—the two ex-Secretaries of the Interior voting in the affirmative; and so the resolution was adopted (Cong. Record, 52d Cong., 1st session, p. 4093).

The House committee reported—unanimously, I believe—substantially the same resolution, and accompanied it by the same report. It was not taken up in the House until December 17, 1892. Before considering it, the chairman of the Committee on Indian Affairs called attention to the error in computing the number of Cheyenne and Arapahoe allottees, hitherto mentioned in this brief. He then submitted the following resolution:

Resolved by the Senate and House of Representatives, That the Secretary of the Treasury be, and he is hereby, directed to retain and cover back into the Treasury $48,800 of the

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appropriation made by Congress to pay the Choctaw and Chickasaw tribes of Indians for their interest in land of the Cheyenne and Arapahoe reservation, dated March 3d, 1891, which amount has been ascertained by a recount of the allottees of said Cheyennes and Arapahoes, to be by that amount more than is due the said Choctaws and Chickasaws upon the purchase and settlement for their said interest.

This resolution was passed, and the House then proceeded to consider the resolution of the committee, which was read as follows:

Resolved, That for reasons set forth in the report of the Committee on Indian Affairs upon the President's message of February 17th, 1892, upon the appropriation of March 3d, 1891, for payment to the Choctaw and Chickasaw Nation for their interest in the Cheyenne and Arapahoe reservation, submitted with this resolution, it is the opinion of the House of Representatives that there is no sufficient reason for interference in the due execution of the law referred to.

After a considerable debate thereon in Committee of the Whole House the resolution was reported back to the House, and the question being taken on the resolution, it was passed—yeas, 163; nays, 47; and thus the controversy was terminated.

It is proper to add that the resolution correcting the error in computation to the amount of $48,800 was amended in the Senate by adding the following proviso, which was subsequently concurred in by the House:

Provided, however, That neither the passage of the original act of appropriations to pay the Choctaw and Chickasaw tribes of Indians for their interest in the lands of the Cheyenne and Arapahoe reservations, dated March third, eighteen hundred and ninety-one, nor of this resolution shall be held in any way to commit the Government to the payment of any further sums to the Choctaw and Chickasaw Indians for any alleged interest in the remainder of the lands, situate in what is commonly known and called the leased district.

But in making the appropriation for the purchase of that portion of the leased district occupied by the Cheyennes and Arapahoes, Congress did more than make a simple appropriation.

It declared that said lands which had been ceded by article 3 of the treaty between the United States and the Choctaws and Chickasaws, April 28, 1866, and proclaimed on the tenth day of August of the same year, were not ceded absolutely, but had been ceded *in trust*. (See act March 3, 1891.) This was not a mere declaration of opinion. This statute of March, 1891, is *in pari materia* with article 3 of the treaty of 1866. They are to be construed together as if this language declaring that the cession of the lands had been made *in trust* had been originally incorporated in article 3 of the treaty of 1866. It was a subject over which Congress had absolute control, being vested by the Constitution with supreme control over the public lands and over the Indians. It imposed on all these lands the nature and character of *trust lands*. Treaties with Indians not being made since 1871, Congress deals with the subject direct.

The language of the act is that the amount named "is hereby appropriated to pay the Choctaw and Chickasaw Nations of Indians for all the right, title, interest, and claim which said nations of Indians may have in and to certain lands now occupied by the Cheyenne and Arapahoe Indians under executive order, said lands lying south of the Canadian river, and now occupied by the said Cheyenne and Arapahoe Indians, said lands have been ceded *in trust* by article 3 of the treaty between the United States and the said Choctaw and Chickasaw Nations of Indians, which was concluded April 28th, eighteen hundred and sixty-six, and proclaimed on the tenth day of August of the same year."

Now, the words *in trust* apply here to all the lands in the leased district. The lands ceded by article 3 of the treaty of 1866 were the lands known as the leased district. That portion of the leased district occupied as the Cheyenne and Arapahoe reservation was not ceded by one instrument, and the reservation of the Wichita and affiliated bands by another, and the reservation occupied by the Kiowa, Comanche, and Apache Indians by still another. They were all ceded by the third article of the treaty of 1866. Each and every acre of land was ceded by the same article. If the Cheyenne and Arapahoe reservation was ceded absolutely, then every other part of the leased district was ceded absolutely. If the Cheyenne and Arapahoe reservation, a part of the leased district, was ceded *in trust*, then the reservation of the Wichitas and affiliated bands and the reservation of the Kiowas, Comanches, and Apaches, as the other parts of the said leased district, were also ceded *in trust*.

Now, this interpretation of the character of the cession under article 3 of the treaty of 1866 was in perfect conformity with the purposes for which this land was ceded, as we have seen throughout the whole history of the negotiations preceding the execution of the treaty, of the treaty itself, and of the uniform construction put upon that article of the treaty by the action of the Government thereunder and of all the officials of the Indian departments up to the action of Secretary Noble.

The Committee on Indian Affairs in the House had adopted the same interpretation when they reported the bill for the purchase of the entire leased district. The bill read:

Be it enacted, etc., "That the sum of $6,211,714.65 be and the same is hereby appropriated out of any money in the Treasury not otherwise appropriated, to pay in full, the Choctaw and Chickasaw Nations of Indians for all the right to the interest and claim which said nations of Indians have in and to certain lands, ceded *in trust* by article 3 of the treaty between the United States and said nation of Indians,

which was concluded April 28th, 1866, and proclaimed on the 10th day of August the same year, except Greer county, so called, which lands exclusive of said Greer county are ascertained by survey to contain 6,291,663 acres" (Cong. Record, p. 183, 51st Cong., 2d session, vol. 22, part 1).

When they were inserted in the appropriation bill approved March 3, 1891, they had been carefully considered. The House Committee on Indian Affairs, as we have just seen, had already reported the bill containing the declaration that the cession of article 3 of the treaty of April 28, 1866, was a cession *in trust*. When Congress passed the bill approved March 3, 1891, it declared that the cession under article 3 of the treaty of April 28, 1866, was a cession *in trust*. This treaty was a treaty, but also under our Constitution it was the law of the land. When a treaty operates of itself without the aid of legislative provision, it is regarded in courts of justice as equivalent to an act of the legislature (Foster *vs.* Neilson, 2d Peters, 314). Congress, with full power and authority over the subject, affixed this interpretation to the treaty of April 28, 1866, to this law of the land, and affixed it with the executive sanction of March 3, 1891. This interpretation became incorporated into said article 3 of said treaty as much as if it had been inserted there originally. It was now a part of the deed, and no subsequent legislation could change it. The parties to it were bound by it just as much as if originally inserted in it. Here was an insertion in the original contract of what Congress believed to have always been a part of it, and it was a legislative interpretation of the true meaning, the tenor, and effect of article 3 of the treaty of April 28, 1866.

That this is a correct statement of the law of this case we refer to Endlich on Interpretation of Statutes, p. 510, § 365, where it is said:

A construction put upon an act of the legislature itself, by means of a provision embodied in the same, that it shall or shall not be construed in a certain designated manner, is

binding upon the court, although the latter without such a direction would have understood the language to mean something different * * * *Moreover a statute declaratory of a former one has the same effect upon the construction of such former act, in the absence of intervening rights, as if the declaratory act has been embodied in the original act at the time of its passage.* (See also Sutherland on Construction of Statutes, p. 306, § 231.) A provision which is special, by pointing to a particular act and declaring for what definite purpose it was enacted, or defining certain words or phrases, has the fullest effect. It is a part of the law, and must be construed and applied accordingly, and the act will have a construction, and the words and phrases a meaning in harmony with the defining provisions, even though otherwise they would have a different effect. (See also State *vs.* S. & S. Orphan Home, 37 Ohio St., 275; Philadelphia, etc., R. R. Co. *vs.* Catawissa R. R. Co., 53 Pa. Stat., 20; Hankins *vs.* The People, 106 Ill., 628.)

In the case of the State *vs.* Soldiers and Sailors' Orphan Home, 37 Ohio, 275, there were two acts on the same subject-matter, and in that case the court said:

Whatever may have been the original meaning of the act, the effect of the adoption of this clause was to incorporate it with the original act, and in the absence of any intervening rights to give to the act the same meaning and effect, as if the clause had been embodied in it, at the time of its passage.

But the legislative interpretation of Congress of a treaty is even more binding than such an interpretation of a previous act of Congress. An act of Congress declaring what is the true meaning of a treaty is of peculiarly binding force. Speaking of treaties, Sedgwick on the Construction of Statutory and Constitutional Law, pp. 386, 387, says that:

It is important to notice the rule, that in the construction of this class of documents the judiciary, in one respect, do not occupy the same position, nor hold the same language that they do in regard to other matters of written law Whenever the nation by its properly constituted agents has

declared its interpretation of a treaty, that interpretation becomes binding on the courts. The Supreme Court of the United States has said: "However individual judges might construe a treaty, it is the duty of the court to confine itself to the will of the legislature, if that will has been clearly expressed; the courts cannot pronounce the course of their own nation erroneous."

This much we feel that we ought to say upon this important branch of this question. Much more we could say. But more we do not propose to say, as we have the brief on this point of the late Judge Shellabarger, to whose labors we are much indebted, and which will be presented and enforced by our associate, Judge Wilson. Besides, General Paine, in his Supreme Court Brief, page 63 *et seq.*, has cited a number of authorities on this question.

But, independent of the question of legislative interpretation, the question naturally arises, if the executive officials of the Government understood that these lands were ceded *in trust* for the benefit of the Choctaws and Chickasaws, and if now the Congress of the United States placed this construction on the third article of the treaty of 1866, how else could the Choctaws and Chickasaws have understood it?

INTERPRETATION OF INDIAN TREATIES.

We have hitherto invoked in the interpretation of this treaty between the United States and the Choctaws and Chickasaws only those rules which govern in the construction of contracts between parties who are on terms of equality with each other. In such cases all that the law requires is the observance by both parties of *bona fides*. But in a contract between parties occupying the relation of these Indian tribes and the Government of the United States, the relations between a superior and inferior, the relations between a guardian and ward, between a great and powerful nation and a weak and defenseless people, here equity and

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justice require that the strong should observe towards the weak, not merely *bona fides*, but what the civil law happily termed *uberrima fides*. Under this rule the agents of the United States, in negotiating the treaties, were bound to have communicated to the Indians every species of information which could have affected their minds.

The Indians were a careless people, unacquainted with business methods, the making of contracts or the formation of treaties. They were dealing with officials of the United States, in whom they reposed confidence and to whom they looked for protection. They had just been informed that the Government desired the cession of this land for Indian tribes from Kansas and elsewhere, whom the Government desired to locate thereon; they were therefore entirely off their guard in making an absolute cession of the land, which could by any possibility of construction be afterwards used for white settlement.

Under such circumstances, to construe this cession into an absolute and unqualified cession would be a breach of confidence, a breach of trust, when the law requires *uberrima fides* to be observed towards them.

But the Supreme Court of the United States has passed on this question, and passed on it in a manner not only in conformity with the great moral principles laid down in these legal authorities, but in a manner which renders it utterly impossible to entertain the idea that under the treaty of 1866 the Choctaws and Chickasaws ever made an absolute cession of these lands.

In 5th Wallace, 737, in the case of the Kansas Indians, it is held that rules of interpretation favorable to the Indian tribes are to be adopted in construing our treaties with them; and on page 760 Justice Davis, who delivered the opinion of the court, adopts the language of C. J. Marshall, used in 6th Peters, 582, where he says: A.R. 5

The language used in treaties with the Indians should never be construed to their prejudice, if words be made use

of, which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty.

And again, in the case of The Choctaw Nation *vs.* The United States, 119th U. S., 1, when Justice Stanley Matthews, pronouncing the opinion of the court, says, on page 27:

A.R. 53. This quotation is not sufficiently full. See A.R. 53 & 54.

The United States is a sovereign nation, not suable in any court except by its own consent, and upon such terms and conditions as may accompany that consent, and is not subject to any municipal law. Its government is limited only by its own Constitution, and the nation is subject to no law, but the law of nations. On the other hand, the Choctaw Nation falls within the description, in the terms of our Constitution, not of an independent State, or sovereign nation, but of an Indian tribe. As such it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the Government of the United States, although from the nature of the case, subject to the power and authority of the laws of the United States, when Congress should choose, as it did determine in the act of March 3d, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative powers.

As it was said by this court recently in the case of The United States *vs.* Kagma, 118 U. S., 375, 383:

These Indian tribes are the wards of the nation; they are communities dependent on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From this very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection and with it the power. This has always been recognized by the Executive and by Congress and by this court whenever the question has arisen.

Justice Matthews, after making this quotation, continues: It had accordingly been said in the case of Worcester *vs.* Georgia, 6 Peters, 515. 583:

> The language used in the treaties with the Indians should never be construed to their prejudice. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning should form the rule of construction.

Now, this is the rule of justice, of equity, of honesty laid down by the Supreme Court. I put it to this court in all candor, if Carl Schurz, Secretary Kirkwood, and Secretary Teller understood this treaty as a mere conveyance of these lands *in trust*, for certain specific purposes, how else can you expect the poor defenceless Indian to understand it, and if he so understood it, then, under the decision of the Supreme Court, his understanding of it becomes the rule of interpretation which is to explain and control its meaning.

But it is contended that these decisions were made in reference to treaties of a much earlier date, and that they have no application to the treaty of 1866. The main reason assigned for this contention is that in 1866 the Choctaws were no longer an unlettered and ignorant, but were an educated and intelligent people; but such reasons are founded on a clear misapprehension of what is the real reason on which the rule for the interpretation of Indian treaties is based. *This fundamental reason on which this rule of interpretation is founded* is "that the recognized relation between the parties is that between a superior and inferior. * * * That the parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right" (119 U. S., 28). The fact that the Choctaws and Chickasaws were no longer an unlettered people could not deprive them of the benefit of this rule of interpretation if the relation of the parties were still that of a superior and inferior. Where the benefit of the rule is

extended to an unlettered people it is only because a want of acquaintance with letters made them a dependent people; but in fact, while many of the Choctaws and Chickasaws had made considerable advances in education, they were still as a mass an unlettered people.

Whatever may be true as regards the mere fact of whether they were or not an unlettered people, never was the inequality between these tribes and the United States more strongly manifest than when their representatives met the commissioners of the United States in council at Fort Smith in 1865. It was at the end of a long and destructive war, in which, by force of circumstances, they had been compelled to participate. They came out of that war not only subdued, but utterly ruined. They were told by the United States commissioners at the very opening of the council that they had forfeited all their rights and interests and *were at the mercy of the Government*. Were these tribes in such a situation as to contract on terms of equality with a power like that of the United States? Never in all their history were these wards of the nation so much under the protection and at the same time within the power of their guardian as at this period. *Here was absolute dependence* and *absolute power*. The Government, under pressing necessity of providing for Indian tribes from Kansas and elsewhere, desired and demanded of these people a cession of part of their lands for Indian settlement, and for Indian settlement only. It is not too much to say that here it was the absolute duty of the guardian to have guarded the ward against signing a treaty for an unconditional and unqualified cession. The ward, under the circumstances, was reposing perfect trust and confidence in the Government, its guardian, for guidance and protection.

Besides, these Indian treaties are made in furtherance of the policy and interests of the Government, and hence the treaties must be so construed as was understood by these people. The court thus gives expression to this rule of

interpretation in 119 U. S., 27. The recognized relation between the parties is that between a superior and an inferior, whereby the latter is placed under the control of the former, and which, while it authorizes the adoption on the part of the United States of such a policy as their public interests may dictate, recognizes on the other hand such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws.

Now, here, in 1866, the United States, the superior power, is making a treaty with an inferior power under its care and its protection, and a treaty in furtherance of its own policy and its own interests. Clearly the circumstances bring this case, without regard to whether the Choctaws were or not an unlettered people, within the rule laid down for the interpretation of Indian treaties.

Upon this point the Court of Claims (page 58 of their decision, page 407 of Transcript of Record) says:

"Advancements in education and learning had undoubtedly been made. * * *

"Complainant nations had governments of their own, * * * but agencies from our own Government were maintained among the nations, with power that restricted them to a degree, and our courts exercised jurisdiction over their persons. As nations and people they were dependent communities, at least. Illiteracy largely prevailed, if history be written from truthful sources, and the demoralization incident to the close of a great war must have had its effect upon people who, by its results, were made more deeply sensible *than ever before* that they were dependent upon the United States for every personal and political right that they might thereafter enjoy. If any one thing has been

settled in our judicial history it is that the Indians ar
wards of the nation. The relation of guardian and
between the United States and the Choctaws and Ch
saws existed when their last treaty was executed, and
must be such an interpretation of their acts as justice
reason demand where power is exerted by the strong
those to whom they owe care and protection."

The language of Chief Justice Marshall in Worces
Georgia has been so often and lately applied, the rul
not be ignored in the construction of a treaty exe
by the claimants a generation ago, whether their a
considered as the acts of an ignorant people or
of a people helpless and otherwise at a disadva
(See the Kansas Indians, 5th Wall., 737, 760; U.
Kagama, 118 *ib.*, 375–383; Choctaw Nation *vs.* U. S
ib., 1–28.)

There are many of the relations of life where e
acting on the same principle which governs in the co
tion of Indian treaties, where confidence is actually r
by one party in the other, will, in the aid of good
come to the relief of one of these parties as again
other. Such are the relations of guardian and ward
and attorney, principal and agent, and insured and i
Here, as illustrated in the case of insured and insur
the duty of the insured to communicate every fact
insurer which could affect his mind in entering i
contract (3d Kent. 285).

"Where such relations exist," says Judge Story, "c
equity, acting upon this superinduced ground, in aid
morals, will not suffer one party, standing in a situa
which he can avoid himself against the other, to de
vantage from that circumstance, for it is founded on a
of confidence" (Story's Equity, vol. 1, § 308).

We believe that the Government did so act towar
people and so represented to them its desire for th
sition of its land *for Indian purposes only*, that they

when they executed the treaty of April 28, 1866, that they ceded the leased district *in trust* for the settlement thereon of friendly tribes of Indians only, with the possibility, in case of necessity, of Indian freedmen.

The whole history of the negotiation shows that this was the case.

It was evidenced in the submission of the fifth stipulation at Fort Smith in September, 1865, to the Choctaws and Chickasaws, as well as to the Creeks, Seminoles, and Cherokees; in the submission of the fourth article of a draft of a treaty by the United States commissioners to the Choctaws and Chickasaws; in the absence of any evidence in the record showing that any other information on the subject was ever furnished the Choctaws and Chickasaws; in the report of Indian Commissioner Cooley in 1866, concerning the purposes of the treaty executed with them; in the recitals in the treaty with the Delawares in July, 1866, as to the purposes for which the lands had been acquired; in the location of Indian tribes in the leased district in pursuance of the treaty; in the oft-repeated expressions of opinions of executive officials of the Government, and in the declaration in the act of March 3, 1891, acknowledging that the Government, as trustee, held these lands *in trust*.

THE GREAT INJUSTICE OF CONSTRUING THE CESSION OF 1866 AS AN ABSOLUTE CESSION.

But we cannot leave this question without calling attention to the great injustice which would be done by treating the cession of 1866 as an absolute cession. It will be recollected that by the ninth article of the treaty of 1855 the Choctaws forever quitclaimed and relinquished to the United States all their right, title, and interest in and to all lands west of the 100th degree of west longitude, a tract of country containing an area of 6,589,440 acres. It will be recollected that the title to this tract had been acquired by

the Choctaws from the United States, under the treaty of October 18, 1820, in exchange for a portion of their lands east of the Mississippi, conveyed by them to the United States, and that they had been deprived of the possession of this large tract by the cession of the same by the United States to Spain, by a subsequent treaty ratified in February, 1821. By the same article, the Choctaws and Chickasaws had leased to the United States another large tract of land for Indian purposes, containing an area of 7,713,239 acres. By the tenth article of the treaty of 1855, it was provided that the United States should pay for the relinquishment and for the lease $800,000, in the proportion of $600,000 to the Choctaws and $200,000 to the Chickasaws. There was no apportionment of how much was to be paid for the relinquishment nor how much for the lease.

But if we appropriate in equity the whole $800,000 to the extinguishment of the title to the lands west of 100th degree of west longitude it will not amount to 12½ cents an acre. Then the United States would have acquired 7,713,239 acres under the lease without the payment of a dollar. If we apply $400,000 on the extinguishment of the claim to the land west of 100 degrees, then the United States would have extinguished this claim at less than 6¼ cents an acre, and if we apply the remaining $400,000 on the lease, then the United States would have paid for the lease a rental value per year of less than one-half a cent an acre for eleven years, from the date of the treaty of 1855 to the date of the treaty of 1866. Certainly no part of this sum of $800,000 could in equity be applied on the purchase-money of the land. When the land was ceded, in 1866, not a dollar was paid on account of the land. When the Cheyenne and Arapahoe reservation was opened to settlement the Government paid the Choctaws and Chickasaws $1.25 per acre. After deducting allotments for the Cheyennes and Arapahoes that reservation amounted to 2,489,160 acres.

Deducting this, and we have over 5,200,000 acres as the

balance of the leased district. Of this residue of the leased district the reservation of the Wichitas and affiliated bands, amounting to 743,610 acres, is a part. Now, if this cession of 1866 is held to be an absolute and unqualified cession, then the Government acquires not merely the reservation of the Wichitas and affiliated bands without the payment of a dollar, but also all the balance of the leased district. This land is as valuable as the surplus lands of the Creeks and the Seminoles, acquired in 1889, or the surplus lands of the Cherokees, in 1892. The Government paid the Creeks and Seminoles $1.25 per acre and the Cherokees $1.42 per acre. The entire leased district was valued at $5 an acre according to an estimate placed on the same submitted in Senate Report 552, 52d Congress, 1st session, page 10. This would amount to forty millions of dollars. Is it to be held that the Government is to acquire the residue of this valuable Leased District land, amounting to more than five millions of acres, without the payment of a dollar? But this seems to be the consequence if this cession of 1866 is to be held to be an absolute and unqualified cession. It is impossible to conceive that these people ever assented to any such cession. It is utterly inconceivable that the Choctaws and Chickasaws could make such a bargain, and it is utterly untrue that any such bargain was ever made. Such monstrous injustice could never be tolerated at any time in any country.

Even the counsel on the other side see this injustice if the cession is to be treated as an absolute cession, and they seek to explain it on the ground that it was a penalty for their having engaged in the rebellion. These 5,200,000 acres are to be appropriated without the payment of a dollar. Here were a people incapable of committing treason, without protection on the part of the United States at the time, who participated in the rebellion, and they are to be punished with a confiscation of 5,200,000 acres of land. The war had closed. Horace Greeley said, "The hour of victory

is the hour of magnanimity." The great captain of the Union armies said, "Let us have peace." That was the policy of the Government towards the people of the South. Not a foot of land belonging to the great leaders of the rebellion was taken, and yet we are told by the counsel for the Government and the counsel for the Wichitas and affiliated bands that, as a penalty for participation in this rebellion, a great and powerful Government will take from this weak and defenseless people 5,200,000 acres of land.

I will not believe, nor do I for a moment suppose that this court will believe, that a great and powerful, aye, an omnipotent Government, so far as these Choctaws and Chickasaws were concerned, would abstain from confiscation in the case of the white people of the South, but would impose its pains and penalties on the weak and defenseless red men of the West.

But it was not an absolute cession, and we think we have said enough to show that it was a cession for the purpose of locating on these lands friendly tribes from Kansas and elsewhere, in addition to the Wichitas and other bands of Indians, whom the Government was permitted to locate thereon by the treaty of 1855, with a reversionary interest to the Choctaws and Chickasaws whenever the Government should attempt to divert the lands from the purposes for which they were leased in 1855 or ceded in 1866.

Our assignment of error to the decision of the Court of Claims is based on the ground that, if the lands were ceded in trust, the court erred in decreeing one hundred and sixty acres of land to each member of the Wichita and affiliated bands. The treaty of 1855 provided not for the location of individual Indians on the land leased, but tribes. The demand made in the fifth requirement at the Fort Smith conference was a cession of land for the location of Indian tribes thereon. In the official report the fifth stipulation reads:

"A portion of the lands hitherto owned and occupied by you, must be set apart for the friendly tribes, now in Kansas or elsewhere, on such terms as may be agreed upon by the parties, and approved by the Government, or such as may be fixed by the Government."

The fifth article of the unsigned treaty of 1865 contemplated a modification of the ninth article of the treaty of 1855, so as to permit the location of other tribes in the leased district. Clearly, only tribal occupancy was contemplated; but the Court of Claims seek to provide for Indians in their individual capacity, upon a dissolution of the tribes. This was never contemplated, and to this extent, we think, the court erred.

We have thus submitted, in all candor, the grounds on which are based in this controversy the claims, the rights and equities of the Choctaws and Chickasaws. In the effort to sustain them we have only resorted to the history of the country, to public official documents, and to such testimony as enlightened and impartial tribunals always recognize and approve. We have invoked only such principles of law as the highest courts of the land have laid down as guides in the investigation of human affairs and human conduct. The conclusions we have drawn are before the court. Whatever may be the rights and equities of others, the Wichitas, the Caddoes, the Wacoes, or any other tribe or people, the rights and equities of the Choctaws and Chickasaws as between them and the United States in this controversy must still remain. They arise out of the relations between them and the United States, the treaties into which they have entered, and the history of the country as affecting these tribes and the Government for more than three-quarters of a century. Whatever may be the rights of others; however defective may be the title which the United States conveyed to us under the treaties of 1820, 1825, and 1830; however encumbered by any claim of any tribes based on a title of occupancy; whatever defect may

be in the patent from the United States to the Choctaw Nation; whatever rights other Indians may by any possibility have under any agreements between them and the United States—these our rights and equities still subsist. The United States is still under solemn obligations to secure them to us, and, failing to do so, to render us ample compensation for all the loss which we thereby sustain.

ANSWER OF THE DEFENDANT INDIANS.

This brings us to the consideration of the answer of the defendant Indians. In this answer these defendants first deny the rights and equities of the Choctaws and Chickasaws. These we have already considered sufficiently in the argument which we have had the honor to submit, and we do not propose again to return to this branch of the question.

The answer then asserts an aboriginal right of occupancy in the Wichitas in the land in controversy, which they say has never been extinguished, and is subject only to the rights acquired therein by the affiliated bands, through their joint occupancy of the same with the Wichitas since 1859.

They assert that the land conveyed to the Choctaws by the treaty of October 18, 1820, was part of a tract conveyed to the United States by the Quapaws by treaty of 1818 (7th Stats., 176), but they say that the aboriginal right of possession was not in the Quapaws, and therefore the United States did not acquire title under said treaty, and therefore the United States could not convey title to the Choctaws by the treaty of 1820.

A.R. 8

A.R. 9

They assert also that their aboriginal rights were acknowledged by the United States and the Choctaws by the treaty of August 24, 1835 (7th Stat., 474).

A.R. 16

They also assert that the so-called leased district was confirmed to them by a certain agreement, which was an

al agreement, which they allege was made at Fort Arbuckle
1859.

They also place some reliance on what is known as the A.R.38
nratified agreement of 1872.

We have seen, according to census bulletin 1890, No. 25, that the Wichitas and affiliated bands do not exceed 1,100 people, of whom not more than 175 are Wichitas. They have never exceeded over 300 in number. These Wichitas are without any records or memorials of any kind, and were until a very late period naked savages—in the very lowest state (Report of John Sibley to Secretary of War, 1805; American State Papers, vol. 1st, Indian Affairs, p. 721, cited on Paine's Brief, pp. 82, 83; Def't Indian Brief, p. 141). They were found generally naked, 1834 (Dodge Journal, filed in this case). They were still naked savages, 1869 (Report of Commissioner of Indian Affairs, 1869, p. 29). It has been well said that the first step in elevating the savage from the lowest condition is to put a shirt on him. They had not even taken the first step within this historical period of sixty-four years. Now, these are the people in whom it is claimed exists the aboriginal right of occupancy to an immense body of land, sufficient for an empire, which embraces the land in controversy.

Now, what do we understand by the aboriginal right of occupancy? This aboriginal right of occupancy is a principle recognized by the law of nations. It has been thus stated:

> It is a fundamental principle of the law of nations that the aboriginal inhabitants of the soil possess only a right of occupancy, and *the measure of that occupancy* is determined by the extent of their wants and of their capacity to use the soil to supply those wants (1 Grotius, 2 C., 11; 2 Black. Com., 2).

In the brief of counsel for defendant Indians, in the Court of Claims (pp. 37 and 38), a number of decisions are

quoted to the effect that the aboriginal title in this country exists in the Indians, and that is one of occupancy only, the United States holding the fee. But in these decisions as quoted the courts are speaking of the aboriginal right of occupancy existing in the Indians generally—*of Indians as a race.* They are not discussing the question of the aboriginal right of occupancy as existing in one tribe of Indians to a particular tract of country independently of the right of any other tribe to the same tract of country. And this is the question we have before us. Did the aboriginal right of occupancy in the land in controversy exist in these Wichitas to the exclusion of any other tribe or band of Indians?

In the excellent review of the origin of title to lands in America, Chancellor KENT, in the third volume of his Commentaries, p. 387, says:

A.R. 48 & 49

There has been considerable diversity of opinion, and much ingenious speculation on the claim of right to this country by the Europeans, founded on the title by discovery. We have seen that with respect to the English colonists in America, the claim was modified, and much of its extravagance destroyed by conceding to the native tribes, their political rights and privileges, as dependent allies, and their qualified title to the soil. As far as Indian rights and territories were defined, and acknowledged by the whites by treaty, there was no question in the case, for the whites were bound by the moral and national obligations of contract and good faith, and as far as Indian nations had formed themselves into regular organized governments, *within reasonable and definite limits*, necessary for the hunter State there would seem to be no ground to deny the absolute nature of their territorial and political rights. But beyond these points our colonial ancestors were not willing to go

And beyond this rule, if so far, I do not think we, the descendants, have been willing to go. We are willing to concede an aboriginal right of occupancy in Indians generally—in Indians as a race, because there was no oth

race on the continent at the discovery of America by the white man; but when an aboriginal right is asserted in a particular tribe, we cannot and do not concede it unless we find in that tribe some sort of governmental organization and its claims to aboriginal occupancy asserted to an extent of territory within reasonable and definite limits and its right recognized and acknowledged by others. I apprehend that when the courts have been called on to pass on this question as regards the rights of tribes it was concerning the rights of tribes who had some sort of governmental organization and whose claims to territory were within ascertained and reasonable limits. Such was the case with the Cherokees, Creeks, Choctaws, and Chickasaws, whose definite and ascertained territorial limits in their ancient homes east of the Mississippi river were recognized from the earliest formation of our Government. We may therefore concede an aboriginal right of occupancy in the Indians as a race, even to the whole continent, there being no other race dwelling on the continent; but we cannot recognize a right in a particular tribe except to definite territory, within reasonable and ascertained boundaries, measured by the wants of the tribe and their capacity to use the soil to supply those wants, and we must find in the tribe some sort of governmental organization through which the right can be asserted and by which it has been maintained. A loose and uncertain claim of aboriginal right in a particular tribe, unrecognized by other tribes or nations, cannot well be reasonably asserted in any court.

We therefore conclude that a claim to territory based on an aboriginal right of occupancy by a particular tribe cannot be asserted in a court of justice, unless it is shown by proper evidence what are the definite limits of the territory claimed with reasonable certainty; that the claim to the territory so described is an exclusive claim; that the territory described has been held adversely, and that the claim

has been recognized and acknowledged by other surrounding tribes or nations.

Now, we are not here to contend that the Quapaws had a perfect aboriginal right to the land conveyed to the United States by the Quapaw treaty of 1818. We have not sufficient evidence to decide this question.

The Choctaws did not accept a transfer of the title which the United States acquired from the Quapaws. The Choctaws acquired their title by exchanging lands, wholly unencumbered, in the State of Mississippi, for lands, wholly unencumbered, west of the Mississippi river, *without any reference to any right which the Quapaws or any other tribe had or might have had therein. The Choctaws therefore look alone to the United States for protection of their title. But while we make no such claim for the Quapaws, we think, so far as the historical record discloses, the aboriginal right of occupancy did not exist in the Wichitas, but the evidence strongly indicates in the Quapaws.*

A.R. 8

In 1818 the United States purchased by treaty (see 7th Stat., p. 176) from the Quapaws the aboriginal title of occupation. This was fifteen years after the acquisition of Louisiana from France. The agents and officials of the United States Government had been for years exploring this region. It was the interest of the Government to ascertain and know who possessed this aboriginal title of occupation. Care and caution were required that they should make this treaty with the true owners of the possessory title. A map of the country accompanied the treaty. It was submitted to the United States Senate. No objection was made by the Wichitas or any other people. The treaty was ratified by the Senate and proclaimed by the President. This treaty, under the Constitution, is a part of the supreme law of the land, and as such must be respected and enforced by the courts of the United States.

Accompanying the treaty was a letter from the United States commissioners who executed it—William Clark and

st Chouteau. A copy of this letter is filed with the nce in this case. It bears date September 6, 1818. letter states that the country ceded is a large tract h at all times heretofore has been considered their rty (property of the Quapaws), as well by the former rnments as by the Osages, their neighbors), embracing ie white settlements in that quarter and far to the west em. There is no mention made of any such people as Wichitas in this letter (American State Papers, vol. 11, Affairs, p. 177).

is to be observed that this treaty is made with the chiefs warriors of said nation; that the territory ceded, which n well-defined limits, has been acknowledged as the perty of the Quapaws by the previous governments of in and France, as well as by their neighbors, the Osages. w, this treaty, before its passage, passed the scrutiny of United States Senate.

Now, I do not hesitate to say that while this evidence is t sufficient to satisfy my mind as to the aboriginal right the Quapaws to this land, I do not find in the whole mass testimony referred to by the counsel for defendant Indians ny testimony in favor of the Wichitas which will compare ith this testimony of Clark and Chouteau in favor of the laim of the Quapaws. Where are the limits of the Wichita laim? When was it set up? How has it been maintained? What tribe or nation has ever recognized it?

But, further, the United States by treating with the Quapaw Indians recognized in such Indians a right to said lands similar to the rights in lands generally recognized in Indian tribes with whom the United States have made treaties (United States *vs.* Brooks, 10th How., 442, side p. 459).

So much for the present insistence of the counsel for the defendant Indians, that the Quapaws did not have the aboriginal title to the leased district, nor any part thereof. We now first inquire, When did the Wichitas assert their

claim? There was no such claim asserted in 1820, when the United States ceded this land to the Choctaws; nor in 1830, when the United States assured the Choctaws that a patent would issue to them for this land; nor in 1842, when the patent issued; nor in 1855, for in February, 1855, Superintendent Neighbors suggests negotiations with the Choctaws for the acquisition of land on which to colonize the Wichitas and other prairie Indians (Senate Ex. Doc. 13, 48th Cong., 1st session, p. 15). Acting on this suggestion, the United States, in June, 1855, leased the district from the Choctaws and Chickasaws for the purpose of colonizing thereon the Wichitas and other tribes of Indians. If the Wichitas were already there, occupying these lands by the aboriginal right of occupancy, why lease the lands for the purpose of settling them there? Clearly at that time there was no recognition of any such right existing in them (Treaty of 1855; Revision of Indian Treaties, p. 274, 11th Stat., 611). Treaty after treaty has been made by the United States conveying title to this land, and yet we are now told that these treaties are all void as against the Wichitas, because they had an aboriginal title of occupation which has never been extinguished. The United States acquired title again in 1855 and 1866, to so much of these lands as are known as the leased district. The Wichitas asserted no rights at either period. Moreover, it is to be borne in mind that they were present *and participated in the conference at Fort Smith* in September, 1865. *They then pronounced the treaty of August* 12, 1861, *alleged to have been made* with the Confederate States, to *be a forgery* (pp. 298–304, 318, 334, 335, Report of Commissioner Cooley and proceedings of conference at Fort Smith, submitted with report of Commissioner of Indian Affairs for 1865). It was mere assertion. No evidence was offered in support of it. We know that the Wichitas and affiliated bands were already located in the leased district as early as 1859 by virtue of the provisions of the treaty of 1855. They knew what was the object of the conference at Fort Smith. They could not

A.R. 109

have been ignorant of the seven propositions submitted at the conference, which were printed and freely circulated through the agents of the different tribes. *Their agent was present* (p. 313). *He participated, together with the Wichitas,* in the proceedings (p. 334, 335). They knew that one, probably the most important of all the seven propositions, was the requirement of the Government that the Indians owning lands in the Indian Territory should sell a part of their lands for the settlement thereon of Indians from Kansas and elsewhere. As inhabitants of the leased district, they were deeply and vitally interested in this question. If they had any aboriginal right in these lands, they now had full opportunity to assert this right. Whatever excuse they may offer for neglecting to assert this right theretofore, they cannot, if they failed to assert their rights then, offer any plea whatever—not even the plea of ignorance. Here upon this point the record is entirely silent. Their mouths are forever sealed.

But even if we consider their claim, on what kind of evidence does it rest?

The evidence of aboriginal right in the Wichitas is found in tradition recited in affidavits of old Indians, in interpretations which they offer of matter in ethnological dictionaries, in fragmentary accounts of ancient travelers through unexplored regions, in the assertions of the Wichitas of today concerning their ancestry, a people without writings, without records, without memorials of any kind or character. I cannot conceive of a court of law giving credence to tales of this kind as evidence. They are too much of the character of that class of literature respecting the early history of America of which Mr. Bancroft speaks when he describes them as tales "as wild as fancy could invent or credulity repeat." So far as they may be deemed worthy of investigation I must leave them to the criticism of my learned and accomplished associate, General Paine, who shows, as a result of scientific research and investigation, that the

Wichitas were always a small and wandering tribe, never exceeding over three hundred in number, roving over an immense territory, never having any fixed home or abode, and certainly never within an historical period having an habitat within what is now known as the leased district, from which could have arisen an aboriginal right of occupancy.

If there be any value in the evidence offered by the defendants to establish a right of occupancy in the Wichitas to the country now known as the leased district, it is absolutely dispelled by the testimony in rebuttal on this point and by the searching criticism of General Paine. But if no testimony had been offered in rebuttal, this evidence on the part of the defendants could not possibly have supported any claim of a right of occupancy. It is too intangible for a court of justice to take hold of it. It rests on none of the ordinary grounds of human belief.

To me this effort to ascertain the home of this wandering tribe a century or two ago would be a fruitless undertaking.

But this claim to original occupancy has been heretofore investigated by the Government in considering the question what land should be assigned in the leased district (Senate Ex. Doc. No. 13, 48th Cong., 1st session). Mr. Price, Commissioner of Indian Affairs, in a communication dated October 9, 1883 (p. 6), says Special Agent Townsend concludes that they (the Wichitas) have no more foundation in fact for the claims to original occupancy of the tract claimed by them than they have to certain tracts or districts in Kansas, New Mexico, or Texas through which they may have roamed and where they have sojourned temporarily. This conclusion appears to be correct. The nature of the occupany of the country by these Indians is not such as to impeach the title derived from the Quapaws, which has been recognized by subsequent treaties with the Choctaws and

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others (page 6. See also Special Agent Townsend's report, same document, pp. 43, 45, and 47).

Again the answer sets forth as evidence of this claim the treaty of August 24, 1835 (7 Statutes, 474), quoted on page 22 of answer. A.R. 16

The preamble recites the purpose of the treaty to be—

For the purpose of establishing and perpetuating peace and friendship between the United States of America and the Comanche and Wichita Nations and their associated bands or tribes of Indians, and between these nations or tribes and the Cherokee, Muscogee, Choctaw, Osage, Seneca, and Quapaw nations or tribes of Indians.

Article 1 provides:

There shall be perpetual peace and friendship between all the citizens of the United States and all the individuals composing the Comanche and Wichita Nations, and their associated bands or tribes, and the Cherokees, &c.

Article 2 provides:

Every injury or act of hostility by one or either of the contracting parties shall be mutually forgiven and forever forgot, &c.

Article 3 provides:

There shall be a free and friendly intercourse between all the contracting parties hereto, and it is distinctly understood and agreed by the Comanche and Wichita Nations, and their associated bands or tribes of Indians, that the citizens of the United States are freely permitted to pass and repass through their settlements or hunting grounds without molestation or injury on their way to any of the provinces of the Republic of Mexico, &c.

Article 4 provides:

It is understood and agreed by all the nations or tribes of Indians, parties to this treaty, that each and all of the said nations or tribes have free permission to hunt and trap

in the Great Prairie west of the Cross Timbers to the western limits of the United States.

Article 5 provides:

The Comanche and Wichita Nations, and their associated tribes or bands of Indians, severally agree and bind themselves to pay full value for any injury their people may do to the goods or other property of such traders as the President of the United States may place near to the settlements or hunting ground for the purpose of trading with them.

Article 6 provides:

The Comanche and Wichita nations, and their associated bands or tribes of Indians, agree that in the event of any of the red people belonging to the nations or tribes residing south of the Missouri river and west of the State of Missouri, not parties to this treaty, should visit their own towns or be found in their hunting grounds they will treat them with kindness and friendship, and do no injury to them in any way whatever.

We do not quote articles 7, 8, and 10, as counsel for defendant Indians do not deem them of sufficient importance to quote them. As they quote article 9, we do also.

Article 9 is as follows:

The Comanche and Wichita Nations and their associated bands or tribes of Indians agree that their entering into this treaty shall in no respect interrupt their friendly relations with the Republic of Mexico, where they all frequently hunt, and the Comanche Nation principally inhabit; and it is distinctly understood that the Government of the United States desire that perfect peace shall exist between the nations or tribes named in this article and the said Republic.

G.R. 16

Two years afterwards, on the 28th of May, 1837 (see 7th Statutes, p. 533) a treaty almost identical in language was made with the Kiowa, Kataka, and Tawakaro Indians. The Muscogees or Creeks and Osages were also parties to this treaty. Like the treaty of 1835, it was simply a treaty for

the establishment and preservation of peace between these tribes in the United States. Like the treaty of 1835, it provides, too, that—

> it is understood and agreed by all the nations or tribes of Indians, parties to this treaty, that each and all of the said nations or tribes have free permission to hunt and trap in the Great Prairie, west of the Cross Timbers to the western limits.

All of the parties, then, to the treaty of 1837, as well as the parties to the treaty of 1835, had the right to hunt and trap in this same Great Prairie.

Now the counsel for the defendant Indians seriously insist that both the United States Government and the Choctaw Nation of Indians, as parties to the treaty of 1835, admit by this treaty such an occupancy of this region of country in the Wichitas as concedes an aboriginal right in the Wichitas to the country described as the Great Prairie west of the Cross Timbers to the western limits of the United States.

This seems to us a very long-drawn conclusion. We are almost disposed to dismiss this contention by simply requesting the court to read the treaties of 1835 and 1837, and decide without any argument thereon. But we think we may say in all candor the counsel entirely mistake the character and scope of these treaties. The sole purpose of either treaty is the establishment and preservation of peace among the several tribes named with each other and the United States. There is no admission of such occupancy by any tribe from which could be inferred an aboriginal right of occupancy in any tribe in or to any territory.

There is certainly no such intention expressed in the treaty, nor is there any statement made from which such an intention could be implied. There is nothing in the treaty recognizing any title of any tribe in any territory, nor is there anything stated from which such a title could be implied. The treaty was not made for any such purpose.

There certainly is no right to the soil anywhere conceded or granted. As Judge Wilson remarks in his brief, page 75:

If the contention of the Wichitas is correct, it just as much establishes a right of occupancy in the Comanche, Osage, Seneca, Quapaw, Muscogee, and Cherokee Indians as in them. That all of these Indians had the exclusive right of occupancy of this land is simply preposterous, and the fact that they were all mentioned in the treaty confirms our theory that the Wichitas, in common with many other tribes or bands, may have roamed over and hunted in these lands, but negatives the idea that they had any such inherent rights therein, by reason of their alleged occupancy, as would entitle them to compensation upon the sale thereof by the United States.

The truth is, there is *no right* conceded in the treaty. There is a permission granted to each of the tribes to hunt and trap in the region described, and this permission is granted to one of these tribes as much as to another. It was a mere license to each of these tribes to hunt and trap on the land described, but as a license it was revocable at pleasure.

There is nothing in the treaty recognizing a title of any kind, in any tribe, to any territory. If there had been, the limits of such territory would have been defined and the character and extent of title set forth. It was apparent that all these tribes were in the habit of passing through this country and hunting in it. It is no more an estoppel in favor of the Wichitas as against the United States and the Choctaws than it is an estoppel in favor of the Choctaws or any other tribe named against the Wichitas.

It was a mere agreement for peace and a mere understanding that each tribe might hunt in the Great Prairie west of the Cross Timbers without molestation from any other.

But, in addition, we desire to supplement what we have said in reference to the character of this treaty by reference to a passage in instructions issued in 1837 by the Indian

Department to Col. A. P. Chouteau, special agent to the Comanches and others. The treaty of 1835 was executed on the 24th of August of that year (7th Stat., 474) on the part of the United States by Commissioners Stokes and Arbuckle. The treaty of 1837 was executed on the 26th of May of that year (7th Stat., 533) on the part of the United States by the same Commissioner Stokes and by Commissioner Chouteau, the special agent just named. The instructions to Chouteau, accompanying his appointment, bear date the 7th of April, 1837. The Indian Department and the Commissioners must have been very familiar with the treaty of 1835 and with the objects to be accomplished by the treaty of 1837. These instructions can be found in requests for findings of facts by counsel for defendant Indians, pp. X, XI, and XII, filed with their brief in the Court of Claims.

In the course of these instructions, on page XI, the department advises Colonel Chouteau:

It has been further stated that the Comanches are dissatisfied because the Creeks and Choctaws have extended their occupation and improvements to the country heretofore used by themselves as hunting grounds. This matter should be explained to them, so that they may *understand that the United States having purchased these lands from the tribes* possessing the occupant title, *has guaranteed the exclusive right* in it to the emigrant Indians. They cannot therefore be permitted to hunt upon it, after the latter are prepared to settle upon and cultivate it.

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It is impossible to doubt that the hunting grounds referred to are the hunting grounds referred to in the fourth article of the treaty of 1835 as the Great Prairie west of the Cross Timbers to the western limits of the United States. Counsel for defendant Indians quote authorities as to location of Cross Timbers (their brief, pages 5, 6, and 7). We cannot quote them all. We take the first. It is from the article in the American edition of the Encyclopedia Britannica,

title "Indian Territory." Speaking of this Territory, the article reads:

The eastern portion is fertile and well watered. The surface is mainly rolling prairie, with broad stretches of rich land along the streams and an abundance of timber. This section of the Territory is separated from the western part, which presents a different aspect by a broad belt of forest *known as the Cross Timbers*, which extends nearly across the Territory in *a north and south direction*, making the outcrop of the carboniferous formation. *Its breadth* ranges from forty to sixty miles. *West of this singular strip of forest the country assumes the appearance of the "Great Plains," that long incline which stretches eastward from the base of the Rocky mountains.*

General Paine (p. 76 of his brief) refers to longitude of Cross Timbers. He says they are located on Tanner's map (No. 56), on Kennedy's (No. 49), on Hunt and Randall's (No. 48), and on Austin's (No. 46), at 97° 15′ west longitude.

As then the Cross Timbers extended nearly across the Indian Territory north and south, and were nearly about 97° 15′ west longitude, we may safely conclude that the Grand Prairie west of the Cross Timbers, mentioned in the 4th article of the treaty of 1835, included all that part of the Indian Territory west of 97° 15′, and included all west of that longitude which had been ceded to the Cherokees, Creeks, and Choctaws. Now, Special Agent Chouteau was to explain to the Comanches that the United States had purchased this land from the tribes having the occupant title, and had guaranteed the exclusive right in it to the emigrant Indians (the Cherokees, Creeks, and Choctaws). They are also to be told that they cannot be permitted to hunt upon it after the latter are prepared to settle upon and cultivate it.

A. R. 8

The record discloses that the United States had purchased the occupant title of the Quapaws by the treaty of August 24, 1818 (7th Stat., 176), and had purchased the occupant title of the great and powerful tribe of the Osages by a treaty of June 2, 1825 (7th Stat., 240), covering an immense region

ch embraced nearly all of what was subsequently known the Indian Territory, certainly all of it except what been acquired from the Quapaws. That this was the rpretation which the United States placed on this treaty the Quapaw treaty is shown by the shortly after exed treaties with the Cherokees of May 6, 1828 (7th Stat.,), February 14, 1833 (7th Stat., 414), and the treaty of 29th cember, 1835 (7th Stat., 478), under which what was subquently known as the Cherokee outlet was extended to western limits of the United States, then under the anish treaty of February 22, 1821, fixed as between the kansas and Red rivers at 100 degrees west longitude. It s further shown by the Creek treaty of February 14, 1833 h Stat., 417), under which the United States assigned the untry south of that assigned to the Cherokees, therein deing the limits of the Creek country and fixing the western undary of the Creek country as the Mexican line, which s then 100 degrees west longitude.

And it is still further manifest by the Choctaw treaty of ptember 27, 1830 (7th Stat., 333), which assured the Chocws that a grant should be made to them of the country erein described, fixing the limits of this tract as the westrn limits of the United States, which, as we have just stated, t that time was the 100th degree of west longitude. Furhermore, each of these tribes was assured in their respective reaties that patents should issue to them for these respective racts of country, and which patents were afterward executed.

This discloses the interpretation placed on the Quapaw reaty of 1818 and the Osage treaty of 1825 by the United States. This interpretation was acquiesced in, not only by the Quapaws and the Osages who accepted reservations within the lands they had ceded to the United States, but of every other tribe or people who were in any way associated or connected with this region of country.

The United States had purchased the occupant title to this land and had granted the exclusive right to it to the

title "Indian Territory." Speaking of this Territory, the article reads:

> The eastern portion is fertile and well watered. The surface is mainly rolling prairie, with broad stretches of rich land along the streams and an abundance of timber. This section of the Territory is separated from the western part, which presents a different aspect by a broad belt of forest *known as the Cross Timbers*, which extends nearly across the Territory in *a north and south direction*, making the outcrop of the carboniferous formation. *Its breadth* ranges from forty to sixty miles. *West of this singular strip of forest the country assumes the appearance of the "Great Plains," that long incline which stretches eastward from the base of the Rocky mountains.*

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A.R. 8

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which embraced nearly all of what was subsequently known as the Indian Territory, certainly all of it except what had been acquired from the Quapaws. That this was the interpretation which the United States placed on this treaty and the Quapaw treaty is shown by the shortly after executed treaties with the Cherokees of May 6, 1828 (7th Stat., 311), February 14, 1833 (7th Stat., 414), and the treaty of 29th December, 1835 (7th Stat., 478), under which what was subsequently known as the Cherokee outlet was extended to the western limits of the United States, then under the Spanish treaty of February 22, 1821, fixed as between the Arkansas and Red rivers at 100 degrees west longitude. It was further shown by the Creek treaty of February 14, 1833 (7th Stat., 417), under which the United States assigned the country south of that assigned to the Cherokees, therein defining the limits of the Creek country and fixing the western boundary of the Creek country as the Mexican line, which was then 100 degrees west longitude.

And it is still further manifest by the Choctaw treaty of September 27, 1830 (7th Stat., 333), which assured the Choctaws that a grant should be made to them of the country therein described, fixing the limits of this tract as the western limits of the United States, which, as we have just stated, at that time was the 100th degree of west longitude. Furthermore, each of these tribes was assured in their respective treaties that patents should issue to them for these respective tracts of country, and which patents were afterward executed.

This discloses the interpretation placed on the Quapaw treaty of 1818 and the Osage treaty of 1825 by the United States. This interpretation was acquiesced in, not only by the Quapaws and the Osages who accepted reservations within the lands they had ceded to the United States, but of every other tribe or people who were in any way associated or connected with this region of country.

The United States had purchased the occupant title to this land and had granted the exclusive right to it to the

emigrant Indians. In 1835, in making a treaty for the establishment of peace between all these Indians—emigrant and indigenous—they had made an arrangement by which all were to be permitted to hunt in these grounds, but this permission was revocable at pleasure, and as the Creeks and Choctaws, who had the exclusive right in these lands, extended their settlements west, this permission was to be modified.

Now, this was the construction placed by the United States in 1837 on the treaty of 1835, not twenty months after its execution. It is utterly and absolutely inconsistent with any admission of anything in the treaty of 1835 from which could be implied a right of aboriginal occupancy in the Wichitas in these lands.

We now come to consider the claims of the Wichitas and the other bands under what they call the agreement at Fort Arbuckle.

Again, say the Wichitas and affiliated bands, we have another claim to the leased district based on an agreement had between our tribes and representatives of the United States held at Fort Arbuckle in 1859.

This agreement never assumed the form of a treaty, was never reduced to writing, was never submitted to the Senate, and never ratified by any department of the Government. Besides, the evidence is altogether conflicting as to the agreement itself. The evidence offered on the part of the Indians is altogether oral evidence, made years afterward, and based on recollections of what the United States officials said to the Indians at the council held at Fort Arbuckle. This is entirely too shadowy a claim on which to rest a title to land, and, besides, at that date the United States had only a title as lessee to this district. On the other hand, we have the official reports of the United States officials concerning the understanding at Fort Arbuckle.

February 1, 1855, prior to the treaty with the Choctaws and Chickasaws of June 22, 1855, Superintendent Neigh-

ested the propriety of negotiating with the Choc-
a tract of land lying on the east side of Red river
as Cache creek), near the Wichita mountains, for
nization of the Wichita Indians and such other
ndians as may be convenient to that location (*Sen-*
oc. No. 13, 48*th Cong.*, 1*st session*, *p.* 15). Now, this
country suggested and these were the Indians to
ized. The treaty of 1855 resulted a few months
d. Under this treaty the extent of country was
nlarged and the number of tribes to be provided
tly increased. On January 15, 1859, Agent Blain
50 Indians—Wichitas, Keechies, Caddoes, and a few
es—in his camp, 20 or 25 miles south of Fort Ar-
This camp was in the southwest corner of the Chick-
ntry, where, he says, he is located by the sufferance
hickasaws.

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escribes the leased district; says it is absurd that it
r intended for a small band like the Wichitas and
s; that it is capable of supporting 1,000,000 of in-
ts, and suggests the colonization of various other
(See pp. 16, 17, and 18.) Following this account of
Blain are the reports of Superintendent Rector, of
thern superintendency of Indians, and of Superin-
Neighbors, of the Texas Indians, as to what took
Fort Arbuckle in the council there with the Indians.
ere informed, say these reports, of the selection of
ade for them, with which they expressed themselves
ased, but not one word was said, according to these
about any assurance to them of the country known
eased district (pp. 21, 22, and 24).
rintendent Neighbors again reports to the Commis-
of Indian Affairs on July 18, 1859, enclosing sketches
elections of land made for the Wichitas and Keechies,
ares and Caddoes, and the several bands to be removed
Texas, and which sketch, he says (it being a very ac-
one), I wish should be taken as a part of my report

from Fort Arbuckle on the 2d instant (p. 25). Special Agent Townsend, in a report to the department July 26, 1883 (p. 42), reviews conference at Fort Arbuckle, says promises of the Government as to lands promised have been duly kept, and gives an account of the two tracts of land to be used by these Indians, amounting to 154,240 acres. The sketches of the lands selected are found on the map accompanying this document (No. 13, 48th Cong, 1st session), and also the map accompanying the report of Superintendent Oberly, of Indian Affairs (Senate Ex. Doc. 78, 51st Cong., 1st session).

There is certainly nothing in the oral evidence offered by the Indians of the proceedings at Fort Arbuckle, and still less in the official reports of those proceedings, to support any claim of title whatever to the leased district. When Superintendent Rector submitted his official report the department responded that his proceedings in the matter were approved and confirmed, and this was the only action taken in the premises to give it official force and recognition (Senate Doc. No. 13, 48th Cong., 1st session, p. 44).

The Wichitas and other bands occupied the lands assigned them by the Government officials who met them in council at Fort Arbuckle. The action of these officials, even approved by the department, could give them no title to the lands so assigned. They held the lands assigned by the mere permission of the Government, and even as to these lands were mere tenants at the will and pleasure of the Government. For some reason the Government did not see fit at that time to provide them with a permanent home, as it could have done under the treaty of 1855.

THE UNRATIFIED AGREEMENT OF 1872.

A.R. 38 This brings us next to the consideration of what is called the unratified agreement of 1872. The sketches of the lands assigned in consequence of the proceedings at Fort Arbuckle, as seen on the maps, show that the lands so assigned

were almost, if not altogether, within the tract described in the unratified agreement of 1872. The Indians were dissatisfied with the quantity of land assigned them by virtue of the council at Fort Arbuckle. In 1872 delegates, "chiefs and headmen and members of the Wichita and affiliated bands, duly authorized to act for their people," recites the agreement, were in Washington. Finally, Hon. Francis A. Walker, then Commissioner of Indian Affairs, without any legal authority whatever, entered into an agreement with them by which the tract of country described in the agreement was to be given them—the Wichitas and affiliated bands—for a home. He evidently expected the agreement to be rendered valid by subsequent ratification. It embraced 743,757.19 acres. The lands originally assigned under proceedings at Fort Arbuckle were 154,240 acres, and under this proposed agreement there was added 589,517.19 acres. The tract embraced in this unratified agreement is the tract the Wichitas and affiliated bands cede to the United States, all their right or claim in, by the agreement of June 4, 1891, and which was ratified by act of Congress of March 2, 1895. It is under this act this suit is brought, and these are the lands which constitute the subject-matter of controversy. This agreement had never been even recognized by Congress until the passage of this act of March 2, 1895. The answer states that it was signed by the Indians under protest. Special Agent Townsend, page 46, says in his report that the Indians repudiate and reject the unratified agreement of October 18, 1872, and claim that they were coerced into signing it. If this agreement then is invalid they acquired no title under it to the lands therein described, and they held no title whatever of which they were deprived by opening these lands to settlement under the act of March 2, 1895. The occupation which they held up to this time was a mere permissive occupation, and they were mere tenants at will of the Government. Simultaneously, then, with the ratification of the agreement

of June 4, 1891, under which they surrender all their cl
of every kind to the tract of country described in the
ratified agreement of 1872. Congress confers on the C
taws and Chickasaws the right to bring this suit to as
their claim to the same tract of land. The ratificatio
the agreement is subject to the rights as ascertained.

But besides the assignment of this home for the Wich
and affiliated bands set forth in the first article of this ag
ment, it contained, in the second article, a relinquishmen
the Wichitas and affiliated bands of their aboriginal ri
of occupancy. We would naturally expect in their re
quishment special mention to be made of what defenda
counsel assert to be the special tract of country to wh
these Wichitas, it is *now* insisted, had this aboriginal ri
The confines of this tract, the counsel on page 37 of
brief of defendant Indians, in the Court of Claims, say
established and admitted by the treaty of 1835 to
"The Great Prairie west of the Cross Timbers to the wes
limits of the United States." We have already consi
the Great Prairie—as the common hunting ground o
the parties to the treaties of 1835 and 1837. But the c
sel for defendant Indians felt that more was necessar
ascertaining the special limits of the tract which they c
as being subject to the aboriginal rights of occupancy o
Wichitas. There must be some limits fixed on the n
and the south; so they fix the southern boundary o
United States in that quarter, the aboriginal right o
Wichitas to these lands, west of the Cross Timbers, t
arbitrarily cut off on the south by the establishment o
boundary line between the United States and Spain b
treaty of 1821. "To the north the confines are indet
nate," say they (Defendant Indians' Brief, p. 37, in the
of Claims), "*but for the purposes of this cause they m*
placed at the Canadian." Now, we have already seen
the Cross Timbers, according to the authority quote
defendants' counsel on page 5 of their brief from the

clopedia Britannica, extended in a north and south direction nearly across the Territory. Marcy in his report quoted by counsel for defendant Indians on page 7 of their brief, in the Court of Claims, says the Cross Timbers extended from the Arkansas river (which at the longitude assigned to the Cross Timbers on the maps cited on page 76 of General Paine's brief, in the Court of Claims—97° 15′—is in the northern part of the Cherokee outlet) in a southwesterly direction to the Brazos, some four hundred miles. It is manifest, therefore, that the country referred to in the treaties of 1835 and 1837, under the designation of "the Great Prairie west of the Cross Timbers," as the country in which all the tribes parties to those treaties were to have free permission to hunt and trap, extended north far beyond the Canadian river—certainly through the Creek country—and probably a great way north through the Cherokee outlet.

But notwithstanding this, defendants' counsel say, *for the purposes of this case*, the confines to which the aboriginal right of occupancy of the Wichitas specially applies *may be fixed at the Canadian river*, the northern boundary of the Choctaw cession of 1820. This tract to which this aboriginal right of these 175 to 300 Wichitas especially applies is thus brought within the limits of the Choctaw country. Now, when the chiefs and head men of the Wichitas sign an agreement in 1872, surrendering all their aboriginal rights, we would expect special mention to be made of this accurately defined district of country to which their aboriginal right so particularly applied. More especially have we reason to expect this when we are informed, as we are by counsel for defendant Indians (on p. XII in their requests for findings), filed with their brief in the Court of Claims, in introducing this agreement, that the only action on the part of the United States looking to an extinguishment of the occupancy of the Wichitas, to which the Wichitas were a party, was this agreement.

But still more especially have we reason to expect particular mention of this accurately defined district, in surrendering their aboriginal right of occupancy, when we consider that this district included the very tract of country in which they had been colonized by the United States in 1859, in pursuance of the treaty of 1855 between the Choctaws and Chickasaws and the United States. It is not strange that the United States do not mention it, for the United States never recognized that these wandering Indians ever had any aboriginal right to any specific tract of country, but it is passing strange that under all these circumstances they, the Wichitas, omit all mention of it whatsoever. This tract of country, the truth is, had not even been conceived of in 1872 by the chiefs and head men of the Wichitas as their aboriginal home. The idea was ushered into existence long afterwards. With less accuracy these wandering Indians, but with more regard to the truth of their roaming everywhere, as set forth in General Paine's brief, surrender claims so vague and uncertain that they are not to be considered as rights of any kind whatever.

The second article of this agreement reads:

In consideration of the reservation provided for in the preceding article, the said Wichitas and other affiliated bands, hereby cede and relinquish to the United States all the right, title, interest or claim of any nature whatsoever in and to the lands in Texas, Louisiana, Indian Territory, or elsewhere within the limits of the United States. (See full copy of agreement, Defendant Indians' Requests for Findings, p. XIII.)

It was not sufficient to surrender the aboriginal rights which they and their affiliates had to lands in the Indian Territory, but also to any lands in Texas and Louisiana, and that not being sufficiently full, the words are added "elsewhere within the limits of the United States." As we have not heard of any special tracts to which the aboriginal rights of their affiliates peculiarly applied, we cannot but

conclude that this surrender was a special surrender by the Wichitas of all such claims in Texas, Louisiana, the Indian Territory, or elsewhere within the limits of the United States. What more could be wanted to establish beyond all question that this handful of savage Wichitas never had a local habitation within any definite and reasonable limits upon which could be predicated what is understood as a title based on an aboriginal right of occupancy? What more need be added to show that in their ignorance, nakedness, and savage independence they imagined themselves proprietors of the soil wherever they roamed in Texas, the Indian Territory, Louisiana, or anywhere else in the limits of the United States?

We have nothing further to add concerning the answers of the defendant Indians, except to state that the Wichitas have cost the Government $20,000 to $30,000 per year for twenty-five years, and it was therefore a good trade for it—the Government.

Whatever may have been the character of the title by which the Wichitas held the lands on which they were colonized, there are certain incontestable facts which remain. The Wichitas never paid a dollar for these lands, nor any other good and valuable consideration. They were merely assigned to them as a home by action of the Government. When the Government opens these lands for white settlement, they cease to be a home for Indians. The United States did not and could not convey to them a title through which it could open these lands to white settlement in violation of the terms on which its own title was acquired. Upon the termination of the occupancy of these lands by the Wichitas and affiliated bands, and the opening of the same to white settlement, the legal and equitable rights of the Choctaws and Chickasaws at once attached. The right is one easily ascertainable. It is a right to compensation for subjecting the lands to a purpose not only not contemplated in the grant of the lands, but a purpose in direct con-

flict with the covenants in the treaties of 1820 and 1
under which the Choctaws had been induced to remove
the Indian Territory, and for a purpose for which the lan
it is safe to say, never would have been granted. T
United States have recognized a right to compensation
the case of settlement with Creeks and Seminoles in 18
and with the Choctaws and Chickasaws in 1891, in referen
to the lands occupied by the Cheyennes and Arapaho
In these settlements they have recognized as a rule in e
mating this compensation the difference between the amou
paid for the lands for Indian settlement under treaties
1866 and the value of the lands for white settlement. Th
fixed the price at $1.25 per acre, and deducted the amou
previously paid for the lands for Indian purposes. W
think we have clearly established that in the cession of t
leased lands not a dollar was ever paid for their cessi
save what was paid for the Cheyenne and Arapahoe occ
pation in 1893. These very lands the Choctaws had pa
for by exchanging for them their ancient homes in th
State of Mississippi.

We find nothing in the final review of this case, either i
the answer of the Wichitas and affiliated bands or the ev
dence adduced thereunder, which can abate one jot of th
legal or equitable rights of the Choctaws and Chickasaws i
the premises. We will not now reiterate the grounds, legal
documentary, and historical, on which we have placed thes
rights. We submit them to the examination of the court
with the confident assurance that they will stand the test o
the closest scrutiny, and that the court will rise from th
investigation of this case satisfied that these rights are legal
just, and equitable, and that the Government cannot afford
in honor to disregard them.

GEORGE T. BARNES,
Attorney for Choctaws.

Nos.

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Nos. 337, 338 & 339.

Brf. of Wilson for Appellees

SUPREME COURT U.S.
FILED
MAR 1 1900
JAMES H. MCKENNEY
Clerk.

Filed Mar. 1, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Nos. 337, 338, and 339.

THE UNITED STATES, APPELLANT,

vs.

THE CHOCTAW AND THE CHICKASAW NATIONS
APPELLEES.

J. M. WILSON,
Attorney of Choctaws and Chickasaws.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 2-28-1900

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

Nos. 337, 338, and 339.

THE UNITED STATES, APPELLANT,

vs.

THE CHOCTAW AND THE CHICKASAW NATIONS, APPELLEES.

STATEMENT OF THE CASE.

This case arose out of a controversy in relation to the ownership, legal or equitable, of a tract of land containing 743,257.19 acres of land, or thereabouts, embraced within what is known in this case as "The Leased District," which forms a part of what has heretofore been known as the Indian Territory.

The Choctaw and Chickasaw nations of Indians, claimants in this case, contend that they are in equity the owners in fee-simple of this land; that the United States hold the lands in trust for specific purposes, which will hereinafter be more fully stated, and that as soon as these specific purposes are departed from by the United States the claimant Indians are entitled to the said lands or the value thereof.

The Wichitas and affiliated bands of Indians, defendants, claim to be entitled to said lands (*a*) by virtue of their aboriginal title of occupancy; (*b*) by virtue of a treaty made between them and other Indian tribes and bands in 1835, the particulars of which will be hereinafter fully stated, and (*c*) because of the location of them on lands in the leased district in 1859, pursuant to the treaty of 1855 hereinafter mentioned.

The United States contend that they own said lands by virtue of a certain treaty made between the Choctaw and Chickasaw nations and the United States on the 28th of April, 1866, the provisions of which will be hereinafter fully set out and discussed.

THE FACTS.

1. Prior to 1820 the Choctaws and Chickasaws occupied vast tracts of country east of the Mississippi river, in the States of Mississippi and Alabama. They owned and held these lands by right of their aboriginal possession. They were neighbors, were friendly with and related to each other, and spoke practically the same language. As these States became more and more thickly settled by the whites, many conflicts naturally arose between them and the Indians; the States enacted various laws hostile to the Indians, and the United States, because of this condition of affairs, desired to procure the removal of said Indians from their lands east of the Mississippi to lands west of that river, in a country not occupied by the whites, and where the Indians could have lands and a government of their own, free from intrusion.

2. These conditions resulted in the treaty of the 18th of October, 1820 (7 Stats., 210; Appendix to Record, pages 9, 10, and 11), and the other treaties hereinafter mentioned. By the first article of said treaty of 1820 the Choctaws, who

were then residing east of the Mississippi river, as above stated, ceded to the United States a part of the land held and occupied by them east of said river, namely, about six million acres, in consideration for which the United States, in the second article of said treaty, ceded to the Choctaws a tract of country in what is now known as the Indian Territory, described as follows:

"Beginning on the Arkansas river where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian fork, and up the same to its source; thence due south to the Red river; thence down the Red river to the mouth of Little river which empties itself into Red river on the north side; thence in a direct line to the beginning."

While it is unimportant to be here noted, it may be mentioned that the eastern boundary of this tract was changed by the treaty with the Chocktaws of 1825 (7 Stats., 234, 235).

The lands occupied and held by the Choctaws east of the Mississippi were not burdened with or subject to any Indian occupancy other than their own, and there is no mention made in the treaty of 1820 of the occupation of the lands west of the Mississippi therein ceded, by any Indian nation or tribe whatsoever, and so far as any information is derivable from the treaty, and at least presumably, the Choctaws understood that they were receiving this land, and they did in fact and in law receive it, in fee-simple and as the sole occupants thereof, and for which they paid a valuable consideration.

3. This hostility of the white inhabitants of the Southern States east of the Mississippi river to the Indians within their borders and the desire of the United States to effect their removal to the country west of the Mississippi, and thereby put an end to the controversies that had arisen, resulted, in 1830, in an act of Congress (4 Stats., 411) providing as follows:

"*Be it enacted, &c.*, That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States west of the River Mississippi, not included in any State or organized Territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside and remove there, and to cause each of said districts to be so described, by natural or artificial marks, as to be easily distinguished from every other.

"2. *And be it further enacted*, That it shall and may be lawful for the President to exchange any or all of such districts, so to be laid off and described, with any tribe or nation of Indians now residing within the limits of any of the States or Territories, and with which the United States have existing treaties, for the whole or any part or portion of the territory claimed and occupied by such tribe or nation, within the bounds of any one or more of the States or Territories, where the land claimed and occupied by the Indians is owned by the United States, or the United States are bound to the State within which it lies to extinguish the Indian claim thereto.

"3. *And be it further enacted*, That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided always*, That such lands shall revert to the United States if the Indians become extinct or abandon the same."

4. The treaty of 1820 having resulted only in a partial removal of the Choctaws to the country west of the Mississippi, it was found necessary to resort to further assurances and inducements to obtain their complete removal to said country, and therefore, on the 27th of September, 1830 (7 Stats., 333), another treaty was entered into between the

United States and the Choctaws, from which we quote articles 2, 3, 4, 12, and 18, as follows:

"ARTICLE 2. The United States, under a grant specially to be made by the President of the U. S., shall cause to be conveyed to the Choctaw nation a tract of country west of the Mississippi river, in fee-simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it, beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas river, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red river, and down Red river to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeably to the treaty made and concluded at Washington city in the year 1825. The grant to be executed as soon as the present treaty shall be ratified.

"ARTICLE 3. In consideration of the provisions contained in the several articles of this treaty, the Choctaw nation of Indians consent, and hereby cede to the United States the entire country they own and possess east of the Mississippi river; and they agree to remove beyond the Mississippi river, early as practicable, and will so arrange their removal that as many as possible of their people, not exceeding one-half of the whole number, shall depart during the falls of 1831 and 1832, the residue to follow during the succeeding fall of 1833; a better opportunity in this manner will be afforded the Government to extend to them the facilities and comforts which it is desirable should be extended in conveying them to their new homes.

"ARTICLE 4. The Government and people of the United States are hereby obliged to secure to the said Choctaw nation of red people the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have the right to pass laws for the government of the Choctaw nation of red people and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U. S. shall forever secure said nation from and against all laws except such as from time to time may be enacted in their own national councils, not inconsistent with the Constitution, treaties, and laws of the United States,

and except such as may, and which have been, enacted by Congress, to the extent that Congress, under the Constitution, are required to exercise a legislation over Indian affairs. But the Choctaws, should this treaty be ratified, express a wish that Congress may grant to the Choctaws the right of punishing by their own laws any white man who shall come into their nation and infringe any of their national regulations.

"ARTICLE 12. All intruders shall be removed from the Choctaw nation, and kept without it. Private property to be always respected and on no occasion taken for public purposes without just compensation being made therefor to the rightful owner," &c.

"ARTICLE 18. The U. S. shall cause the lands hereby ceded to be surveyed; and surveyors may enter the Choctaw country for that purpose, conducting themselves properly and disturbing or interrupting none of the Choctaw people. But no person is to be permitted to settle within the nation, or the lands to be sold before the Choctaws shall remove. And for the payment of the several amounts secured in this treaty, the lands hereby ceded are to remain a fund pledged to that purpose until the debt shall be provided for and arranged. And further it is agreed that in the construction of this treaty wherever well-founded doubt shall arise, it shall be construed most favorably towards the Choctaws."

This treaty was executed irrespective of the act of Congress above quoted. In it there will be found various provisions, not above quoted, with reference to the removal of the Choctaws from their country east of the Mississippi to the territory ceded to them by the treaty of 1820, and from these provisions it will appear that not only was this cession of the land west of the Mississippi to the Choctaws contemplated, but their removal from the country east of the Mississippi, where their presence was so obnoxious, was secured (119 U. S., 37).

The particular features of said treaty to which we beg to invite the attention of the court are:

(a.) A stipulation that the United States, under a special agreement made by the President, "shall cause to be con-

eyed to the Choctaw nation a tract of country west of the lississippi river, in fee-simple, to them and their descend-nts, to inure to them while they shall exist as a nation and ve on it."

(*b.*) In consideration of the provisions contained in the everal articles of said treaty, the Choctaws ceded to the nited States "the entire country they own and possess ast of the Mississippi river, and they agree to remove be-ond the Mississippi river as early as practicable, and will arrange their removal that as many as possible of their eople, not exceeding one-half their whole number, shall epart during the falls of 1831 and 1832, the residue to llow during the succeeding fall of 1833."

(*c.*) The United States agree to secure "to the Choctaw nation of red people the jurisdiction and government of all the persons and property that may be within their limits," and it is stipulated on the part of the United tates "that no State shall ever have a right to pass laws for the government of the Choctaw nation of red people and their descendants, and that no part of the land granted to them shall ever be embraced in a Territory or State."

5. Pursuant to this treaty of 1830 the removal of the hoctaws began, and, without detailing any of the history onnected with that removal, it is sufficient for the purpose f this statement to call attention to the fact that by the treaty f 1830 the United States were under the obligation to con-ey to the Choctaws and their descendants in fee-simple he lands so assigned to them west of the Mississippi. Ac-ordingly on the 22d of March, 1842, a patent was issued y the President of the United States containing the fol-owing provisions:

"The United States of America, in consideration of the remises, and in execution of the agreement and stipulation

in the aforesaid treaty, have given and granted, and by these presents do give and grant, unto the said Choctaw nation the aforesaid tract of country west of the Mississippi, to have and to hold the same, with all the rights, privileges, immunities and appurtenances, as intended to be conveyed to them in the aforesaid article, in fee-simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it, liable to no transfer and alienation except to the United States and with their consent."

App. Record, p. 29.

This patent was duly recorded.

6. Pursuant to the purpose of the Government of the United States to remove from the States east of the Mississippi the various Indian nations and tribes that were causing dissensions and conflicts, practically the same arrangements were made with the Chickasaws, Cherokees, Seminoles, and Creeks, by which these Indians relinquished their territory east of the Mississippi and removed to the Indian country west of that river. (See treaty with Cherokees, July 8, 1817, 7 Stats., 156; treaty with Creeks, February 12, 1825, 7 Stats., 237, and treaty with Seminoles, March 28, 1833, 7 Stats., 423.) In the case of the Chickasaws, however, a distinction was made, to which we shall presently refer.

The Chickasaws, although neighbors of and speaking practically the same language as the Choctaws, as above stated, were a distinct and independent nation of Indians, occupying a large tract of country in the States of Tennessee and Mississippi. In furtherance of the purposes and policy above stated, on the 20th of October, 1832, the United States entered into a treaty with these Indians, which was proclaimed on the 1st of March, 1832 (7 Stats., 381), by the first article of which they ceded to the United States all their said property lying east of the Mississippi. By article 2 of this treaty the United States agreed to have the prop-

erty so ceded surveyed and sold, and in article 3 it is provided that, as a consideration for said cession, payment shall be made to the Chickasaws from time to time of the proceeds of such sales, deducting expenses of survey, sale, etc.; the United States to aid them in a home west of the Mississippi.

Under these conditions negotiations were carried on between the Choctaws and Chickasaws, at the instance and under the supervision of the United States, the result of which was that, on the 17th of February, 1837, a convention was entered into between the Choctaw and Chickasaw nations (11 Stats., 573), which was approved by the Senate and President of the United States, the first and third articles of which are as follows:

"ARTICLE 1. It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country, to be held on the same terms that the Choctaws now hold it, except the *right* of disposing of it, which is held in common with the Choctaws and Chickasaws, to be called the Chickasaw district of the Choctaw nation, to have an equal representation in their general council, and to be placed on an equal footing in every other respect with any of the other districts of said nation, except a voice in the management of the consideration which is given for these rights and privileges; and the Chickasaw people to be entitled to all the rights and privileges of Choctaws, with the exception of participating in the Choctaw annuities, and the consideration to be paid for these rights and privileges, and to be subject to the same laws to which the Chactaws are; but the Chickasaws reserve to themselves the sole right and privilege of controlling and managing the residue of their funds, as far as is consistent with the late treaty between the said people and the Government of the United States, and of making such regulations and electing such officers for that purpose as they may think proper.

"ARTICLE 3. The Chickasaws agree to pay the Choctaws, as a consideration for these rights and privileges, the sum of five hundred and thirty thousand dollars, thirty thousand of which shall be paid at the time and in the manner

that the Choctaw annuity of 1837 is paid, and the remaining five hundred thousand dollars to be invested in some safe and secure stocks, under the direction of the Government of the United States, redeemable within a period of less than 20 years, and the Government of the United States shall cause the interest arising therefrom to be paid annually to the Choctaws in the following manner: Twenty thousand dollars of which to be paid as the present Choctaw annuity is paid, for four years, and the residue to be subject to the control of the general council of the Choctaws, and, after the expiration of four years, the whole of said interest to be subject to the entire control of the said council."

It will be seen from the above that the Chickasaws were to form a district or separate country in the territory of the Choctaws; that said territory was to be held in common, and was to be occupied on the same terms with the Choctaws, except as to the right of disposition, and that the dominion of these two nations over this tract was complete and absolute.

7. As above stated, the policy of the Government up to this time had been to remove these Indians from the States east of the Mississippi, to which they had held aboriginal title and ownership, but where their presence was offensive to the whites, into the country west of the Mississippi river, and to preserve to them and their descendants forever their respective tribal relations and governments, a policy which was continued, as will hereinafter appear, until quite a recent date (1889).

The lands thus ceded to the Choctaws, Chickasaws, Cherokees, Seminoles, and Creeks constitutes what for many years was known as the Indian Territory, over which, by all the solemn guarantees that it was possible for the United States to make, these several Indian nations were to have exclusive jurisdiction and government, except so far as their laws might come into conflict with the Constitution and laws of the United States.

Between the years 1837 and 1855 the United States, in further pursuance of said policy, conceived the purpose of locating Indians other than these five civilized tribes upon such part of their territory as was not needed or used by them, and on the 22d of June, 1855, the Choctaws having moved into said territory and being in occupancy thereof in common with the Chickasaws, as aforesaid, the Government of the United States entered into a treaty with the Choctaws and Chickasaws (11 Stats., 611 *et seq.*), articles 9 and 10 of which are as follow:

"ARTICLE 9. The Choctaw Indians do hereby absolutely and forever quitclaim and relinquish to the United States all their right, title, and interest in and to any and all lands west of the one-hundredth degree of west longitude; and the Choctaws and Chickasaws do hereby *lease* to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein, excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas river, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas, which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the President for their government: *Provided, however*, The territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore.

"ARTICLE 10. In consideration of the foregoing relinquishment and lease, and as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct."

The features of this treaty to which attention is specially invited are the following:

That the Wichitas and other tribes or bands of Indians therein referred to were not, before the execution of this treaty, occupants of the tract of land in controversy or any part of the "Leased District;" that the United States desired to procure the privilege of settling these Indians there, and that for the purpose of securing this right it was considered necessary to enter into this treaty of 1855 with the Choctaws and Chickasaws, the recognized owners of said land, as aforesaid.

By article 1 of this treaty of 1855 the boundaries of the Choctaw and Chickasaw country are specifically defined. The United States grants forever the lands within these limits (of which the lands in controversy are a part) to the members of the Choctaw and Chickasaw nations, their heirs and successors, *to be held in common*, so that each and every member of either tribe shall have an equal undivided interest in the whole. All persons not being members of either tribe (with certain named exceptions) are to be considered intruders and to be removed from said land by the United States agent, &c., and no persons are permitted to reside within the limits of this tract except with the permission of the Choctaws and Chickasaws.

It is further to be observed that the lease that was made of a part of this Choctaw country by the express terms of article 9 of said treaty of 1855 was for the permanent settlement of the Wichitas and such other tribes or bands of Indians as the United States might desire to locate thereon, and for no other purpose or use; that, notwithstanding this lease, there was reserved to the Choctaws and Chickasaws the right to settle thereon as theretofore; that when the Government should locate such Indians thereon, while the Indians so located were to be subject to the exclusive control of the United States, under such rules and regulations as the President might prescribe, nevertheless these rules were not

to be inconsistent with the rights and interests of the Choctaws and Chickasaws, thus again recognizing the right of said nations to the exclusive ownership and government of this tract of country.

Pursuant to said treaty of 1855, the Wichitas and affiliated bands, as they are called, were located in the tract of country known in this case as the "Leased District," to compensation for their equity in which the Choctaws and Chickasaws are making claim.

In 1864 the Commissioner of Indian Affairs, in his annual report of that year, made the suggestion that the Choctaws and Chickasaws, and other nations of Indians located in what is now known as the Indian Territory, should be required to receive within the limits of their country other *tribes* with whom they were on friendly terms, and urged "the importance of preserving the Indian country *for the use of the Indians alone* * * * and, if need be, enforcing such terms (in treaties) as will secure ample homes within that country for all such tribes as from time to time it may be found practicable and expedient to remove thereto."

As in the cases of the States of Mississippi, Alabama, and Tennessee, before mentioned, so in the Western States of Kansas, Colorado, Texas, &c., there were Indians residing which these States desired to have removed. In pursuance of the above suggestion of the Commissioner of Indian Affairs, steps were taken with this end in view. Accordingly, in the month of September, 1865, at the instance of the Government of the United States, delegates or representatives of various Indian tribes, including the Choctaws, Chickasaws, Creeks, Cherokees, Seminoles, Osages, Senecas, Shawnees, Quapaws, Wyandottes, Wichitas, and Comanches, convened in council at Fort Smith, Arkansas, and were there met by a commission, appointed by the President, consisting of the Hon. D. N. Cooley, Commissioner of Indian Affairs; the Hon. Elijah Sells, superintendent of the Southern Superintendency; Thomas Wistar, a leading member of

the Society of Friends; Brigadier General W. S. Harney, of the United States Army, and Col. Eli S. Parker, also of the United States Army, and a member of General Grant's staff.

At this council or convention the purposes or wishes of the Government with regard to this scheme of colonization and other matters were made known to the Indians. They are embodied in the seven propositions which are set forth in full on the fifteenth page of the petition of claimants in this case. It is not necessary at this point to repeat any but the fifth, which is in these words:

"5th. A part of the Indian country to be set apart to be purchased for the use of such Indians from Kansas or elsewhere as the Government may desire to colonize therein."

In submitting these propositions to the assembled delegates, the Hon. D. N. Cooley, Commissioner of Indian Affairs, in elucidation of the provisions contained therein, with regard to the said fifth proposition addressed them as follows:

"A portion of the lands hitherto owned and occupied by you *must be set apart for the friendly tribes now in Kansas and elsewhere*, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government."

The proceedings of the council show that "the president of the U. S. commission then stated that the agents will be supplied with printed copies of the address, and are requested to go with an interpreter to their respective tribes for the purpose of fully explaining what is said therein." (See Report of Comm'r Ind. Aff. 1865, second day, Sept. 9, 1865). It will be observed that this speech of the Commissioner was addressed, not to the representatives of any particular tribe or tribes of Indians, but to the delegates of them all in the aggregate.

The propositions above referred to, including the fifth

thereof, as stated in the language just above quoted, having been submitted to the delegates, as aforesaid, they were by said delegates accepted, so far as they had authority, and taken to their respective tribes or nations, and thereafter the said tribes appointed other delegates to treat with the United States upon the basis of the said several propositions. Subsequently treaties were made upon this basis by said several tribes. (The treaties, other than that with the Choctaws and Chickasaws, will be hereinafter considered in connection with the main question in this case, and it is therefore not necessary to refer to them now.)

Said propositions were handed to the Choctaw and Chickasaw representatives in that convention to consider, and the indorsement on the back of those propositions was evidently also considered by said Choctaw and Chickasaw representatives, because said representatives made formal reply to the original propositions and to the indorsement. (See Record, pp. 76 and 142; App. Record, p. 148.)

There must also have been some interchange of views between the United States commissioners and the Choctaw and Chickasaw representatives at that particular time as to the form and substance of a new treaty, besides the preliminary or peace treaty, to be entered into, because then and there the United States commissioners drew the form of a new treaty and gave it to the Choctaw and Chickasaw representatives, to be taken home with them, to be considered as an expression of what the United States would require of the Choctaws and Chickasaws, the fifth article of which is mainly important in this connection and is as follows:

"ART. 5. The Choctaw and Chickasaw tribes agree to a modification of the ninth article of the treaty concluded in the city of Washington the 22d day of June, A. D. 1855, by which they agree that all of that portion of their common territory west of the 98th degree of west longitude leased to the United States may be used for the permanent settlement of the Wichita and such other tribes or bands of Indians as

the Government may desire to locate thereon without e
ception or restriction as to the character of the tribes."

It is important to state that there is nothing in the reco
or history pertaining to this case showing anything else
to the policy and purpose of the United States leading
the treaty of April 28, 1866, than the said fifth propositi
and the said fifth article of said unsigned treaty.

It is manifest that the purpose was by the treaty of 18
to enlarge the treaty of 1855 so as to admit the settleme
of Indians not embraced in the treaty of 1855.

Among the treaties so made as a result of the event ju
mentioned was one with the Choctaws and Chickasaw
dated the 28th of April, 1866 (14 Stats., 769), by the fir
article of which peace was declared. By the second, slaver
was abolished, except in punishment of crime, &c. Ti
3d, 4th, 5th, 7th, 8th, 10th, 43d, 45th, and 46th articles a
as follows:

"The Choctaws and Chickasaws, in consideration of th
sum of three hundred thousand dollars, hereby cede to th
United States the territory west of the 98th degree we
longitude, known as the leased district, provided that th
said sum shall be invested and held by the United State
at an interest not less than five per cent., in trust for th
said nations until the legislatures of the Choctaw an
Chickasaw nations, respectively, shall have made such law
rules, and regulations as may be necessary to give all pe
sons of African descent resident in the said nations at th
date of the treaty of Fort Smith and their descendant
heretofore held in slavery among said nations, all th
rights, privileges and immunities, including the right o
suffrage, of citizens of said nations, except in the annuitie
moneys, and public domain claimed by or belonging t
said nations, respectively, and also to give to such person
who are residents and their descendants, forty acres each o
the land of said nations on the same terms as the Choctaw
and Chickasaws, to be selected on the survey of said lan
after the Choctaws and Chickasaws and Kansas Indian
have made their selections as herein provided, and imme

diately on the enactment of such laws, rules and regulations the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter, less such sum, at the rate of one hundred dollars *per capita*, as shall be sufficient to pay such persons of African descent before referred to as, within ninety days before the passage of such laws, rules, and regulations, shall elect to move, and actually remove, from the said nations respectively. And should the said laws, rules, and regulations not be made by the legislatures of said nations, respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper, the United States agreeing, within ninety days from the expiration of said two years, to remove from said nations all such persons of African descent as may be willing to remove, those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars or any part thereof, but shall be upon the same footing as other citizens of the United States in said nations."

"ARTICLE 5. A general amnesty of all past offenses against the laws of the United States, committed before the signing of this treaty by any member of the Choctaw or Chickasaw nations, is hereby declared; and the United States will especially request the States of Missouri, Kansas, Arkansas, and Texas to grant the like amnesty as to all offenses committed by any member of the Choctaw or Chickasaw nation. And the Choctaws and Chickasaws, anxious for the restoration of kind and friendly feelings towards themselves, do hereby declare an amnesty for all past offenses against their respective governments, and no Indian or Indians shall be proscribed, or any act of forfeiture or confiscation passed against those who may have remained friendly to the United States, but they shall enjoy equal privileges with other members of said tribes, and all laws heretofore passed inconsistent herewith are hereby repealed."

"ARTICLE 7. The Choctaws and Chickasaws agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian Territory: *Provided, however*, such legislation shall not in anywise interfere with or annul their present tribal organization, or their respective legislatures or judiciaries, or the rights, laws, privileges, or customs of the Choctaw and Chickasaw nations respectively."

"ARTICLE 10. The United States reaffirm all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw nations, entered into prior to the late rebellion and in force at that time, not inconsistent herewith; and further agree to renew the payment of all annuities and other moneys accruing under such treaty stipulations and acts of legislation from and after the close of the fical year ending on the 30th of June, in the year 1866."

"ARTICLE 43. The United States promise and agree that no white person, except officers, agents, and employés of the Government, and of any internal improvement company, or persons traveling through, or temporarily sojourning in, the said nations, or either of them, shall be permitted to go into said territory, unless formally incorporated and naturalized by the joint action of the authorities of both nations into one of the said nations of Choctaws and Chickasaws, according to their laws, customs or usages; but this article is not to be construed to affect parties heretofore adopted, or to prevent the employment temporarily of white persons who are teachers, mechanics, or skilled in agriculture, or to prevent the legislative authorities of the respective nations from authorizing such works of internal improvement as they may deem essential to the welfare and prosperity of the community, or to be taken to interfere with or invalidate any action which has heretofore been had in this connection by either of the said nations."

"ARTICLE 45. All rights, privileges, and immunities heretofore possessed by said nations, or individuals thereof, or to which they were entitled under the treaties and legislation heretofore made and had in connection with them, shall be, and are hereby declared to be, in full force, so far as they are consistent with the provisions of this treaty.

"ARTICLE 46. Of the moneys stipulated to be paid to the

Choctaws and Chickasaws under this treaty for the cession of the leased district, and the admission of the Kansas Indians among them, the sum of one hundred and fifty thousand dollars shall be advanced and paid to the Choctaws, and fifty thousand dollars to the Chickasaws, through their respective treasurers, as soon as practicable after the ratification of this treaty, to be repaid out of said moneys, or any other moneys of said nations in the hands of the United States; the residue, not affected by any provision of this treaty, to remain in the Treasury of the United States at an annual interest of not less than five per cent., no part of which shall be paid out as annuity, but shall be annually paid to the treasurers of said nations, respectively, to be judiciously applied, under the direction of their respective legislative councils, to the support of their government, the purposes of education, and such other objects as may be best calculated to promote and advance the welfare and happiness of said nations and their people respectively."

In substance, the above treaty is a declaration of amnesty and a condonation of all past offenses committed by either of the parties against the other before the signing of the treaty; a consent that the United States should pass laws for the better administration of justice and the protection of the rights of person and property within the Indian Territory; a reaffirming by the United States of all its obligations to the Choctaws and Chickasaws arising out of treaty stipulations entered into prior to the rebellion; an agreement to renew payment of annuities accruing under such treaty stipulations; an agreement that no white persons (with certain exceptions) should be permitted to go into the Indian country unless incorporated or naturalized under their laws, and a restoration of all rights, privileges, and immunities possessed by the Choctaws and Chickasaws under treaties theretofore made.

Finally, in article 3, in consideration of the sum of $300,000, there is a cession by the Choctaws and Chickasaws, apparently absolute on its face, of "the territory west of the

98th degree west longitude, known as the "leased district," said $300,000 to be held in trust by the United States, however, "until the legislatures of the Choctaw and Chickasaw "nations, respectively, shall have made such laws, rules "and regulations as may be necessary to give to persons of "African descent resident in said nations at the date of the "treaty of Fort Smith, and their descendants, heretofore "held in slavery among said nations, all the rights, privi- "leges and immunities, including the right of suffrage, of "citizens of said nations," &c., and 40 acres of land each, to be selected after survey.

9. Upon the conclusion of this treaty of 1866 the United States proceeded to colonize on the lands so acquired from the Choctaws and Chickasaws other bands and tribes of Indians, among which were the Cheyennes, Arapahoes, Kiowas, Comanches, and Apaches. The Wichitas had been located on a part of the "leased district," under the treaty of 1855, by the Indian agents Neighbors and Rector.

The Wichitas and Keechies were located on a tract of 69,120 acres, and the Caddoes, Delawares, and Texas Indians were located on a tract of 85,120 acres, making a total of 154,240 acres. (See Sen. Ex. Doc. No. 13, 48th Cong., 1st sess., pp. 7, 8, and 25, and accompanying map.)

Brief.

I.

The question in issue between the Choctaw and Chickasaw nations and the United States.

Recapitulating briefly what is presented in the foregoing statement of facts, it will be remembered that prior to 1820 the Choctaws were the owners of large tracts of land east of the Mississippi river; that they were induced by the considerations above named to part with these lands and remove to the country in which they now reside west of the Mississippi river; that the lands to which they so removed were conveyed to them in fee-simple, and that they were guaranteed the right of self-government and freedom from intrusion by the whites; that, pursuant to the treaty of 1837, the Chickasaws, who also owned lands east of the Mississippi, were located upon the lands of the Choctaws in the Indian Territory; that by the treaty of 1855 the Choctaws quitclaimed and relinquished to the United States all their right, title, and interest in and to their lands west of the 100th degree of west longitude, and the Choctaws and Chickasaws together leased to the United States that portion of their common territory lying between the 98th and 100th degrees, known as the "leased district."

It will be further remembered that this country was leased to the United States for "the permanent settlement of the "Wichita and such other tribes or bands of Indians as the "Government may desire to locate therein, *excluding, how-*"*ever, all the Indians of New Mexico and also those whose* "*usual ranges at present are north of the Arkansas river*," etc.; that subsequently, having adopted the policy with regard to the Indians having their habitat in the States of Kansas, Colorado, and Texas that had been formerly adopted with

regard to the Indians in the States east of the Mississippi, the United States, as clearly appears from the unsigned treaty of 1865 and the address of the Commissioner of Indian Affairs to the Indians assembled at Fort Smith, obtained from the Choctaws and Chickasaws a cession of the "leased district" for the purpose of removing the restriction that existed in the lease of 1855 with regard to the Indians that might be settled thereon.

And it is a matter of history, of which the court will take judicial notice, that in 1889 the Government of the United States, yielding to the requirements and demands of the white settlers for land, abandoned its policy of preserving for the use of the Indians alone the lands embraced within the Indian Territory, and decided to open said country for settlement under the pre-emption and homestead laws of the United States. When, in the act of March 2, 1889 (25 Stat., 1005), this plan was carried out and the purpose for which the land in said "leased district" was leased and ceded to the United States was abandoned, the Choctaw and Chickasaw nations immediately presented their memorial to Congress, claiming the value or proceeds thereof as compensation for their reversionary or equitable interest in said land, and said claim, together with the claim of the Wichitas and affiliated bands of defendant Indians in this case, was referred to the Court of Claims and to this court for adjudication.

Said act of March 2, 1889, presented the first occasion when it was necessary for the Choctaws and Chickasaws to assert their rights and interest in said "leased district," and it was immediately done by memorials to Congress and a petition to the commission organized under said act. (See H. R. Report No. 3147, 51st Cong., 2d sess.)

The question, therefore, that arises is whether by the treaty of 1866 the cession to the United States of the land lying between the 98th and 100th degrees of west longitude was an *absolute* cession of all the rights and equities of the

Choctaws and Chickasaws therein, or whether it was a cession of those lands to the United States *in trust*, to be used for the colonization thereon of other Indians, in accordance with the expressed intention and settled policy of the United States, to which I shall hereinafter again refer.

The contentions of the Choctaws and Chickasaws are :

(*a.*) That the provisions of article 3 of the treaty of 1866, taken in connection with the other provisions contained in said treaty, and viewed in the light of the conditions and circumstances that induced its promulgation, constitute, not an absolute cession of said leased district, but a cession in trust for the colonization of Indian tribes thereon, and that upon failure of the United States to carry out the purpose for which said lands were ceded, the title thereto reverts to the Choctaws and Chickasaws, and if the lands are sold they should receive the proceeds thereof; and—

(*b.*) That if these provisions of article 3 do constitute an absolute conveyance of said lands by the Choctaw and Chickasaw Indians to the United States, divested of all equities and trusts in their favor, said language should be so reformed or construed that all the rights and equities claimed by said Indians, and obviously intended to be secured to them, shall be embraced therein, the omission so to provide being due to mistake and inadvertence on the part of the officers who prepared said treaty.

II.

JURISDICTION.

In this connection I may say that it is manifest from all the antecedent history of this matter, to which I shall presently refer, and from the language of the act of March 2, 1895 (28 Stat., 898), conferring upon the Court of Claims and this court jurisdiction of the case at bar, that it was the

intention of Congress to confer upon the court jurisdiction to hear and determine this whole subject-matter in all its legal and equitable aspects. The language of the act is:

"Jurisdiction be, and the same is hereby, conferred upon the Court of Claims to hear and determine said claim of the Choctaws and Chickasaws, and to render judgment thereon, it being the intention of this act to allow the said Court of Claims jurisdiction so that the rights, *legal and equitable*, of the United States and the Choctaw and Chickasaw nations and the Wichita and affiliated bands of Indians in the premises shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party in the hearing of said claim."

And it is in view of the above that I earnestly request of the court that broad and liberal construction and interpretation of the language of the various treaties, and the circumstances and conditions relating thereto and connected therewith, that by all principles of justice and equity and by the expression of this court in cases to which I shall hereinafter call its attention, the claimant Indians in this case, the Choctaw and Chickasaw nations, have a right to expect.

III.

RULE OF CONSTRUCTION OF INDIAN TREATIES.

At this point I venture to call attention, merely for the convenience of the court, to a very familiar and well-settled rule in the construction of treaties made with the Indians, and to which I have alluded above. I select from the language of this court in the case of the *Choctaw Nation vs. The United States*, known as the "Net Proceeds case" (119 U. S., 27, 28), the following:

"As was said by this court recently in the case of the *United States vs. Kagama*, 118 U. S., 375, 383: 'These Indian tribes are the wards of the nation; they are communities

dependent on the United States, dependent largely for their daily food, dependent for their political rights.' * * * From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by Congress and by this court whenever the question has arisen.

"It had accordingly been said in the case of *Worcester vs. Georgia*, 6 Pet., 515, 582: '*The language used in treaties with the Indians should never be construed to their prejudice.* If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * *How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.*'"

See, also, Vattel's Law of Nations, Book 2, c. 17, § 289.

While the Indian tribes are recognized, in a measure, as separate nations, they have universally been held to be dependent nations, the "wards of the United States," and, as such, are subject to all the rules governing transactions between guardian and ward; and this principle is peculiarly applicable to a treaty between Indians and the United States, because in the case of such a treaty the rule has always been to inquire as to "how the Indians themselves understood it" (*Holden vs. Joy*, 17 Wall., 243).

In the recent case of *Geoffroy vs. Riggs* (133 U. S., 258, 271), this court, speaking of treaties generally, says:

"It is a general principle of construction with respect to treaties that they shall be *liberally construed*, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense imposed upon them by local law, except such restricted sense is clearly intended."

It will be noticed that in article 3 the leased district is simply "ceded" to the United States. It is not in terms ceded "in fee-simple" or "absolutely" or in any other term that would indicate an absolute cession of all the interest of the Choctaws and Chickasaws in said lands. The word "cede" is said by Bouvier to be applicable to the act by which one State or nation transfers territory to another. As the character of this cession is not expressly stated in article 3, it must be assumed to have been one made in furtherance of the purpose, as stated in other sections of the articles of the treaty of 1866 itself; in the representations of the Commissioner of Indian Affairs to the Indians assembled at Fort Smith, and in the unsigned treaty of 1865, to which I shall hereinafter more particularly refer.

This court is now called upon to construe a treaty made with this "unlettered people"—this people who were ignorant not only of the refinements of our language, but of the language itself—in which more than 7,700,000 acres of their land, worth more than $9,000,000, are being dealt with. By former treaties with them, and by the patent issued in pursuance thereof, they were to hold this land in fee-simple so long as they remained a nation and continued to live upon it; they were to have absolute jurisdiction over it and over all persons and property within its limits; no other tribe or nation of Indians and no other people could domicile themselves thereon, and not even the United States could create a State or territorial form of government over it without their consent. The United States desired to procure a location for other Indian tribes that had been situated within the States, and instituted the negotiations which resulted in the accomplishment of what is set forth in the seven propositions above alluded to, the most conspicuous of which was that the United States should be allowed the privilege of colonizing other Indian tribes upon the lands belonging to the nations treated with.

Whatever may have been the form of expression actually

used in the submission of this matter to the delegates of the tribes assembled at Fort Smith, one thing is certain, and that is that the agents of the United States impressed it upon these Indians that what was sought to be accomplished was the procurement by the United States of this right to locate other Indian tribes upon the territory so alleged to have been ceded by the third article of the said treaty of April 28, 1866; and it is equally certain that this is all that the Indians intended to give, and did actually give, to the United States as a result of these negotiations.

When, therefore, the court is called upon to construe this treaty under the rule it has laid down, it would seem to be impossible, in the light of the language contained in the 10th and 45th articles thereof, and in the light of the history of this matter, to hold otherwise than that it was the evident understanding of the claimants in this case that they were simply granting to the United States what the commission that was appointed to consult with them said the United States desired, to wit, the right to locate other Indian tribes upon the part of their lands known as the "leased district," and this they did in consideration of the above-mentioned provision for the care and removal of their freedmen or former slaves.

This, I respectfully submit, is the only fair and reasonable interpretation of the language contained in article 3 of said treaty under the rule for the interpretation of such treaties laid down by this court, and for the further reason that it is also a well-settled rule of law that while the language of an instrument such as this cannot be changed by parol evidence, yet it is equally true that, in the event of controversy or doubt as to the meaning and effect of any of the provisions contained therein, all the facts, conditions, and circumstances surrounding the preparation of the instrument and the purposes to be attained by such language may be shown, in order that the court may occupy precisely the same position that the parties themselves occupied at the time of the

execution of the instrument in controversy, and from these facts and circumstances interpret the language thus employed in consonance with the intention of the parties.

IV.

TREATY OF 1866.

As this court is called upon to determine the effect of the treaty of 1866, which is contended by the Government to be an absolute cession of the "leased district" to the United States, and which it will be my purpose to show was a cession in trust, or that it should be reformed or construed so that it will become such, it is essential that the court should familiarize itself with the conditions that induced the parties to enter into the stipulations therein contained.

It will be remembered that article 9 of the treaty of 1855, in leasing to the United States the right to locate other Indians upon the lands embraced within the country between the 98th and 100th degrees of west longitude, contained a limitation of that right; in other words, the grant to the United States of said right expressly excluded "all the Indians of "New Mexico, and also those whose usual ranges are at "present north of the Arkansas river." It will also be noticed that the territory so leased was "to remain open to settlement by Choctaws and Chickasaws as heretofore," and the foreign Indians were to be "subject to the exclusive con- "trol of the United States under such rules and regulations, "*not inconsistent with the rights and interests of the Choctaws* "*and Chickasaws*, as may from time to time be prescribed "by the President for their government," etc. Under this provision the Choctaws and Chickasaws continued to legislate for their own citizens who preferred to remain upon said land.

When the civil war occurred a majority of the Indians in the Indian Territory, most of whom were slave-holders,

elected to cast their fortunes with the South, and the attorney for the Government has produced and printed in the record (p. —) a treaty with the Confederate government. During the war they naturally suffered as a result of the conflict and became greatly impoverished. In fact, their condition became so desperate that when it was brought to the attention of the Government of the United States, at the close of the war, representatives of the various tribes or nations of Indians in the Indian Territory were convened at Fort Smith, in the month of September, 1865, when were submitted to the assembled delegates the seven propositions referred to in the foregoing statement of facts, and which are as follows:

"1st. That such tribes must enter into a treaty for permanent peace and amity among themselves, with each other as tribes, and with the United States.

"2d. The tribes settled in the Indian Territory to bind themselves, at the call of the United States authorities, to assist in compelling the wild tribes of the plains to keep the peace.

"3d. Slavery to be abolished and measures to be taken to incorporate the slaves into the tribes, with their rights guaranteed.

"4th. A general stipulation as to final abolition of slavery.

"*5th. A part of the Indian country to be set apart to be purchased for the use of such Indians from Kansas or elsewhere as the Government may desire to colonize therein.*

"6th. That the policy of the Government to unite all the Indian tribes of this region into one consolidated government should be accepted.

"7th. That no white person, except Government employés, or officers or employés of internal improvement companies authorized by the Government, will be permitted to reside in the country, unless incorporated with the several nations."

It will be seen from the above that one of these propositions (the fifth) was in pursuance of the policy that the

Government of the United States had marked out many years before and has adhered to until a very recent day.

In his report of 1864, as already stated, the Commissioner of Indian Affairs had urged "the importance of preserving "the Indian country *for the use of the Indians alone*, and, if "need be, enforcing such terms (in treaties) as will secure "ample homes within that country for all such tribes as "from time to time it may be found practicable and expe "dient to remove thereto." This being considered an opportune time to obtain from the Choctaws and Chickasaws their consent to the removal of the limitation that existed in article 9 of the treaty of 1855, and to which I have referred, and for obtaining from the other Indians assembled at Fort Smith their consent to the location of foreign Indians upon their land, the Hon. D. N. Cooley, in presenting the substance of these five propositions to the Indians so convened, stated to them:

"A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government."

This speech was addressed to the representatives of no particular nation or tribe, but to them all, as hereinbefore stated. It was as a result of this that what is known as the unsigned treaty of 1865 was drawn, as hereinbefore stated by the terms of which it was clearly indicated that the Choctaw and Chickasaw tribes must agree "to a *modification* "of the 9th article of the treaty concluded in the city of "Washington the 22d day of June, A. D. 1855, by which "they agreed that all of that portion of their common ter "ritory west of the 98th degree of west longitude leased to "the United States may be used for the permanent settle "ment of the Wichita and such other tribes and bands of "Indians as the Government may desire to locate thereon

"*without exception or restriction as to the character of the "tribes.*"

As will be seen hereafter, treaties similar to the one of 1866 with the Choctaws and Chickasaws were made with the Cherokees, Seminoles, and Creeks, in which cessions as absolute on their face as the one in the case at bar were made of the lands of these Indians to the United States. I shall hereafter refer to the action taken by the Government of the United States with regard to the claims set up by the latter Indians under these treaties, and from which it will be seen that upon the opening to settlement of their lands they were duly paid the difference between the amount for which they were sold and the amount paid them under the various treaties resulting from the convention of 1865.

See N. Y. Indians *vs.* U. S., 170 U. S., 30, 31.

As already stated, in the "leased district" of the Choctaws and Chickasaws are embraced 7,713,239 acres of land, which were undoubtedly worth at the very least as many dollars as there were acres contained therein, and for the cession in article 3 of said treaty of 1866 the United States paid $300,000, and this upon the condition that if the Indians did not within two years pass certain laws for the benefit of their freedmen the money was to cease to be held in trust for them, but was to be held for the use and benefit of such freedmen as the United States should remove from said Territory.

It is most respectfully submitted that it is inconceivable that these Indians who were the owners of this land, as to which the United States had stipulated that it should never be brought within the jurisdiction of any State or Territory, would cede away the country they had thus acquired in such a manner as to part with their rights in and control over the same for an amount equal to not exceeding three cents an acre; and it is also inconceivable that the United States should attempt to evade or get rid of these treaty

stipulations without fully and fairly advising the Indians of such intent and purpose. It is still more inconceivable that the United States would attempt to procure from these Indians for the nominal consideration of $300,000 (even if the Indians were to get the benefit of it, which they were not) all their rights in and title to the lands embraced in this leased district, aggregating more than 7,000,000 acres, of the value of more than $9,000,000.

Now, keeping in mind the conditions prior to and at the time of the making of the treaty of 1866, it becomes important also to bear in mind the purpose the United States had in view, as avowed, in entering into the negotiations which resulted in the said treaty of 1866. Whether the object to be accomplished was expressed in the form of the fifth of the seven propositions that were circulated among the Indians in print, or whether it was as stated in the speech of Mr. Cooley, the Commissioner of Indian Affairs, it matters not. The purpose of the United States, as conveyed to the Indians, was clearly and indisputably not to purchase outright the title of the Indians to the lands owned by them for the sum of $300,000, but was simply to acquire the right to use the same for the settlement of such Indian tribes as it might choose to colonize thereon.

It had not entered into the minds of the commissioners, so far as can be gathered from anything that was said or done at the time, to acquire any other right than that just expressed; and it certainly never entered into the minds of any of the persons representing the Indians that the United States had any other purpose in view, or that anything else was being done than simply the acquiring of the right to colonize other Indian tribes within this leased district; and this is enforced and made apparent by the provisions of article 3 of the said treaty of 1866, by which the said alleged cession was made, in respect to the disposition of the consideration that was to be paid to the claimants herein for this right.

An analysis of the provisions of the said article (which need not be here entered upon in detail, because it will be elsewhere presented) will show that in point of fact this amount of $300,000 was not to be received by the Choctaws and Chickasaws for any use or benefit resulting to themselves, but was to be devoted to the removal of their freedmen or former slaves from the nations. In other words, this $300,000 was not intended to be paid as a compensation for the more than 7,000,000 acres of land that were being ceded, but was simply created and set apart as a fund to be devoted to certain specific objects and for the benefit of persons who were not citizens of either the Choctaw or the Chickasaw nations—this in consideration of the right to locate other Indian tribes upon a part of said land.

These freedmen were persons for whom the United States, and possibly the Choctaws and Chickasaws, desired to make provision. They were not citizens of the nations, and had no ownership in their property, and this provision was manifestly made for their benefit in order to effect a change in the condition of these dependent people.

This being so, it is inconceivable that it could have been understood, either by the United States or by the Choctaw and Chickasaw nations, that they were parting with their entire interest in this vast tract of land for the sum of less than three cents an acre, or were doing anything more than simply granting to the United States, in consideration for this provision for the removal and benefit of their former slaves, the right to use this leased district for the further colonization of other Indian tribes therein.

That this is so further appears from an examination of other provisions of said treaty. By article 10 thereof the United States reaffirm all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaws and Chickasaws entered into prior to the late rebellion and not inconsistent with the treaty. Among the obligations that the United States had entered into with

regard to these nations was that the Choctaws should hold this land in fee; that no other Indians or persons should be permitted to reside thereon without their consent; that they should have absolute control and dominion over it, and that it should never be brought within the limits of any State or Territory.

Article 45 of said treaty preserves to the Choctaws and Chickasaws all the rights, privileges, and immunities theretofore possessed by said nations, or by individuals thereof, or to which they were entitled under the treaties and legislation theretofore made in connection with them. All these rights are declared to be in full force so far as not inconsistent with the other provisions of the treaty. Both of the last-named articles contain, in substance, the provision that the rights, privileges, immunities, &c., that existed prior to the execution of the treaty, and that are not inconsistent with the provisions thereof, shall remain in force, and this provision that they shall not be inconsistent only strengthens our contention that this was not an absolute cession to the United States of the lands named in the said third article, and this because if the cession was an absolute one, intended to dispose of this leased district absolutely and without restriction or limitation, there could not be any obligations, rights, privileges, and immunities with regard to this land that could be reaffirmed and continued by said articles 10 and 45, and these words would be inoperative and meaningless.

If this was an absolute cession, then the dominion and control of the Choctaws and Chickasaws over the lands involved therein would be taken away from them altogether. The absolute right to, and dominion over, said lands would be in the grantee, and there could not remain any rights, privileges, and immunities in the Choctaws and Chickasaws to which the language contained in said articles 10 and 45 could refer. The fact, therefore, that these rights, privileges, and immunities are reserved to the claimants by these two

articles of said treaty shows conclusively that neither these Indians nor the United States understood that by the language contained in said article 3 the Choctaws and Chickasaws were doing anything more than simply conferring upon the United States, in consideration of said provision for the benefit of their freedmen, the right to use this land for the colonization of other Indian tribes thereon; and the language contained in said articles 10 and 45, as we have said above, would be utterly useless and meaningless if the language contained in article 3 is interpreted to be an absolute cession, unless there can be imputed to the United States the intention, by the use of the language reserving the said rights, privileges, and immunities, to mislead and deceive the said Indians to their prejudice.

But, in addition to this, it is not inconsistent with the language contained in the third article of said treaty so to construe it as that the lands mentioned therein are ceded in trust and not absolutely, and one of the reasons of this is that, while the language of said alleged cession is broad and general, yet the application of the consideration paid therefor shows that this sum of $300,000 was not paid as a consideration for the lands, as we have already attempted to show, but was made as a provision for the benefit of others, and in no sense for the benefit of either the Choctaw and Chickasaw nations or the individuals composing them, which individuals, by the terms of the treaty of 1855, were in point of fact the owners of this property.

And if, as is attempted by the Government in this case to show, the United States had acquired and intended to acquire the full title to this immense domain of 7,713,239 acres of land acquitted of all claim of the Choctaws and Chickasaws, it is uncommonly strange that no exception was made as to what was written into the tenth and forty-fifth articles of said treaty of 1866. The absence of such an exception from said articles of said treaty furnishes additional evidence that the United States Commissioners knew they had made no such bargain.

V.

INTERPRETATION OF THE TREATY OF 1866 BY THE PARTIES THERETO.

The interpretation of the cession of 1866 for which we contend in this case is the one that has actually and uniformly been placed upon it by both of the parties thereto, and until the recent effort of the United States to throw open these lands to settlement the character of said cession as a cession in trust for the purposes above stated was never questioned.

In the first place, the Indians who made the cession understood it to be a conveyance in trust for those purposes; and in the next place, the United States, through the various officers who have from time to time had the subject under consideration, have so construed it. All of the Government officers who have had any occasion to administer said treaty, or who have had occasion to express in any form an interpretation of the language in question as affecting the rights of the Indians, have interpreted it as a cession in trust.

"The principle that the contemporaneous construction of "a statute," says this court in the case of *Pennoyer vs. McConnaughy* (140 U. S., 1, 23), "by the executive officers of "the Government whose duty it is to execute it is entitled "to great respect and should ordinarily control the con- "struction of the statute by the court, is so firmly imbedded "in our jurisprudence that no authorities need be cited to "support it." (See also *Jopliff vs. Jopliff*, 122 U. S., 131; *United States vs. Philbrick*, 120 U. S., 52, and *United States vs. Hill*, 120 U. S., 169, 180.)

The following are instances of this interpretation by the officers of the Government of the United States charged with the duty of construing the language in said act and administering the treaty:

1. On the 14th of June, 1866, shortly after the treaty with the Choctaws and Chickasaws, the Government made a treaty with the Creek nation of Indians (14 Stats., 785), by which these Indians ceded to the United States the west half of their entire domain, containing 3,250,560 acres of land. The Cheyennes and Arapahoes were colonized on a part thereof by executive order, but a part of the lands so ceded by the Creeks remained unoccupied. In 1871 Congress passed an act which prohibited the further colonization of Indians on unoccupied lands in the Indian Territory except with its consent (— Stats., —). In 1879, persons having gone on these unoccupied lands who were not entitled under the treaties and law to be on the same, the question was raised as to the right of the Government to expel them as intruders, and on the first of May, 1879, the Secretary of the Interior, in response to an inquiry by the Secretary of War, was brought to a consideration of the question as to the status of such lands.

Mr. Schurz, the then Secretary of the Interior, in a communication to the Secretary of War in reply to the abovementioned inquiry, among other things, in speaking of the Choctaw and Chickasaw lands, and referring to the 9th article of the treaty of June 22, 1855, after having gone over the antecedent history, informed the Secretary of War that the lands ceded by the Choctaws and Chickasaws were by said article 9 *leased to the United States for the purpose of the permanent settlement of the Wichita and such other bands of Indians as the United States might desire to place thereon;* and, further, that "the treaty of 1866 substituted a direct purchase for the lease, *but did not extinguish or alter the trust.*" Here, then, the first time that any question arose as to the status of the lands in controversy, the Secretary of the Interior expressly interpreted the treaty of 1866 to be a continuation of the trust (created by the treaty of 1855) in the United States for the settlement of other Indian tribes thereon.

2. About this time one Payne, a citizen of the United States, conceived the idea of settling upon these lands that were still unoccupied by the Indians and upon which no Indians had yet been located, claiming that they were subject to settlement under the land laws of the United States. He accordingly organized an expedition, and entered upon these lands with a view to such settlement. On the 12th of February, 1880, as a consequence of the above-mentioned invasion, the President of the United States issued a proclamation, in which he said that *the lands were subject only to the occupation of Indian tribes*, officers of the Indian Department, military posts, and such persons as might be privileged to reside and trade therein under the intercourse laws of the United States, and proceeded to warn and notify all persons who proposed to enter upon said lands that they would be speedily removed, and stated that, if necessary, the aid and assistance of the military force of the United States would be invoked for that purpose.

This could not be if the United States, by the treaty of 1866 with the Creeks, had become the absolute owner of these lands. There was no law in existence that would have authorized the President to make it unlawful for persons who might desire to do so to enter upon the public lands, or if any did so, to remove them therefrom; and therefore these lands were thus again recognized by the Executive as held by the United States in trust for the specified purpose mentioned in the treaty.

In pursuance of the proclamation of the President above referred to, the said Payne was removed from the lands upon which he had entered. Having subsequently returned, he was arrested, indicted, tried, and convicted for said offense in the district court for the western district of Arkansas. Judge Parker, before whom the case was tried, held that "*the moment the Government purchased the land, and by the same simultaneous act with such purchase, it reserved it for a specific purpose. That purpose was the same as the one*

for which the land had been used for thirty-three years, ever since the Creek treaty of the 14th of February, 1833;" and he further held that this Indian country was obtained by the Government *for Indian occupancy*, and proceeds to show that the lands having been procured for such a purpose they could not be used for any other purpose.

3. On the 7th of February, 1882, the Senate of the United States passed a resolution calling upon the Secretary of the Interior for information concerning the right of settlers to occupy any part of the Indian Territory. On the 17th of the same month the then Secretary, the Hon. S. J. Kirkwood, transmitted to the Senate a communication from the Commissioner of the General Land Office upon the subject. Necessarily it involved a consideration of the question as to the status of the lands of which the leased district is a part under the existing treaties. In this communication the Commissioner says that there are no lands in the Indian Territory open to settlement or entry by freedmen or any other persons under the public land laws of the United States. He then proceeds to state in detail the history of these lands, and, referring to the treaties with the Choctaws, Chickasaws, Seminoles, and Creeks, says of the said treaty of April 28, 1866, with the claimants herein, that *the cession was by the 10th article thereof made subject to the conditions of the compact of June* 22, 1855, *by the 9th article of which it was stipulated that the lands should be appropriated for the settlement of such tribes or bands of Indians as the United States might desire to locate thereon.*

The Commissioner also holds that the lands embraced in the Choctaw and Chickasaw cession were also included in a definite district established by the stipulations of the said treaty of 1855, pursuant to the act of Congress of May 28, 1830, the United States engaging by the seventh article of such treaty to keep out from that district all intruders. He further says that "in pursuance of the stipulations of the

foregoing compacts, and in the exercise of the trusts assumed by the United States under the several treaties, and in accordance with the provision of law and the lawful orders of the President, all the lands in the Indian Territory to which the United States has title have been permanently appropriated or definitely reserved for the uses and purposes named."

Again he says:

"*The title of the United States to lands in the Indian Territory is, as heretofore shown, subject to specific trusts, and it is not within the lawful power of either the legislative or executive departments of the Government to annihilate such trusts or to avoid the obligations arising thereunder.*"

It is thus seen that at this time the officials of the United States having such matters in charge, in interpreting this treaty of 1866 with the Choctaws and Chickasaws, so construed it that the United States were held to have received these lands in trust for the purpose specified; that this conveyance was made for the purpose of carrying out a scheme or plan which the United States had long before adopted, of bringing the various tribes or bands of Indians who were located in the various States into this region of country and permanently settling them there, with the consent of the Indians who were the owners of the country to which they were so removed, and of thus putting an end to the strife and the offensive features incident to their residence in the States, and that it was for this purpose alone that the transfer to the United States that is contained in said article 3 was made.

Therefore that conveyance had impressed upon it the trust that the lands should be used for the purpose aforesaid, and, when they ceased to be so used, or when that scheme of the United States was abandoned, then all the rights that the Choctaws and Chickasaws theretofore had were revived, or, rather, they were preserved to them by

the provisions of the tenth and forty-fifth articles of the said treaty, hereinbefore referred to.

4. Again, on the 23d of January, 1884, the Senate of the United States called upon the Secretary of the Interior for information in respect of the status of the lands in the Indian Territory other than those claimed and actually occupied by the five civilized tribes. Under date of the 31st of the same month, the then Commissioner of Indian Affairs, the Hon. Hiram Price, elaborately considered this question, reviewed the treaties with the Choctaws and Chickasaws, and concluded as follows:

"This being the condition of things, it is clear that no authorized settlement could be made by any persons in the Territory, except under the provisions of the intercourse laws, such persons having first obtained the permission provided for in these statutes. It may be further stated that *no part of said Territory remains free from appropriation either to a direct trust by treaty or by reservations for tribes thereon under executive order.*"

5. The then Secretary of the Interior, the Hon. H. M. Teller, in his communication transmitting this opinion of the Commissioner of Indian Affairs to the Senate, says:

"These lands were acquired by treaties with the various Indian nations or tribes in that Territory in 1866, *to be held for Indian purposes*, and to some extent for the settlement of the former slaves of some of said nations or portions thereof. *Such are the purposes for which such lands are now being used or held according to the common understanding of the objects of the treaties by which they were acquired*, and from this arose the necessity for the obligation to keep such lands in their present condition of occupancy or otherwise."

6. On the 1st of July, 1884, President Arthur issued another proclamation, reciting, in the preamble, that—

"Certain persons have, within the territory and jurisdiction of the United States, begun and set on foot preparation

for an organized and forcible possession of and settlement upon the lands of what are known as the Oklahoma lands in the Indian Territory, which territory is designated, recognized and described by the treaties and laws of the United States, and by the executive authorities, as Indian country, and as such is subject to Indian occupation only. * * *

"Now, therefore, for the purpose of properly protecting the interests of the Indian nations and tribes in said territory, * * * I do admonish and warn all persons intending or preparing to remove upon said lands or into said Territory, against any attempt to so remove," &c.

7. Again, on the 23d of January, 1885, the Senate of the United States, by a resolution, inquired of the Department of the Interior as to the status of lands in the Indian Territory. In response to this resolution the Secretary of the Interior, among other things, says:

"Objection will be made to the occupation of any part of the Indian Territory by others than Indians, on the ground that the Government set apart the Territory *for the exclusive use of the Indians* and covenanted that no others should reside therein. *It is not denied that the treaties so provide.*"

It is, however, in this communication, suggested by the Secretary that—

"It is within the power of the Government, *with the consent of the Indians interested*, to change this provision of the treaties so that these lands may be within the reach of settlers, and steps should be taken at once to change the present condition of affairs in the unoccupied portion of the Indian Territory. It can be done without violating the treaties, or without subjecting the Government to the charge of bad faith."

8. Again, on the 28th of January, 1885, the President of the United States, in response to a resolution of the Senate requesting him to advise the Senate as to the status of the lands in question as viewed by the Executive (this growing out of the proposed use of military force for the purpose of

expelling intruders from these lands), among other things, says:

"None of the land or general laws of the United States have been extended over these lands, except as to the punishment of crimes, &c. It is clear that no authorized settlement can be made by any person in the Territory in question until the existing status of these lands shall have been changed by agreement with the Indians interested, or in some other manner as may be determined by Congress. The treaties heretofore made with the Indians should be maintained, and the power of the Government, to the extent necessary, should be used to keep off intruders and all other unauthorized persons."

9. Again, on the 26th of January, 1885, the Commissioner of Indian Affairs reviews this whole subject, and reiterates in substance what has been before said, to wit, that these lands are held by the United States in trust to carry out the scheme for the colonization of Indian tribes thereon which has been above explained.

10. As a result of this constant agitation in Congress touching the status of these unoccupied lands in the Indian Territory, and of these repeated efforts to subject them to private ownership in opposition to these repeated assertions that they were held by the United States in trust for the settlement of Indians and could not be occupied otherwise, and it becoming apparent that something should be done pursuant to the suggestions that had been made by the Department of the Interior, the Congress of the United States, in 1889, passed an act providing for the appointment of a commission to negotiate with the Cherokee Indians, "and with all other Indians owning or claiming lands lying west of the 96th degree of west longitude in the Indian Territory, for the cession to the United States of all their title, claim or interest, of every kind or character, in and to said lands" (25 Stats., 1005).

Thereupon the Choctaws and Chickasaws appointed delegation to meet these commissioners for the purpose negotiating with them with reference to the disposition their interest in the lands in controversy in this case, a they set forth their claim to the said commission as n contended for. Afterwards, on the 31st of March, 1890, th also presented their said claim, by a memorial in that half, to the Senate and House of Representatives of t United States. This memorial having been referred to t Committee on Indian Affairs of the House, it was in tu referred by that committee to the Department of the Inter for information, and the acting Commissioner of Indi Affairs submitted a report to the committee, in which reviewed all the treaties made between the Choctaws a Chickasaws and the United States and the proceedi which led up to and resulted in the treaty of April 28, 18 with these Indians. He also discussed the provisions this treaty, and informed the committee that he was opinion that the Choctaw and Chickasaw Indians—

"*have good ground for the claim that the United States t the lands ceded by them upon the trust to settle other Indi and freedmen thereon, as the policy upon which the negotiati were made clearly indicated its desire and purpose to* * * * While there are clearly no words of limitation the treaty of 1866 as to the use to which the ceded la should be put by the United States, *the history of the negot tions preceding and resulting in that treaty, and the subsequ treatment of the subject, quite clearly indicate that the Choct and Chickasaws have good ground for claiming that they und stood that the lands were to be used for the location of other dians and freedmen thereon.* If they have, as seems to be case, an equitable claim, it is for Congress to determine wh shall be the measure or allowance to be made for its adju ment in order to clear the lands of the encumbrance."

Having shown by the above instances the uniform int pretation of this treaty of 1866 by the officials of the exe tive branch of the Government in the way for which we

contending, I now turn to the legislative interpretation thereof and invite the attention of the court to the following examples of the treatment of this question by the Congress of the United States:

VI.

LEGISLATIVE DECLARATION AND INTERPRETATION.

Of absolutely conclusive force and effect, however, is the legislative declaration of the Congress of the United States as to the character of this cession, expressed in the Indian appropriation act of March 3, 1891 (26 Stats., 989), which was occasioned by the assertion of a claim by the Choctaws and Chickasaws arising as follows:

Among the tribes and bands of Indians settled on the leased district of the Choctaws and Chickasaws under the treaty of 1866 were the Cheyennes and Arapahoes. In 1891, in pursuance of the change in the policy of the United States to which I have above referred, it was proposed to open these Cheyenne and Arapahoe lands to settlement under the public land laws. The claim of the Choctaws and Chickasaws for compensation for their reversionary or equitable interest in these lands was duly presented to Congress by memorial, and was carefully considered by the committees of the Senate and House of Representatives and in conference, and in the act of the 3d of March, 1891, above mentioned (see p. 1025, 26 Stats.), after providing for the allotment of the Cheyenne and Arapahoe lands, there is appropriated $2,991,450 to pay the Choctaws and Chickasaws for their equitable interest therein. Said provision is as follows:

"And the sum of $2,991,450 be, and the same is hereby, appropriated out of any moneys in the Treasury not otherwise appropriated, to pay the Choctaw and Chickasaw nations of Indians for all the right, title, interest and claim which said nations of Indians may have in and to certain lands now occupied by the Cheyenne and Arapahoe Indians

under executive order; said lands lying south of the Canadian river, and now occupied by said Cheyenne and Arapahoe Indians. *Said lands have been ceded in trust by article 3 of the treaty between the United States and the said Choctaw and Chickasaw nations of Indians which was concluded April 28, 1866, and proclaimed on the 10th day of August of the same year*, and whereof there remains, after deducting allotments, as provided by said agreement, a residue ascertained by survey to contain 2,383,160 acres."

It is respectfully submitted that by this statute the character of the cession of 1866 is definitely fixed. It is expressly declared by the Congress of the United States, after full and careful inquiry and consideration, to have been a cession "in trust;" and, as will be seen, upon the abandonment by the United States of the purpose for which such trust was created, the right of the Choctaws and Chickasaws to compensation for their reversionary and equitable interest in said lands was duly recognized. Indisputably, any defect or omission to express the intent of the parties in the treaty of 1866 was thereby cured. In this connection the following considerations are involved:

(*a.*) The act of the 3d of March, 1891, is a statute *in pari materia* with the treaty of 1866, and must control the construction to be placed upon said treaty. It relates to precisely the same subject matter. The lands of the Cheyennes and Arapahoes (to pay for the reversionary interest of the Choctaws and Chickasaws in which said appropriation was made) were a part of the same leased district that is involved in the case at bar. The statute was enacted to compensate the same nations of Indians for the identical interest that they are setting up in the present case, and the act was intended to and did fix the character of the cession of 1866 here in question. No two subjects-matter could be more nearly related.

In the case of *Alexander vs. Mayor of Alexandria* (5 Cranch, 7, 8), the court says:

"It is to be observed that acts *in pari materia* are to be construed together as forming one act. If, in a subsequent clause of the same act, provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. *Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated in the foregoing act, is a direction to the courts in expounding the provisions of law.*"

See the same thing, held in—

Doe vs. Winn, 11 Wheat., 386.
Pollard vs. Kibbe, 14 Pet., 366.
United States vs. Freeman, 3 How., 564.
Converse vs. United States, 21 How., 463.
United States vs. Walker, 22 How., 299.
Railroad vs. United States, 127 U. S., 406.
Vane vs. Newcombe, 132 U. S., 235.

It would be useless to cite further authorities upon a proposition so fundamental.

As will be presently seen, the same principle applies to the construction of treaties or to a subsequent act of Congress relating to the subject-matter thereof. They must be construed together and the latest expression of the legislature must prevail.

(*b.*) The payment of the Choctaws and Chickasaws for their interest in the lands occupied by the Cheyennes and Arapahoes is a subject-matter that was perfectly competent for Congress to legislate upon, because the act so passed dealt with the public lands over which Congress has the supreme and exclusive control, as it has over the Indians themselves, and this legislation was, moreover, in favor of the interests of the Indians.

(*c.*) The declaration in the act of 1891 was strictly pertinent, and germane to the matter of the appropriation there made, and was a matter to which the attention of Congress was of necessity specifically and especially called. In short, the declaration was necessary in order that the purpose for which the appropriation was made should be shown, and it could not, therefore, be mere recital or opinion concerning a matter not germane to the subject of legislation, and as such only entitled to consideration as evidence of the matter recited.

On this point I respectfully request the attention of the court to what is said in Sutherland on Statutory Construction (sec. 231, p. 306):

"A provision which is special by pointing to a particular act and declaring for what definite purpose it was enacted, or defining certain words or phrases, has the *fullest* effect. *It is a part of the law and must be construed and applied accordingly, and the act will have a construction, and the words and phrases a meaning, in harmony with the defining provisions, even though otherwise they would have a different effect.*" (See cases cited in Note 2.)

This principle is thus stated in Endlich on the Interpretation of Statutes, § 365, pp. 510, 511:

"The right of the legislature to prescribe the legal definitions of its own language must be conceded. Moreover, a statute declaratory of a former one has the same effect upon the construction of the former act, in the absence of intervening rights, as if the declaratory act had been embodied in the original act at the time of its passage."

In the note to the above, the author cites many of the cases cited in Sutherland to the same proposition.

(*d.*) While the principles above quoted purport to relate to the construction of *statutes*, they are, of course, equally applicable to the construction and interpretation of treaties or of statutes and treaties relating to the same subject-matter

(26 Am. and Eng. Ency. Law, 555). As stated in the American and English Encyclopædia of Law (vol. 26, p. 546), "no distinction is made between treaties made under au-"thority of the United States and the laws of Congress, but "both are declared to be the supreme law of the land; con-"sequently, when in conflict, being of equal dignity, effect "is to be given to the later as the last expression of the "law-making power."

This court, in the case of *Whitney vs. Robertson* (124 U. S., 194), says:

"If the treaty contain stipulations which are self-executing—that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. *Congress may modify such provisions so far as they bind the United States, or supersede them altogether.* By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, *if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.*"

The court, after repeating that "the duty of the courts is to construe and give effect to the latest expression of the sovereign will," quoting from the *Head Money cases* (112 U. S., 580), continues:

"So far as a treaty made by the United States with any foreign nation can be the subject of judicial cognizance in the courts of this country, *it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.*"

It will be seen from the above decision that, even in the case of inconsistency or absolute repugnance between a treaty and subsequent legislation upon the same subject,

the courts will give effect to the one last in date as controlling the other. In the case at bar, as I have above endeavored to show, there is no real repugnance between the language that constitutes the cession in the third article of the said treaty of 1866 and the language contained in the said act of 1891. The latter is a direct legislative declaration of the character and effect to be given to said cession, and is one made in "enforcement" of the provisions of the said treaty.

As between the Choctaws and Chickasaws and the United States, it is respectfully submitted, the declaration by Congress of the character of the cession contained in the third article of the treaty of 1866 is *conclusive*. The act of 1891 must be construed with and, so far as this cession is concerned, taken to be a part of said treaty of 1866. It is not, however, the only legislative expression as to the character of said cession, and to some of the others I shall now briefly refer.

1. On the 20th of September, 1890, Mr. Peel, from the Committee on Indian Affairs of the House of Representatives, reported a bill from that committee (No. 12106, Fifty-first Congress, second session) which provided:

"That the sum of $6,211,714.65 be, and the same is hereby, appropriated out of any money in the Treasury not otherwise appropriated, *to pay in full the Choctaw and Chickasaw nations of Indians for all the right, title, interest, and claim which said nations of Indians may have in and to certain lands ceded in trust by article 3 of the treaty between the United States and said nations, concluded April 28th*, 1866."

Accompanying this bill was the unanimous report of the said Committee on Indian Affairs, in which is reviewed the entire history of this matter, and the conclusion is reached that "*there can be no reasonable doubt that the treaty of* 1866 *was intended by all of the parties thereto to be a cession in trust to the United States* for the location of other bands or tribes

of Indians upon the lands ceded thereby." No final disposition was made of this bill.

2. The appropriation in the act of March 3, 1891, to pay the Choctaws and Chickasaws for their interest in the lands that had been occupied by the Cheyennes and Arapahoes was made by said act immediately available, but upon one pretext or another payment was delayed. In December of the same year, Congress again convened, and on the 18th of February following, a communication was sent by President Harrison to the Senate and House of Representatives in which he quotes the provision of the appropriation act above set forth, and states that if it had been presented to him as a separate measure he would have vetoed it. Among other things he says that—

"After a somewhat careful examination of the question, I do not believe that the lands for which this money is to be paid were, to quote the language of section fifteen of the Indian appropriation bill, already set out, 'ceded in trust by article 3 of the treaty between the United States and the said Choctaw and Chickasaw nations of Indians, which was concluded April 28, 1866,'" &c.

The President then proceeds with an elaborate presentation of the history of these lands and of the relations of the Indians thereto.

This communication of the President was referred by the Senate and House of Representatives to their respective Committees on Indian Affairs. The Senate committee at that time was composed of the following Senators: Henry L. Dawes, chairman; Orville H. Platt, Francis B. Stockbridge, Charles F. Manderson, Richard F. Pettigrew, John T. Morgan, James K. Jones, George Hearst, and John W. Daniel. On the 15th of April, 1892, Senator Jones, of Arkansas, presented to the Senate the report of its said committee, in which the question now under discussion in this case was most fully and carefully considered. The commit-

tee reached the conclusion, as will more fully appear by reference to its report, that the lands ceded by the said treaty of 1866 and known as the leased district *were ceded to and held by the United States in trust, and that, upon the transfer thereof to citizens of the United States, the Choctaws and Chickasaws would have the right to regard such action as a forfeiture of the trust estate held by the United States therein, and would be entitled to compensation for the full value thereof.* (See Senate Report No. 552, 52d Cong., 1st sess.)

The views stated by the President in his said message to the Senate and House of Representatives in support of his contention that said lands were not ceded in trust are so fully answered in the above report of the Committee on Indian Affairs of the Senate that I content myself with submitting herewith a copy thereof, and requesting the especial attention of the court thereto. Answer to the position so taken by the President was also made in the elaborate memorials presented on behalf of the Choctaws and Chickasaws, copies of which we also herewith submit to the court. In these three documents this subject is so fully considered that I deem further argument unnecessary upon this branch of the case.

Accompanying the report of the Senate committee, to which we have just referred, was the following resolution:

"*Resolved*, That for reasons set forth in the report of the Committee on Indian Affairs upon the President's message of February 18, 1892, upon the appropriation of March 3, 1891, for payment to the Choctaw and Chickasaw nations for their interest in the Cheyenne and Arapahoe reservation, in the Indian Territory, submitted with this resolution, that *it is the opinion of the Senate that there is no sufficient reason for interference in the due execution of the law referred to.*"

This resolution was adopted by the Senate, after full discussion, on the 9th of May, 1892, by a vote of 43 to 13, as will more fully appear by reference to the proceedings of that body in that behalf.

3. The House of Representatives, whose Committee on Indian Affairs had made substantially the same report upon precisely the same resolution, subsequently adopted the said resolution by a vote of 163 to 47.

Thus it appears, as I have before said, that up to the time of this message to the Senate and House of Representatives by the President of the United States, no question had ever been made by either the executive, legislative, or judicial branches of the Government that the lands involved in this controversy were ceded to and held by the United States upon the clearly understood trust above indicated, and that upon the receipt of this message both branches of Congress almost unanimously resolved that in their opinion the views of the President were without justification, and that the contention of the Choctaws and Chickasaws was the correct and only reasonable one under the circumstances.

After this specific declaration by Congress, the money that had been appropriated to pay them for their interest in the lands that had been occupied by the Cheyennes and Arapahoes was paid, the interest thus paid for being, as above stated, precisely the same as that held by these claimants in the lands involved in this suit, which are now occupied by the Wichitas and affiliated bands, as they are called.

VII.

ACTION BY THE GOVERNMENT IN SIMILAR CASES.

The fact that the cession of 1866 was intended by the parties to said treaty to be a cession in trust of the leased district for the settlement thereon of such Indian tribes as the United States might desire to colonize in said country is made further apparent by the dealings of the Government with the other nations of Indians with which treaties had been entered into as a result of the convention at Fort Smith in 1865, and to these dealings I now invite attention.

THE CREEKS AND SEMINOLES.

The Creek nation of Indians, prior to their removal to the Indian Territory, occupied certain lands in the States of Georgia and Alabama, from which, as in the cases of the Choctaws and Chickasaws, the United States and the States of Georgia and Alabama desired their removal. The Seminoles, who once constituted a part of the Creek Nation, occupied certain territory in the State of Florida, from which it was likewise desired that they should be removed.

In pursuance of this desire on the part of the United States and the States, on the 12th of February, 1825, a treaty was entered into with the Creeks, by the first article of which these Indians ceded to the United States, absolutely, all their lands lying within the States of Georgia and Alabama. In exchange for the lands thus ceded the United States agreed to convey to the Creeks, an equal quantity of land, acre for acre, west of the Mississippi river, commencing on the Arkansas river at the mouth of the Canadian fork and running west between the Arkansas and Canadian fork for quantity. It was also stipulated that a deputation of Creeks should be sent to explore the country so offered in exchange, and that, if the same should not be acceptable to them, they should select other lands. These lands were accepted, however, and thus the Creeks acquired their lands in what afterwards came to be known as the Indian Territory.

On the 9th of May, 1832, the United States entered into a treaty with the Seminoles (7 Stats., 368), by which the Seminoles relinquished their land in Florida and agreed to emigrate to the country west of the Mississippi river ceded to the Creeks by the treaty of 1825; and on the 14th of February, 1833, another agreement or convention was entered into between the United States and the Creeks (7 Stats., 417), by which the boundaries of the said lands

lying west of the Mississippi were distinctly defined. By the third article of this treaty it is provided that "the United States will grant a patent, in fee-simple, to the Creek nation of Indians for the land assigned said nation by this treaty or convention whenever the same shall have been ratified by the President and Senate of the United States, and the right thus guaranteed by the United States shall continue to said tribe of Indians so long as they exist as a nation and continue to occupy the country so assigned them," which is substantially the same provision that is found in the said treaty of 1830 with the Choctaws. By article 4 it is provided:

"The lands referred to shall be taken and considered the property of the whole Muscogee or Creek nation, * * * and it is also understood and agreed that the Seminole Indians of Florida shall also have a permanent and comfortable home on the lands hereby set apart as the country of the Creek nation, and they, the Seminoles, will hereafter be considered a constituent part of the said nation, who are to be located on some part of the Creek country by themselves, which location will be selected for that purpose by the commissioners who have signed these articles of agreement."

Note here that, as in the case of the Choctaws and Chickasaws, the Creeks and Seminoles had always been friends and neighbors and spoke the same language.

In this way the Seminoles became occupants of a part of the Creek country, and on the 7th of August, 1856, a treaty was entered into between the United States and the Creeks and Seminoles for the purpose, as will be seen by the preamble (11 Stats., 699), of settling dissensions and controversies that had arisen between the Creeks and Seminoles by reason of the location of the latter in the Creek country. The third article of said treaty provides:

"The United States do hereby solemnly guarantee to the Seminoles the tract of country ceded to them by the first article of this convention, and to the Creek Indians the

lands included within the boundaries defined in the second article thereof, and likewise that the same shall be respectively secured to and held by said Indians by the same title and tenure by which they were guaranteed and secured to the Creek nation by the fourteenth article of the treaty of March 24, 1832, the third of the treaty of February 14, 1833, and by the letters patent issued to the Creek nation on the 11th of August, 1852, recorded, &c. * * * *Provided, however*, That no part of the tract of country so ceded to the Seminoles shall ever be sold or otherwise disposed of without the consent of both parties legally given."

As in the case of the Choctaws, the United States also solemnly agree and bind themselves that no State or Territory shall ever pass laws for the government of these tribes, and that no portion of the territory ceded shall ever be embraced within the limits of any State or Territory without the full and free consent of the Indians.

The substance of these four treaties may be briefly stated as follows: The Creeks ceded their lands in Georgia and Alabama to the United States and took in exchange the lands between the Canadian fork and the Arkansas river. The Seminoles did likewise with their lands in Florida and were located upon the lands of the Creeks west of the Mississippi. The Creeks and Seminoles removed to this country, and a separate tract was set apart for the Seminoles, to which they afterwards obtained the fee-simple title under the said treaty of August 7, 1856.

These Indians having thus acquired the title to these lands, and the United States having, as aforesaid, adopted the scheme (as it has been called in some of the official communications above referred to) of colonizing other bands of Indians on the western part of the Indian Territory, a commission was appointed, as above stated, in connection with the Choctaw and Chickasaw cession, to meet and treat with the Indians assembled in council at Fort Smith in the month of September, 1865, upon the basis of the seven propositions already set forth herein.

The Seminoles and Creeks were also represented in this council, and, as a matter of course, the said seven propositions were submitted to their delegates as well as to the others there assembled. The speech that was made by Commissioner of Indian Affairs Cooley was addressed to and considered by these delegates of the Creeks and Seminoles, and these seven propositions, in whatever form they were made, were carried home by these delegates of the last-named tribes for the consideration of their respective nations.

The result of this was that on the 11th of March, 1866, a treaty was concluded between the United States and the Seminoles (14 Stats., 755), by the first article of which it was declared that perpetual peace should exist between the contracting parties; that the Seminoles would remain firm allies of the United States, and that they would remain at peace with the other Indian tribes and among themselves, which is substantially the same as the provisions made in the first article of the treaty of the 28th of April of the same year with the Choctaws and Chickasaws.

By article 2 of said treaty with the Seminoles it was stipulated that slavery should be abolished, as was also done by the second article of the said treaty with the Choctaws and Chickasaws. By article 3 of the said Seminole treaty it is stipulated that—

"In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Seminoles cede and convey to the United States their entire domain, being the tract of land ceded to the Seminoles with the Creek nation under the provisions of article 1 of the treaty of the United States with the Creeks and Seminoles made and executed at Washington August 7, 1856."

In consideration of said cession of lands, estimated at 2,169,080 acres, the United States agreed to pay the Seminoles the sum of $325,362, being at the rate of 15 cents an acre.

Now, it should be distinctly borne in mind that by the

treaties to which reference has just been made the Semi
acquired a fee-simple title to the tract of land set ap
them by the treaty of 1856, to be held by them, as i
present case, so long as they should exist as a natio
continue to reside thereon. By the treaty of 1866 the
noles as absolutely ceded these lands to the United
as did the claimants in this case, and received as a consi
tion therefor the sum of 15 cents an acre.

Subsequently the United States, for reasons not nece
here to be stated, as they are a part of the history o
country, proposed to open these lands for settlement, th
diverting them from the purpose for which they were
inally set apart, and thereupon the question arose
whether or not these Seminole Indians had any
therein; and, if so, what (see Ex. Doc. 122, 50th Con
sess.), and the Congress of the United States, after the f
investigation possible, by the act of the 2d of March,
(25 Stats., 1004), appropriated the sum of $1,912,942
pay the Seminoles for their reversionary or equitable in
in said lands.

Keeping now in mind this antecedent history to
we have just above referred, and which it is not nece
to repeat, we will next direct the attention of the co
the treaty that was made on the 14th of June, 186
Stats., 785), with the Creeks, by the first article of whi
in the other treaties mentioned, provision was mad
perpetual peace, in the second the abolishment of sl
and in the third a cession as follows:

"In compliance with the desire of the United Stat
locate other Indians and freedmen thereon, the C
hereby cede and convey to the United States, to be s
and used as homes for such other civilized Indians
United States may desire to settle thereon, the west h
their entire domain, to be divided by a line running
and south, * * * and in consideration of said cess
the west half of their lands, estimated to contain 3,25
acres, the United States agree to pay the sum of thirty
per acre, amounting to $975,168, &c."

The only difference, if it is a difference, between the language employed in this cession and that used in the treaty with the Choctaws and Chickasaws is that it contains the words "to be sold to and used as homes for such other civilized Indians," &c. This is really no difference whatever, because the objects that were sought to be accomplished by all of the said several treaties with the Creeks, Seminoles, Choctaws, and Chickasaws, the provisions of which we have above set forth, were precisely the same and a part of the same general plan or scheme, to wit, the establishment of peace, the abolishment of slavery, and the procuring of the right to locate other Indians on the lands belonging to the nations treated with that were still unoccupied, &c.; and it will be noticed that the Creeks ceded this land to the United States for the specified sum of thirty cents an acre.

Such being the condition of affairs upon and after the execution of the treaty with the Creeks of June 14, 1866, when the United States entered upon the new scheme of opening the unoccupied lands in the Indian Territory to public settlement, which has been before referred to (see Ex. Doc. 98, 50th Cong., 2d sess.), the question arose as to whether the Creeks had any interest in the lands so ceded by them by the treaty of 1866, and the Government of the United States contemplating, as aforesaid, the opening of these lands to settlement, and the establishment of a territorial form of government thereover (which, it will be remembered, was prohibited by the treaties above named), and after having acquired all the information from the executive and judicial departments of the Government which has already been brought to the attention of the court, on the 1st of March, 1889 (25 Stats., 759), an appropriation was made by Congress, as in the case of the Seminoles, to pay the Creeks $2,280,857.10 for their equitable interest in these lands, this payment being at the rate of $1.25 per acre, deducting the 30 cents per acre paid in accordance with the treaty of June 14, 1866, as to unassigned lands, and 20 cents

per acre to cover expenses on the lands theretofore assigned to and occupied by other Indians.

THE CHEROKEES.

The Cherokees also owned lands east of the Mississippi, and the Government, for the same reasons that have been mentioned as to the Indians above named, desired to effect their removal to the west. The Government pursued the same policy with relation to the Cherokees, granting them territory for their sole occupancy west of the Mississippi, and giving them the same guarantees against intrusion and against their ever being subject to any government other than their own as in the cases to which attention has already been called.

These last-named Indians received the same grant in fee-simple, and when the United States desired to locate other Indians on their lands they were invited to participate and did participate in the convention of 1865 just as the others did. They made a treaty with the United States in 1866 of the same tenor and on the same basis as the other treaties making provision for the settlement of other Indian tribes on the lands of the other nations with whom treaties were made in the same year, and when such settlements were made the Cherokees were paid the full value of the land so settled.

So that in every case the Indians, in the carrying out of this policy, have been paid for the lands secured to them, when they have been diverted from the purposes for which they were set apart, and if, in this case, these claimants are not paid for their said equitable interest they will be made the sole exception, although the conditions and circumstances under which they made the cession of 1866 are identically the same.

In this connection, as a further instance of the construction placed by Congress upon the language making the

cessions contained in the said various treaties of 1866, to which we have referred, we again ask the attention of the court to what we have already said in connection with the appropriation made in favor of the Choctaws and Chickasaws of the 3d of March, 1891 (26 *Stats.*, 1005), to pay them for their equitable interest in the part of this same leased district upon which the Cheyennes and Arapahoes had been located. (*See claimant's petition, pp.* 20, 21.)

VIII.

POWER OF THE COURT TO REFORM THE CESSION OF 1866

In the brief of the attorney for the Government it is claimed that "the court below had no jurisdiction to go "beyond the plain words of the cession in the treaty of "1866 and to inquire into any supposed intention of the "parties to create a trust instead of making it an absolute "cession"—in other words, that the court below was without jurisdiction to reform or construe the treaty of 1866 so as to make the cession in article 3 to be a cession in trust.

In support of this contention the attorney for the Government asserts (*a*) that the language of the treaty is not doubtful or inconsistent; (*b*) that the jurisdictional act confers no power of reformation upon the court, and that (*c*) the act is not ineffective, although no power of reformation is given.

Referring to the act giving this court jurisdiction of the case at bar, it will be observed that it expressly states that it is the intention to allow the court "jurisdiction, so that the rights, legal and *equitable*," of the various parties "in the premises shall be fully considered and determined." As I have before said, it is manifest that it was the intention of Congress to bestow upon the court jurisdiction to determine this whole matter in all its legal and equitable aspects.

One of the most conspicuous and useful of the powers of

courts of equity is the power to reform instruments in writing that do not express the actual meaning and intent of the parties and to decree relief according to the terms of the instrument as it would have read if the intent of the parties had been correctly expressed. This is a rule of equity jurisprudence so familiar that a citation of authorities is unnecessary. Nevertheless, I ask the attention of the court to the following, which I quote from the leading case of *Gillespie vs. Moon* (2 Johnson's Ch'y, N. Y., 596):

"The rule in the courts of law is, that the written instrument does, in contemplation of law, contain the true agreement of the parties, and that the writing furnishes better evidence of the sense of the parties than any that can be supplied by parol. *But equity has a broader jurisdiction, and will open the written contract to let in an equity arising from facts perfectly distinct from the sense and construction of the instrument itself.* 'It must be an essential ingredient,' says Lord Thurlow (1 Bro., 350), 'to any relief under this head that it should be an accident perfectly distinct from the sense of the instrument.' I have looked into most, if not all, of the cases on this branch of equity jurisdiction, and it appears to me to be established, and on great and essential grounds of justice, *that relief can be had against any deed or contract in writing founded in mistake or fraud. The mistake may be shown by parol proof,* and the relief granted to the injured party whether he sets up the mistake affirmatively, by bill, or as a defense."

The chancellor then proceeds with an elaborate and detailed examination of the cases upon this subject, English and American, from which he reaches the conclusion above quoted. This case has been cited with approval in innumerable cases since the said decision was rendered, with which it is not necessary to encumber this brief.

Recurring briefly to what has already been gone over herein, it is beyond all dispute that the Choctaws held title, unincumbered by the occupancy of any other tribes or bands of Indians, to a vast tract of territory east of the Mississippi river; that their occupancy had been intruded upon by the

whites, and that efforts had been made to subject them to the laws of Mississippi; that they resisted these intrusions and these efforts to subject them to a jurisdiction other than their own, and that they were therefore willing to comply with the desire of the said State and of the United States that they should remove to the lands now occupied by them west of the Mississippi. One of the most important of the considerations that moved them to cede their lands in Mississippi to the United States was their desire to preserve their own autonomy as a nation, and to have a tract of country over which they would have exclusive control and jurisdiction free from all interruption and intrusion by any people other than their own.

This consideration to these Indians was of supreme importance, and upon the right to the exclusive occupancy of their lands and to govern themselves they naturally placed the highest value. It was obviously their desire to obtain the full and uninterrupted enjoyment of these rights and privileges that induced them to relinquish to the United States this vast tract of country in which they had lived, and over which they had had the supreme control, for an unknown number of years before it was first inhabited by the whites. Nothing but a consideration in the highest degree vital to their existence and happiness could have induced them to remove from the land of which they had for so many years enjoyed complete possession and exclusive occupancy, and on which it is conceded they had the right to remain, where they had had health, prosperity, and independence, and to which they were attached by all the ties of what are known as love of country and love of home.

All these things the Choctaws gave up at the instance of the Government of the United States and went into a land unknown to them under the solemn promise and assurance that they should be protected from further persecution and intrusion, and that they should have conferred upon them the absolute ownership and title thereto; that they should

have the right to the sole occupancy of it, and that no governmental control other than their own should ever be exercised thereover. With the utmost care these Indians made these provisions against the ills to which they had been subjected because of the fact that they were within the jurisdiction of a State that was continually enacting laws hostile and oppressive to them.

These wrongs and oppressions are matters of history with which this court is already familiar, they having been brought to its attention in the case, recently decided, of the *Choctaw Nation vs. The United States*, known as "the net proceeds case," reported in 119 U. S., p. 1 *et seq.*

The stipulation for the protection and independence of these Indians is one of the most conspicuous features in all the compacts and treaties that they entered into with the United States in regard to their lands, and is a right which they had always jealously and carefully guarded and provided for. It is provided for in article 7 of the said treaty of June 22, 1855, where it is said that "so far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secure in the unrestricted right of self-government, and have jurisdiction over all persons and property within their respective limits," and substantially the same provision is contained in the treaty of April 28, 1866, which contains the cession of the lands now in dispute.

This being so, as has been hereinbefore more fully set forth, when the United States, in 1865, desired to procure the privilege of locating other bands or tribes of Indians in the western portion of the Indian Territory, this policy and obligation to protect the Choctaws and Chickasaws against intrusion, except with their consent, was recognized, and when the delegates of the several nations were brought together at Fort Smith, the commissioners appointed by the United States presented the said fifth proposition to said

delegates, which was in substance, no matter in what form it was expressed, that "a part of the Indian country be set apart to be purchased for the use of such Indians from Kansas or elsewhere as the Government may desire to colonize therein." They were made to understand, as stated in the speech of Mr. Cooley, that—

"A portion of the lands now occupied by you *must be set apart for the friendly tribes, now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government*, or such as may be fixed by the Government."

It was upon this basis that the treaty with the Choctaws and Chickasaws of 1866 was negotiated, and it was upon the mutual understanding that it was for said purpose that the lands in controversy were ceded to the United States, and that said treaty was executed by the Indians and approved and administered by the Government of the United States. The Choctaws and Chickasaws so understood it, as is conclusively shown by the evidence (see the deposition of Gen. Cyrus Bussey on file herein), by the terms of the unsigned treaty of 1865, and by the surrounding circumstances, and it was so understood by the officials of the Government who were called upon to administer it, as is apparent from their subsequent interpretation of it, and their statements to the delegates of the purposes for which the said convention or council was called together.

Such being the case, if by any accident, inadvertence, or design (and we do not attribute it to design), or if by a careless use of language, the words used in the said treaty of April 28, 1866, do not express this most manifest intention of the parties because of the omission to insert provisions reserving and securing to the claimants in this case the interest, trust, and equity hereinabove set forth, as promised and stipulated by the commissioners who negotiated the said treaty, then it is not only within the power

of this court, but is its manifest duty, to reform this instrument so as to make it express this clearly understood intention, or, which is the same thing, to interpret it according to such manifest intention and render a judgment accordingly.

So reformed or interpreted, the result would be that the opening of these lands to the public for settlement under the land laws of the United States would terminate this trust, would violate the solemn obligation of the United States to preserve these lands to the use of the claimants alone, and would obliterate any consent by the Choctaws and Chickasaws to place other Indians thereon, and would render the United States, according to all the rules of law and equity applicable to the questions involved, liable to the Choctaw and Chickasaw nations for the full value of said lands divested of the trust, and which value is legislatively fixed at $1.25 per acre.

And there is another principle of equity that is here applicable. The Indians are the wards of the nation. Whenever the question has been before this court, they have been held to be under the tutelage and protection of the United States. As was said in the case of *United States vs. Kagama* (118 U. S., 383), "from their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, there arises the duty of protection, and with it the power." This being so, under all the principles that have been asserted by this court in regard to the interpretation of treaties with these Indian nations, the transaction in the present case should be as carefully scrutinized and as strictly construed against the United States as any transaction of like character between guardian and ward.

It is a fundamental rule in such transactions that purchases by the guardian from the ward will be set aside, if the interests of the ward have been sacrificed, as constructively fraudulent. Can a transaction between the United

States and these Indians, by which the United States acquires from them their territory east of the Mississippi, of incalculable value, and then obtains a cession of more than 7,700,000 acres of the land which they had given in exchange for less than four cents an acre, bear the test of such scrutiny? Surely the right of the court to construe this instrument upon this ground, if not upon the ground of the mistake heretofore shown, cannot be doubted.

IX.

CONSIDERATION FOR CESSION AND LEASE IN TREATY OF 1855.

The attorney for the Government devotes nearly one hundred pages of his brief (pages 45 to 141) to an attempt to show that the $800,000 paid under the treaty of 1855 for the relinquishment and lease therein set forth, and the $300,000 paid under the treaty of 1866, were paid for the absolute cession to the United States of the leased district; that this $1,100,000 was a sufficient consideration, and that the Choctaws and Chickasaws have therefore parted with all their interest in said lands; and in support of said contention he asserts—

(*a.*) That the United States had no power to convey the land west of the 100th degree of west longitude, relinquished by the treaty of 1855 to the Choctaws;

(*b.*) That the treaty of 1830, limiting the cession to the 100th meridian, annulled the treaty of 1820;

(*c.*) That the provision for said relinquishment was only inserted in the treaty of 1855 as a correction of an error made by the United States in apparently conveying said land to the Choctaws in the treaty of 1820;

(*d.*) That the lease of 1855 being a lease for the *permanent* settlement of other Indians on the property leased, the lessors were divested of any reversionary interest therein; and,

(*e.*) That the whole of the $800,000 provided for in the

treaty of 1855 should therefore be applied as consideration for the *lease* therein made and not the relinquishment.

Aside from the fact that even if this contention of the attorney for the Government were sound, such a consideration (about 14 cents an acre) would be so grossly inadequate that the cession of 1866, under the circumstances under which it was made, would be set aside for that reason alone. I think it will be apparent to the court from the following that the $800,000 provided for in the treaty of 1855 was paid at least in part for the relinquishment in question.

1. Answering the first of the above contentions of the attorney for the Government, I shall first call attention to article 2 of the treaty of 1820 (7 Stats., 210), in which it is recited that—

"For and in consideration of the foregoing cession" (of more than 6,000,000 acres east of the Mississippi) "on the part of the Choctaw nation, and in part satisfaction for the same, the commissioners of the United States, in behalf of said States, do hereby cede to said nation a tract of country west of the Mississippi river, situate between the Arkansas and Red rivers, and bounded as follows: Beginning on the Arkansas river where the lower boundary line of the Cherokee strikes the same; thence up the Arkansas to the Canadian fork, and up the same to its source; thence due south to the Red river; thence down Red river three miles below the mouth of Little river, which empties itself into Red river on the north side; thence a direct line to the beginning."

In the treaty of 1830, already fully set out, in consideration of the relinquishment by the Choctaws of the remainder of their land east of the Mississippi, about 10,000,000 acres, the United States stipulated that—

"Under a grant specially to be made by the President of the United States, (the United States) shall cause to be conveyed to the Choctaw nation a tract of country west of the Mississippi river, in fee-simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it: Beginning near Fort Smith, where the Ar-

kansas boundary crosses the Arkansas river; running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red river, and down Red river to the west boundary of the Territory of Arkansas; thence north along that line to the beginning."

It will thus be seen that when in 1830, for the reasons already given, it became necessary again to treat with the Choctaws for their removal west of the Mississippi, it will be noticed that an attempt was made to secure to them the same amount of territory west as they had received under the treaty of 1820—that is, the cession was to the source of the Canadian fork and thence due south to the Red river, as in the treaty of 1820; but as the United States had then ceded the land west of the 100th meridian to Spain, the extent of the cession west was to the source of the Canadian "if in the limits of the United States, or to those limits."

The land included in the above cession was part of the territory acquired from France in 1803. It is true, as stated in the brief of the Government, that by the treaty proclaimed on the 22d of February, 1821, the land embraced in the cession to the Choctaws in 1820 west of the 100th meridian was ceded to Spain; but it is equally true that as between the United States and the Choctaws this cession to Spain can cut no figure. The sovereignty of the land was ceded to Spain, but this cession was, of course, subject to the rights of property of the inhabitants thereof, and when it was restored to the United States by Mexico it was still subject to these rights.

A great part of the argument of the attorney for the Government is based upon the assumption that the power of the United States to convey the territory ceded to the Choctaws under the treaty of 1820 was restricted to the right to convey the territory it had acquired from the Quapaws under the treaty with those Indians of August 24, 1818 (7 Stats., 176). As will be shown hereafter in what I shall

have to say regarding the claim of the Wichitas and affiliated bands, it was within the power of the United States to convey to the Choctaws the fee of the lands within the boundaries described in the treaty of 1820 irrespective of any rights they had acquired from the Quapaws (*Beecher vs. Wetherby*, 95 U. S., 517) or any other Indians, and as the attorney for the Government himself asserts that the Quapaws had no title to and did not cede to the United States any lands *west* of the 100th meridian (see his brief, p. 50 *et seq.*), it is difficult to see how any limitation in the cession of the Quapaws to the United States can control the right of the United States to cede to the Choctaws lands in which the Quapaws had no interest.

2. As indicated above, the attorney for the United States also contends that as the treaty of 1830 excludes the country west of the 100th meridian (in that the extent of the grant is only to the limits of the United States, which were then at that point), the treaty of 1820 is annulled and the cession in the latter treaty must control. In making this contention the attorney for the Government indiscreetly makes use of a sword that cuts both ways. If the treaty of 1820 is annulled, it follows that the cession of the land east of the Mississippi becomes inoperative, and that the 6,000,000 acres therein ceded still belong to the Choctaws.

As in the case of a statute, the rules for the construction of which apply equally to treaties, as has been shown, a subsequent treaty cannot be said to repeal or annul a former one so as to divest a nation or individuals of rights of property that have been acquired thereunder unless that intention clearly appears, and then adequate compensation must be provided. The rule is stated in 23 American and English Encyclopædia of Law (p. 503) as follows:

"The repeal of a statute, in the absence of a saving clause, necessarily divests and destroys all inchoate interests which have arisen under it, *but leaves unimpaired those that have become vested.*" Citing many cases in note 1.

Aside from the fact that the treaty of 1830 was evidently intended as a *confirmation* of the cession contained in the treaty of 1820, repeating, as it does, the extent of the cession west in exactly the same words, it will be seen from the above that even if it had in terms repealed the treaty of 1820, to which it was merely an addition, it could not affect the vested rights of property acquired by the Choctaws under the treaty of 1820 before this land was ceded to Spain and when the United States were the undisputed owners thereof.

But this question is settled beyond dispute by the recognition of and payment for the land ceded in the treaty of 1820 that is contained in the treaty of 1855.

3. It is also asserted by the attorney for the Government that this cession of land beyond the 100th meridian is impossible, because a line drawn due south from the source of the Canadian river would not strike the Red river, as called for in the description in the treaty of 1820, the source of the Red river being further east.

In reply to this it is only necessary to mention that elementary rule in the construction of descriptions in deeds that where there is an ambiguity or discrepancy between the metes and bounds and natural or artificial monuments that are also named the latter control; and the reason upon which this rule is based is particularly applicable in this case, for what did the Indians know about "meridians" and lines drawn "due south"? Nothing, of course. What they did know was that by this treaty of 1820 they were getting a section of land lying between the Canadian and Red rivers and extending west to their sources, and it is respectfully submitted that this description must be construed accordingly.

4. From all of the above it follows that at the time of the making of the treaty of 1855 the United States must have

regarded the Choctaws as the owners of the part of the ce
sion of 1820 lying west of the 100th meridian, and that th
provision for the relinquishment was not inserted mere
for the purpose of correcting an error in the treaty of 182
It is clear that the United States had the right and power
and actually did convey to the Choctaws the land west
the 100th degree, and that it was for the relinquishment
their title thereto that at least a part of the $800,000 consi
eration was paid.

The attorney for the Government argues that, as und
the agreement between the Choctaws and Chickasaws th
proportion in which they were to own their lands was
three-fourths to one-fourth, the appropriation in the trea
of 1855 of $200,000 to the Chickasaws and $600,000 to th
Choctaws shows that it was the intention of the Governme
that the $800,000 should be paid exclusively for the leas
allowing nothing for the relinquishment. As a matter
fact, $400,000 was paid for the relinquishment of th
Choctaws of their land west of the 100th meridian an
the remaining $400,000 was paid to the Choctaws an
Chickasaws as compensation for the lease of lands betwe
the 98th and 100th degrees.

Counsel for the Government has evidently overlooked th
first article of the agreement of January 17, 1837 (Ap
Rec., p. 20), wherein, in providing for the status of th
Chickasaws, it states the Chickasaws are "to have an equ
representation in their (Choctaw) general council, and to
placed on an equal footing, in every other respect, with an
of the other districts of said nation, except a voice in th
management of the consideration which is given for the
rights and privileges; and the Chickasaw people to be en
tled to all the rights and privileges, with the exception
participating in the Choctaw annuities, and the consider
tion to be paid for these rights and privileges," &c.

In pursuance of this the Chickasaws became entitled

share in the proceeds of these two transactions, and they received $100,000 each of the amounts paid for the relinquishment and the lease. (See letter of Choctaw delegates, App. Rec., p. 303.)

5. Although the attorney for the Government takes the ground that while the conveyance in the treaty of 1855 purports to be a lease, it is not in fact a lease, and contains none of the elements of a lease; that as the Government is given the right to *permanently* locate Indians upon the lands in the leased district, the Choctaws and Chickasaws have no reversionary interest in such lands as have actually been so settled, still he takes occasion, on page 267 of his brief, to cite a case that completely and effectually disposes of this most important theory in his case.

The case to which he refers is the case of the *Texas and Pacific Railway Company vs. Marshall* (136 U. S., 393), where the railroad company, in consideration of $300,000 and 66 acres of land, agreed to *permanently* establish its eastern terminus and Texas office in the city of Marshall and to construct in said city machine shops and car works. What is quoted from said case by the attorney for the Government is as follows:

"It seems to us that the real essence of the contract was that the railroad company should, in its process of construction, make this city its eastern terminus and should establish there its depot, its machine shops, and its car works, and that this should be done in the ordinary course of its business, with the purpose that it should be *permanent;* but it did not amount to a covenant that the company should never cease to make its eastern terminus at Marshall; that it would for all time continue to have its machine shops and car works there, and that whatever might be the changes of time and circumstances, of railroad rivalry and assistance, these things alone should remain forever unchangeable. * * *

"It appears to us, so far from this, that the contract on the part of the railroad company is satisfied and performed

when it establishes and keeps a depot and sets in operation car works and machine shops, and keeps them going for eight years and until the interests of the railroad company and the public demand the removal of some or all of these subjects of the contract to some other place. It was the fair meaning of the words 'permanent establishment' as there was no intention at the time of removing or abandoning them. *The word 'permanent' does not mean forever, or lasting forever, or existing forever.* The language used is to be considered according to its nature and its relation to the subject-matter of the contract, and we think that these things were permanently established by the railway company at Marshall."

The attorney for the Government also cites:

Mead vs. Ballard, 7 Wall., 290.
Newton vs. Commissioners, 100 U. S., 548.
Sumner vs. Darnell, 128 Ind., 38.
Hardy vs. Wiley, 87 Va., 125.

It would seem unnecessary to comment upon the effect of this decision upon the theory of the Government. If by the use of the word "permanently" the Choctaws and Chickasaws did not grant to the United States the right to locate other Indians upon the leased district *forever*, but only so long as they might continue to exercise the right, it follows that upon the abandonment of that purpose the land reverts to the grantors.

X.

THE CLAIM OF THE WICHITAS.

As before stated, the claim of the Wichitas and affiliated bands is based upon (*a*) their alleged aboriginal occupancy of the land involved in this controversy; (*b*) the treaty of August 24, 1835, between the United States and the Wichita, Comanche, Cherokee, Muscogee, Choctaw, Osage, Seneca, and Quapaw Indians; (*c*) the provision in article 9 of the

treaty of 1855 for their "permanent" settlement on said lands, and (*d*) an unratified agreement made in 1872.

ABORIGINAL OCCUPANCY.

To the first of these contentions of the Wichitas, to wit, that the cessions of the United States to the Choctaws in 1820 and 1830 were ineffective because the Wichitas had a prior and better title to these lands than the United States, there are many replies:

1. One alone is conclusive. It is that the United States have the supreme and paramount title to any and all of the public domain, and can confer upon any grantee a good title, whether aboriginal title of the Indian occupants is extinguished or not. It is true that by a conveyance of such lands the naked fee only is passed to the grantee, and that the grantee takes subject to the Indian right of occupancy; but, as between the Choctaws and Chickasaws and the United States, this can make no difference, as it is to the United States that the aboriginal claimants must look for compensation for the loss of their lands.

This question has been passed upon by the Supreme Court of the United States in many cases, among others, in the case of *Beecher vs. Wetherby* (95 U. S., 517). On page 525 *et seq.* the court lays down the doctrine that we have just stated. This case of *Beecher vs. Wetherby* was one in which the Menomonee Indians claimed the aboriginal title to the lands involved in the suit as one that had not been extinguished, and the court was thus brought to the exact question with which we are now dealing. In the opinion of the court, at said page 525, delivered by Justice Field, it is said:

"But the right which the Indians held was *only that of occupancy. The fee was in the United States*, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked

fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that, in this matter, the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, *the propriety or justice of their actions towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties*, neither of whom derives title from the Indians. *The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the Government.* It was so ruled in *Johnson vs. McIntosh* (8 Wheat., 543), in 1823, and in *United States vs. Cook* (19 Wall., 591), in 1873. Other cases between those periods have affirmed the same doctrine. *Clark vs. Smith* (13 Pet., 195). See, also, *Jackson vs. Hudson* (3 Johns. N. Y., 375); *Veeder vs. Guppy* (3 Wis., 502), and 8 Op. Att'y Gen'l, pp. 262–'4. In *United States vs. Cook*, the United States maintained replevin for timber cut and sold by Indians on lands reserved to them, the court observing that the fee was in the United States, and only a right of occupancy in the Indians; that this was the title by which other Indians held their land, and that the authority of *Johnson vs. McIntosh* on this point had never been doubted. * * * 'The possession, when abandoned by the Indians, attaches itself to the fee without further grant.'"

2. Neither in the treaty of 1820 nor in that of 1830 is there any recognition whatever of the fact that the lands ceded thereunder to the Choctaws were occupied by the Wichitas or any other bands of Indians, nor is there any reservation whatever in favor of any such Indian occupants; on the contrary, the treaty of 1830 provides "that the United "States, under a grant specially to be made by the President "of the United States, shall cause to be conveyed to the "Choctaw nation a tract of country west of the Mississippi "river in fee simple to them and their descendants, to inure "to them while they shall exist as a nation, and live on it," and in article 4 it is provided that—

"The Government and people of the United States *are hereby obliged* to secure to the Choctaw nation of red people *the jurisdiction and government of all the persons and property that may be within their limits*, so that no Territory or State shall ever have a right to pass laws for their government, *and no part of the land granted them shall ever be embraced in any Territory or State.*"

3. The fact that the Government of the United States did not regard the Wichitas or any other Indians as having any rights in or title to the said lands by reason of their prior occupancy is conclusively shown by the ninth article of the said treaty of 1855, which provides for the settlement of the said Indians in this leased district. Such a provision would have been wholly unnecessary if the occupation of that country by the Wichitas prior to said treaty was such as to fix on it their alleged aboriginal title or rights.

4. In addition to this, Congress has, throughout its entire dealings with the Wichitas, dealt with them, and with the subject of their territorial rights, on the principle and assumption that they were inhabitants or occupants of lands in the State of Texas and not of this Choctaw country. After the promulgation of the said treaty of 1855, a series of legislative acts was passed which show upon their face that the Wichitas were not inhabitants of the Choctaw leased district, but were inhabitants of Texas, and that they were required, in order to become occupants of the leased district, to be colonized thither by the United States. The following acts, among others, may be pointed to as showing this:

The appropriation act of June 19, 1860 (12 Stats., 56), expressly provides for the removal of "the Indians (naming, among others, the Wichitas) lately residing in Texas to the country leased from the Choctaws"—this, in so many words. The separate government and autonomy of the Wichitas, and the fact that they were located in Texas

in a territory entirely separate and distinct from the territory ceded to the Choctaws, and therefore were not possessed in their aboriginal right of this Choctaw country, are also recognized in the following acts:

The act of March 2, 1861 (12 Stats., 236); that of June 25, 1864 (13 Stats., 177); that of March 3, 1865 (13 Stats., 551); that of July 26, 1866 (14 Stats., 278); that of March 2, 1867 (14 Stats., 514), and that of July 27, 1868 (15 Stats., 20).

And in the following acts appropriation is made for the subsistence and transportation, among others, of the Wichitas, "collected upon the reservation set apart for their use and occupation in the Choctaw country:" The acts of May 28, 1872 (17 Stats., 284); March 3, 1871 (16 Stats., 564); February 14, 1873 (17 Stats., 440); June 22, 1874 (18 Stats., 149); March 3, 1875 (18 Stats., 423); March 3, 1877 (19 Stats., 290); May 27, 1878 (20 Stats., 84), and many other equivalent acts, the benefits of the provisions of which the Wichitas have voluntarily accepted.

The undeniable effect of this unbroken chain of legislation is the establishment, beyond all cavil, of the proposition that the aboriginal rights of the Wichitas in this leased district did not exist at the date of the said treaty of June 22, 1855, and whether they have acquired any rights since then by treaty stipulation or by express agreement with the United States is a question which will be considered in another connection in this brief.

5. Still further evidence of the fact that the Wichitas could not have been the occupants of this land at the time of the Choctaw cession of 1820 is furnished by the treaty of August 24, 1818 (7 Stats., 176), by which the United States obtained from the *Quapaws*, and not the Wichitas, the identical section of country in which the leased district is situate, and in which there is no mention made of Wichita occupancy.

The above, I think, completely disposes of the claim of the Wichitas and affiliated bands to the proceeds of the sale of these lands because of any right or title they have therein by reason of their aboriginal occupancy.

THE TREATY OF 1835.

The claim of the Wichitas is also based upon the treaty of August 24, 1835 (7 Stats., 474), the preamble of which states that it was entered into "for the purpose of establishing perpetual peace and friendship between the United States and the Comanche and Wichita nations and their associated bands or tribes, and between these nations or tribes and the Cherokee, Muscogee, Choctaw, Osage, Seneca, and Quapaw nations or tribes of Indians."

This is the first we hear of the Wichitas in the way of any business, peace, or other negotiations with the United States, and it is claimed that by this treaty of 1835 the United States recognized the dominion of the Wichitas over the land in question by reason of their aboriginal occupancy thereof. This, of course, we deny. The various provisions of the treaty and the purposes for which it was entered into are sufficiently indicated by the following extracts therefrom:

Article 1 provides:

"There shall be perpetual peace and friendship between all the citizens of the United States and all the individuals composing the Comanche and Wichita nations, and their associated bands or tribes, and the Cherokees," &c.

Article 2 provides:

"Every injury or act of hostility by one or either of the contracting parties shall be mutually forgiven and forever forgot," &c.

Article 3 provides:

"There shall be a free and friendly intercourse between all the contracting parties hereto, and it is distinctly understood and agreed by the Comanche and Wichita nations, and their associated bands or tribes of Indians, that the citizens of the United States are freely permitted to pass and repass through their settlements or hunting grounds without molestation or injury on their way to any of the provinces of the Republic of Mexico," &c.

Article 4 provides:

"It is understood and agreed by all the nations or tribes of Indians, parties to this treaty, that each and all of the said nations or tribes have free permission to hunt and trap in the great prairie west of the Cross Timbers to the western limits of the United States."

Article 5 provides:

"The Comanche and Wichita nations, and their associated tribes or bands of Indians, severally agree and bind themselves to pay full value for any injury their people may do to the goods or other property of such traders as the President of the United States may place near to their settlements or hunting ground for the purpose of trading with them."

Article 6 provides:

"The Comanche and Wichita nations, and their associated bands or tribes of Indians, agree that in the event of any of the red people belonging to the nations or tribes residing south of the Missouri river and west of the State of Missouri, not parties to this treaty, should visit their own towns or be found in their hunting grounds they will treat them with kindness and friendship and do no injury to them in any way whatever."

Now, if the contention of the Wichitas in respect of this treaty be correct, it just as much establishes a right of occupancy in the Comanche, Osage, Seneca, Quapaw, Muscogee, and Cherokee Indians as in them. That all of these Indians

had the exclusive right of occupancy of this land is simply preposterous, and the fact that they were all mentioned in the treaty only confirms our theory that these Wichitas, in common with many other tribes or bands, may have roamed over and hunted in these lands, but negatives the idea that they had any such inherent rights therein, by reason of their alleged occupancy, as would entitle them to compensation upon the sale thereof by the United States. As before stated, if they had they would have asserted their claim long ago, when they were placed there by the United States under the lease made by the treaty of 1855.

The treaty of 1835, with the Comanches, Wichitas, and others, contains no recognition of a right of occupancy in the Wichitas or in any of the nations named, but, on the contrary, as we have above said, makes such a contention impossible. It was not intended for any such purpose, and no inference of that kind can possibly be drawn from it. All that can be deduced from its various provisions is that there were a number of bands or tribes of Indians located in various parts of the country that were hostile to each other and to the whites; when they came in contact on these lands, which they were in the habit of using as a hunting ground, conflicts and strife arose, which it was the desire of the Government to prevent and suppress, and it is perfectly apparent that the whole purpose of this treaty was to restore peace and good order among the various Indian tribes or bands who were using this land as hunting ground.

These various tribes and bands of Indians resided elsewhere, roaming over these lands and using them as a common hunting ground, and the presence of the Choctaws in said treaty was not for the purpose of recognizing the right of occupancy in any of the other bands or tribes, but was for the purpose of accomplishing what the treaty in its preamble says that it was made to accomplish, to wit, the preservation of peace. The Choctaws, being also named therein, could as well claim the said treaty to be a recogni-

tion of their rights by reason of occupancy as could the Wichitas or any of the other Indians named.

And this view is made absolutely conclusive by the provisions of article 4 of the treaty with the Choctaws of 1830, which have already been quoted in this brief. It will be remembered that it provides that the United States shall secure to the Choctaw nation "the jurisdiction and govern-"ment of all the persons and property that may be within "their limits," making no exception in favor of the Wichitas or any other Indians. It is specific in providing that *the Choctaws alone* shall govern and have jurisdiction of all persons and property within their limits. This, of course, would have included the Wichitas if they had been occupants of that country; and it seems absurd, therefore, to contend that it was the intention of the treaty of 1835 to leave them and their associated bands and tribes in full possession and enjoyment of their alleged aboriginal rights when it had already been ordained that the *Choctaws alone* should have the absolute right to the jurisdiction and government of persons and property upon said land.

A more dangerous state of things than this contention of the Wichitas alleges to have existed could not be devised. It is not to be supposed that if the Wichitas and affiliated bands of Indians really were the recognized aboriginal occupants of this land, as alleged, they would have stood by, without protest and without effort to prevent such an intrusion upon their rights, and submitted their lands and themselves to the jurisdiction, government, and ownership of the Choctaws. Such a condition of affairs would inevitably have insured between these grantees of the United States and the various tribes settled in the same territory, each of which had, according to the contention of the Wichitas, the absolute right and power of government over the same land, persons, and property, the one as the grantee of the Government, and the others as the aboriginal occupants of the soil, perpetual war and strife instead of

the peace which it was the very purpose of the Government to establish and maintain.

In 1837 this treaty of 1835 was the subject of construction, and instructions to Chouteau, a special Indian agent, were issued, in which is the following:

"It has been further stated that the Comanches are dissatisfied because the Creeks and the *Choctaws* have extended their occupation and improvements to the country heretofore used by themselves as hunting grounds. This matter should be explained to them, so that they may understand that the United States, having purchased these lands from the tribes possessing the occupant title, has guaranteed the exclusive right in it to the *emigrant Indians*. They cannot, therefore, be permitted to hunt upon it after the latter are prepared to settle upon and cultivate it" (Appendix Record, p. 28).

CLAIM OF THE WICHITAS UNDER THE TREATY OF 1855.

The claim of the Wichitas and affiliated bands is also based upon the theory that as they were settled by the United States in the leased district under and by virtue of the provisions of article 9 of the treaty of 1855, and that as by this article provision was expressly made for a "permanent" settlement, the Choctaws and Chickasaws, having assented to such permanent settlement, are precluded from setting up any claim to the proceeds of the sale of said land provided for in the act of March 2, 1895. In short, it is claimed that it is the possessory right of the Wichitas and affiliated bands and not the equitable interest of the Choctaws and Chickasaws that is being destroyed by said sale, and that consequently the Choctaws and Chickasaws, having released whatever rights they may have had by their consent to the permanent settlement of the Wichitas and affiliated bands, are not entitled to the proceeds of such sale.

1. The assumption upon which this position is based involves an assumption of the entire question in dispute in this case, namely, an assumption that the title bestowed by the Choctaws and Chickasaws upon the United States in the third article of the treaty of the 28th of April, 1866, is not what the act of March 3, 1891 (26 Stats., 1025), declares it to be, to wit, one ceded in trust for the settlement of Indians, but is an absolute cession, putting an end to all right, title, and claim whatsoever of the Choctaws and Chickasaws in and to said land.

In our petition we have shown, we think most abundantly, that the declaration of this act of Congress that these lands were ceded by the claimants "in trust" for the settlement of Indians was accurate—this viewed independently of the force and effect of the act itself—and that, even if it were not a cession "in trust," the said act, as an act of the legislative body having the supreme power of disposing of the public domain, makes it so.

If, then, this was a cession by the Choctaws and Chickasaws to the United States, "in trust" for the settlement of such tribes and bands of Indians as the Government might choose to colonize thereon, as stated in paragraph 5 of our petition (p. 15), the "permanent settlement" mentioned in article 9 of the said treaty of June 22, 1855, could not endure after the land had ceased to be used for that purpose. The right of settlement terminated at the time the land ceased to be so used, and reverted to the claimants in this case and not to the Wichitas and affiliated bands.

If the cession made by article 3 of the said treaty of 1866 was indeed one made to the United States "in trust" to endure only while the United States might choose to use the land for the settlement of other Indians thereon, then it becomes simply self-evident that a *perpetual* occupation by such Indians as the Government might place thereon was not meant. Only such an occupation was intended as would endure so long as the Government had reserved and retained

the power to allow it to be used by such Indians, which power would of course cease as soon as the Government should sell the land or use it for any other purpose.

It is impossible to make this plainer than it is made by a mere statement of the proposition that when a grant is made upon a limitation or condition which, if not performed, works a forfeiture of the thing granted, then the forfeiture or reversion is to the grantor, unless the grantor has authorized it to be in favor of some one else or has released his reversionary interest. In this case there is nothing that makes the reversion to inure to any one else than the Choctaws and Chickasaws. Hence, when the United States ceased to use this land for the settlement thereon of Indians, it reverted to the Choctaws and Chickasaws, and to them alone.

2. In this connection, a further suggestion is appropriate. It is that if the words "permanent occupation" are interpreted to mean an occupation forever, so that if the Wichitas and affiliated bands should ever be deprived thereof they would be entitled to compensation (as they claim), the Government itself would be deprived of all right to put an end to such occupancy, as is done by said act of March 2, 1895, under which this suit is brought, and as is also done by the said act of 1891, opening the part of the leased district occupied by the Cheyennes and Arapahoes to public settlement. Such an interpretation of this language would not only be unreasonable and absurd, but would render it inoperative—inoperative because it would be impossible for the Government to authorize a settlement or occupation of these lands by the Wichitas and affiliated bands that could inure to them after the Government had ceased to use said lands for the settlement thereon of Indians and placed it within the public domain. The Government could not confer upon the Indians settled by it upon this leased district a greater estate than it possessed.

As already stated, the attorney for the United States h
kindly saved me the trouble of citing authorities for t
purpose of showing that the word "permanently" does n
mean forever, and that, therefore, when the Choctaws a
Chickasaws, in article 9 of the treaty of 1855, leased to t
United States the lands between the 98th and 100th meri
ians for the permanent settlement of the Wichitas, &c., th
did not part with their entire interest in said lands (Tex
and Pacific Railway Company *vs.* Marshall, 136 U. S., 39
It is not necessary to repeat those authorities.

THE UNRATIFIED AGREEMENT OF 1872.

The claim of the Wichitas and affiliated bands is al
based upon an agreement that was signed by the Comm
sioner of Indian Affairs on the 19th of October, 1872, und
which they contend that they are entitled to 160 acres apie
and the proceeds of the sale of the unallotted lands in th
alleged reservation.

In reply to this contention it is sufficient to mention t
fact that the agreement referred to was repudiated by t
Indians themselves, was signed by the Commissioner
Indian Affairs without authority, and was never ratified
Congress, although twice submitted for its action.

In arriving at the policy of getting other Indians tha
the five civilized tribes settled in the Indian Territor
which was inaugurated by the treaty of June 22, 1855, wi
the Choctaws and Chickasaws, several ideas entered in
consideration: 1st, That the Choctaws and Chickasaws cou
spare the occupancy of some of their lands between the 98
and 100th degrees of west longitude; 2d, that the Wichi
and other bands or tribes of Indians were troublesome a
their presence very objectionable to the white people
Texas; 3d, that their being neighbors to the five civiliz
tribes would be beneficial and civilizing to the Wichitas a

others; and, 4th, that it would be more convenient and easy for the Government to support and control them.

The Choctaws and Chickasaws did not conceive this arrangement, but consented to it because the immigrants were Indians with tribal organization, with the common Indian ideas and habits as to occupancy of lands, and because the United States made the demand or request (which amounts to the same). The Government of the United States has never conferred with the Choctaws and Chickasaws or any other Indians when it comes to formulating a policy in respect to them or changing its policy. It makes its own policies and expects compliance with them on the part of the Indians. This makes the inequality, dependence, and inferiority of the Indians.

There is no evidence that the United States or the Choctaws and Chickasaws had any thought or intention by the treaty of 1855 of limiting the ultimate fee of the Choctaws and Chickasaws in the lands leased under that treaty.

In 1864 and 1865 the United States again changed its policy, and declared its intention to settle other Indians in this leased district, and demanded compliance with it from the Choctaws and Chickasaws; but in that the Choctaws and Chickasaws came under no obligation to the Wichita and affiliated bands of Indians, nor is there any evidence that the United States demanded or contemplated the creation of a trust in behalf of those Indians.

In 1889, in pursuance of an act of Congress of March 2, 1889 (25 Stat., 1005), the United States again changed its policy in respect to the lands in controversy by providing for a commission of three persons to negotiate with all "Indians owning or claiming lands lying west of the 96th "degree of longitude in the Indian Territory for the cession "to the United States of all their title, claim or interest of "every kind or character in and to said lands."

This act is *pro tanto* a declaration of an abandonment of

the former purposes of the United States in respect to the lands in this controversy.

In 1891 the three commissioners of the United States provided for as above shown went upon the lands in this controversy to the Wichita and affiliated bands of Indians and made an agreement with them in June of that year as if the said Indians were the owners of said lands, and in said agreement (article ---) provided for the allotment of 160 acres to each of 1,060 of said Indians and the sale of the remainder for the benefit of said Indians, and this after the Choctaws and Chickasaws had made known to the United States by memorial to Congress their claim of ownership of said lands, and after said memorial had been referred to the Interior Department and the validity of their claim to said lands had been most favorably reported upon and recognized, and after Congress had passed the act of March 3, 1891, appropriating payment to the Choctaws and Chickasaws for the lands occupied under executive order by the Cheyenne and Arapahoe Indians, which last-named lands were also a part of the said "leased district" and occupied precisely the same legal status in respect to the Choctaws and Chickasaws as the lands in this controversy, and this said agreement of June, 1891, was entered into without notice to the Choctaws and Chickasaws and without their knowledge and consent. This action of the United States in passing said act of March 2, 1889, and in making said agreement of June, 1891, shows a complete abandonment of its purposes in respect to the lands in this controversy as those purposes appear in the ninth article of the treaty of 1855 and in the third article of the treaty of 1866, and absolves the Choctaws and Chickasaws from their obligations to comply in any respect with said articles of said treaties, in so far as the lands in this controversy are concerned.

Hence the Choctaws and Chickasaws call attention anew to that part of the nineteenth paragraph of their petition

wherein they claim compensation for the value of the lands which by said act of March 2, 1895, are to be allotted to the members of the said Wichita and affiliated bands of Indians.

Our contention in respect of the Wichitas and affiliated bands is that they went upon these lands not because they ever paid anything for them or had any aboriginal rights therein, but were moved there by the Government for the purpose of locating them in the Indian country, and to remove them from the States where their presence was objectionable, for the convenience of the Government and to carry out its policy of endeavoring to locate certain Indians in the Indian Territory. They were placed there by the Government as tribes or bands, and the Government only paid the Choctaws and Chickasaws for the privilege of locating these tribes or bands in that Indian country as tribes or bands. By the grant of this privilege to the Governmen the Wichitas and affiliated bands or tribes acquired no int terest in these lands, and consequently, when the purpose for which the Choctaws and Chickasaws granted this privilege was or shall be abandoned, the right of the Choctaws and Chickasaws is precisely the same as though no such permission had ever been granted. The abandonment of its policy by the Government and the adoption of an entirely different one gave the Wichitas no rights in these lands as against the Choctaws and Chickasaws, and if by reason of this change any injury comes to the Wichitas and affiliates, it is for the Government, out of its own funds, and not for the Choctaws and Chickasaws to make compensation. Hence we insist that the Court of Claims erred in decreeing to the individuals of the Wichitas and affiliates one hundred and sixty acres each out of these lands that belong to the Choctaws and Chickasaws.

J. M. Wilson,
Attorney of Choctaws and Chickasaws.

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Brf. of Owen for Choctaw

IN THE

Supreme Court of the United States.

Filed Mar. 7, 1900.

THE UNITED STATES AND THE WICHITA AND AFFILIATED BANDS OF INDIANS,
APPELLANTS,
v. etc
THE CHOCTAW AND CHICKASAW NATIONS,
APPELLEES.
etc

No. 337.
338.
339.

Brief on Behalf of Choctaw Nation.

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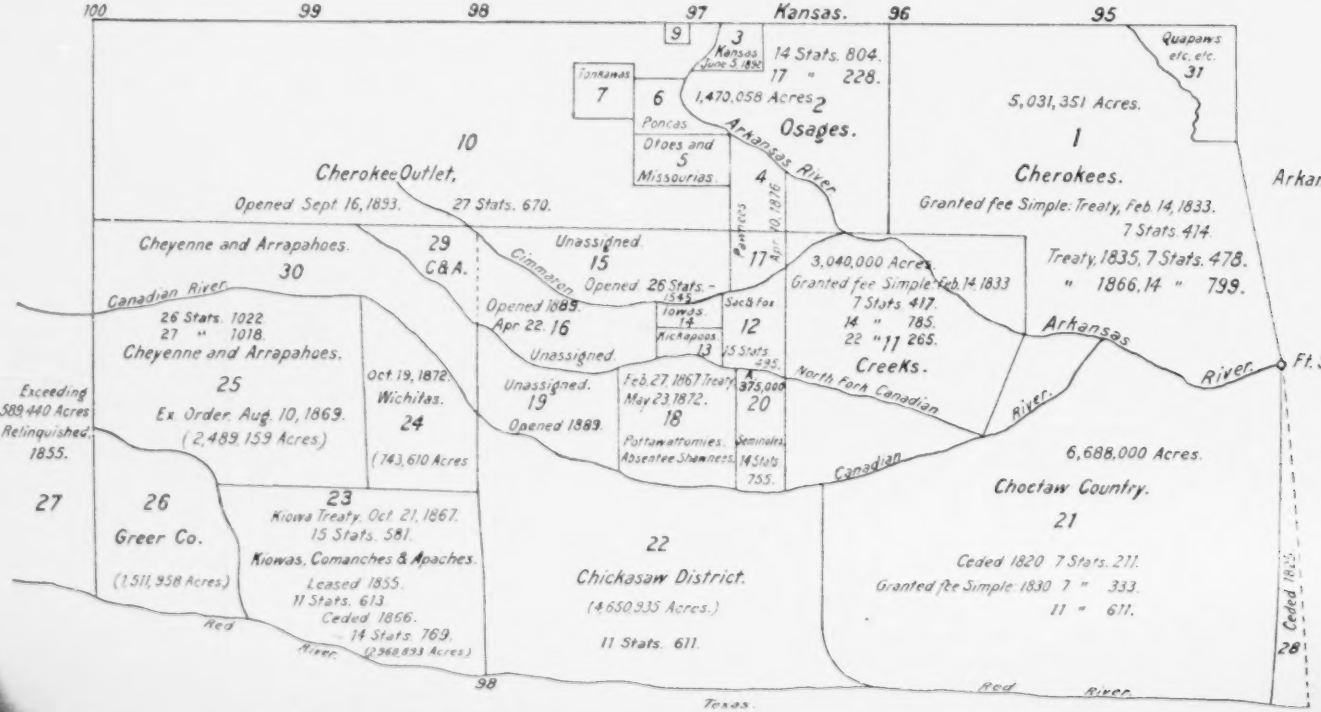
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Kansas.
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Kansas
June 5, 1880
14 Stats. 804.
17 " 228.
Tonkawas
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6
1,470,058 Acres.
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Osages.
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Otoes and
Missourias.
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4
Arkansas River.
Quapaws
etc, etc.
31
5,031,351 Acres.
1
Cherokees.
Granted fee Simple: Treaty, Feb. 14, 1833.
7 Stats. 414.
Treaty, 1835, 7 Stats. 478.
" 1866, 14 " 799.
Arkansas.
10
Cherokee Outlet,
Opened Sept. 16, 1893.
27 Stats. 670.
Pawnees
Apr. 10, 1876
17
3,040,000 Acres.
Granted fee Simple Feb. 14 1833
7 Stats. 417.
14 " 785.
22 " 11 265.
Creeks.
Cheyenne and Arrapahoes.
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C & A.
Unassigned.
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Opened 26 Stats. -
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Cimmaron
Canadian River.
26 Stats. 1022.
27 " 1018.
Cheyenne and Arrapahoes.
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Ex. Order. Aug. 10, 1869.
(2,489,159 Acres.)
Opened 1889.
Apr. 22.
16
Iowas
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Kickapoos
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Sac & Fox
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15 Stats.
495.
Arkansas
River.
Ft. Smith.
Unassigned.
Oct. 19, 1872.
Wichitas.
24
(743,610 Acres
Unassigned.
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Opened 1889.
Feb. 27 1867. Treaty
May 23, 1872.
18
Pottawattomies.
Absentee Shawnees.
A
375,000
20
Seminoles.
14 Stats
755.
North Fork Canadian
River.
Exceeding
6,589,440 Acres
Relinquished
1855.
27
26
Greer Co.
(1,511,958 Acres.)
23
Kiowa Treaty. Oct. 21, 1867.
15 Stats. 581.
Kiowas, Comanches & Apaches.
Leased 1855.
11 Stats. 613.
Ceded 1866.
14 Stats. 769.
(2,968,893 Acres.)
22
Chickasaw District.
(4,650,935 Acres.)
11 Stats. 611.
Canadian
River.
6,688,000 Acres.
Choctaw Country.
21
Ceded 1820 7 Stats. 211.
Granted fee Simple: 1830 7 " 333.
11 " 611.
Ceded 1855
28
Red River.
Red River.
98
Texas.

Tracts 1 to 10. Cherokee Lands. (7 Stats. 414.) Treaty 1833.

Deeded June 14, '83. Settled in full '93.

Tract 2. Set apart Treaty 1866 and sold to Osages. (17 Stats. 228.)
" 3. " " " " Kaws. June 5, 1872.
" 4. " " " " Pawnees, Apr. 10, 1876. (19 Stats., Secs. 4, 29.)
" 5. " " " " Otoes and Missourias, Mar. 3, 1881. (21 Stats. 387.)
" 6. " " " " Poncas, Aug. 15, 1876. (19 Stats. 192, 287; 20 Stats. 76; 21 S. 422.)
" 7. " " " " Nez Perces (20 Stats. 74. 23 Stats. 90.
" " " " " Tonkawas (24 Stats. 624.

Tracts 2 to 10. Bought and paid for full fee by U. S., $8,595,736.12. Mar. 3, 1893. (27 Stats. 640.)

" 11 to 20, 29 and 30. Creek and Seminole lands. Fee simple title. (7 Stats. 417.)

Tract 20. Set apart by Treaty 1866 and sold Seminoles. (14 Stats. 755.)

Settled in full 1889.

" 12. Set apart by Treaty 1866 and sold Sac and Foxes. (15 Stats. 496.)
" 13. Set apart by Treaty 1866 to Kickapoos. (Ex. order Apr. 15, 1883.)
" 14. Set apart by Treaty 1866 to Iowas. (Ex. order Apr. 15, 1883.)

Tracts 15, 16, 19. Set apart by Treaty 1866 and opened as original Oklahoma. Mch. 1, 1889.

Tract 18. Set apart Treaty 1866, and Pottawatomies and Shawnees located May 23, 1872, under Treaty Feb. 27, 1867.
" 17. Set apart by Treaty of 1866 and sold Pawnees @ 30c. an acre. Apr. 10, 1876. (19 Stats. 29, Sec. 4.)

Tracts 29 and 30. Set apart by Treaty of 1866 and assigned Cheyenne and Arapahoes. (Ex. order Aug. 10, 1869.)

" 21 to 28. Ceded Choctaws, 1820. Claim admitted except as to Tract 27.

Tract 27. Choctaw land ceded to Spain by U. S. without Choctaw consent, 1821.

" 28. Receded by Choctaws 1825, now in State of Arkansas.

" 22. Chickasaw District. Set apart by Choctaws, 1837. (4,650,935 acres.)

" 27. Relinquished to U. S. by Choctaws, 1855. (Exceeds 6,589,440 acres.)

Tracts 23 to 26. Leased District, 1855. Choctaws and Chickasaws retaining jurisdiction and full rights of settlement.

" 23 to 26. Ceded to U. S. in trust, to be purchased, for use of friendly Indians by Art. 3, Treaty 1866. (14 Stats. 769.) (7,713,239 acres.)

Tract 25. Assigned Cheyennes and Arapahoes. Ex. order Oct. 10, 1869, and freed from trust limitation by purchase, Mch. 3, 1891. (2,489,159 acres.)

" 24. Assigned Wichitas by Executive permission: now in litigation Court of Claims, Case 18,832. (743,610 acres.)

" 23. Lands "set apart" for Kiowas, Comanches, and Apaches. Oct. 21, 1867. (2,968,893 acres.)

" 26. Greer County. A portion of the Leased District formerly claimed by Texas and not assigned any Indians. (1,511,958 acres.)

IN THE

Supreme Court of the United States.

THE UNITED STATES AND THE WICHITA AND AFFILIATED BANDS OF INDIANS, APPELLANTS, *v.* etc., THE CHOCTAW AND CHICKASAW NATIONS, APPELLEES. etc.	No. 337. 338. 339.

BRIEF ON BEHALF OF CHOCTAW NATION.

PREFATORY.

It is the purpose of this argument to show—

1st. That the land in controversy was patented in fee simple to the Choctaws in 1842.

2d. That the United States in 1855 was authorized to provide permanent settlement of the Wichitas and certain other particular Indians thereon "on reasonable terms," and obtained a "lease," paying a certain sum cash thereon on account.

3d. That the "reasonable terms" by which this lease or permit was obtained is open to adjustment on a basis

that shall be "reasonable" as explained to the Choctaws in the treaty of 1855.

4th. That the cession of 1866 was simply an extension of the authority of the United States to locate any Indians without restriction as to the habitat of such proposed immigrant Indians, and that such cession was made in trust to the United States "to be purchased" by or for such Indians "for the use" of such Indians only, the land being at all times held as Indian country and not open to white settlement.

(*a*) This proposition is established by the record attending the negotiations in 1865 at Ft. Smith.

(*b*) By the records of the Government in 1866, during which year the treaty had been consummated.

(*c*) By the subsequent construction of the Executive Department of the United States.

(*d*) By the subsequent construction of the Congress of the United States.

(*e*) By the collateral history of the other tribes of the so-called "Five Civilized Tribes" whose affairs were directed by the United States under the same fixed policy.

(*f*) By the internal evidences of the treaties themselves.

(*g*) By the demonstrated understanding of the Choctaws and Chickasaws.

These reasons are unavoidably interwoven, and, therefore, are set forth preferably in order of time rather than separately under the several headings which comprise the above résumé.

Argument.

I.

The Wichita reservation is a portion of the Leased District and was ceded to the Choctaw Nation by the United

States by treaty October 18, 1820. (7 Stats. 211.) The Choctaw Nation paid full value for the land ceded to them by the treaty of 1820 aforesaid.

The treaty of September 27, 1830 (7 Stats. 333), contracted that the United States should cause to be conveyed to the Choctaw Nation "in fee simple to *them* and "*their descendants*" the tract of country previously described and ceded by the treaty of 1820, "if within the "limits of the United States." The Chickasaws acquired an interest in this property by the agreement of January 17, 1837. (11 Stats. 573.)

A patent was issued by the United States of date March 23, 1842, covering the land in question and conveying it to the Choctaw Nation. The patent followed the principle of private property set up in the treaty of 1830, and made the grant, including the Leased District, to the Choctaw Nation, "to have and to hold the same, with all the "rights, privileges, immunities, and appurtenances of "whatever nature thereunto belonging," "*in fee simple* "to them and their descendants."

The treaty of 1855 makes still more clear this idea of personal ownership by describing the lands, *including* the Leased District (Art. 1, 11 Stats., p. 611) and inserting the following language:

"And pursuant to an act of Congress, approved May "28, 1830, the United States do hereby forever *secure* "and *guarantee* the lands embraced within the said limits, "**to the members** of the Choctaw and Chickasaw Tribes, "their heirs and successors, to be held in common; so "that each and *every member of either tribe shall have an* "**equal, undivided interest in the whole.**"

The Choctaws and Chickasaws agreed to accede to the desire of the United States, and the preamble recites: "The "*United States desire* that the Choctaw Indians * * *

" *make provision* for the permanent settlement within the " Choctaw country, of the Wichita and certain other tribes " or bands of Indians, *for which purpose* the Choctaws and " Chickasaws are willing to lease, **on reasonable terms** to " the United States," &c. The right of the United States to the use of any portion of the land in question for Indian settlement was first obtained by the treaty of July 22, 1855, articles 9 and 10 (11 Stats. 611, *et sequitur*).

"ARTICLE 9. The Choctaw Indians do hereby absolutely " and forever quitclaim and relinquish to the United States " all their right, title, and interest in, and to any and all " lands, west of the one hundredth degree of west longi- " tude; and the Choctaws and Chickasaws do hereby lease " to the United States all that portion of their common " territory west of the ninety-eighth degree of west longi- " tude for the *permanent* settlement of the Wichita and " such other tribes or bands of Indians as the Government " may desire to locate therein; **excluding,** however, all the " Indians of New Mexico, and also those whose usual " ranges at present are north of the Arkansas river, and " whose permanent locations are north of the Canadian " river, but including those bands whose permanent ranges " are south of the Canadian or between it and the Arkansas; " which Indians shall be subject to the exclusive control " of the United States, under such rules and regulations, " not inconsistent with the *rights* and *interests* of the Choc- " taws and Chickasaws, as may from time to time be pre- " scribed by the President for their government: Provided, " however, the territory so leased *shall remain open to* " *settlement by Choctaws and Chickasaws as heretofore.*

"ARTICLE 10. **In consideration** of the foregoing relin- " quishment and lease, and as soon as practicable after " the ratification of this convention, the United States will " pay to the Choctaws the sum of six hundred thousand " dollars, and to the Chickasaws the sum of two hundred " thousand dollars, in such manner as their general coun- " cils shall respectively direct."

Under the authority of these articles the Government of the United States made provisions for the Wichita and Affiliated Bands in 1859. The Acting Commissioner of Indian Affairs on March 30, 1859, instructed the Superintendent within whose charge the Leased District lay as follows: "Fix upon a suitable location for the "Wichitas and make such examination of the country as "will enable you to determine the proper places for locating "and colonizing the Texas and other Indians which it is "intended to place within that district. In carrying out "this policy, the different bands, so far as they cannot be "united, ought to be located upon distinct reservations, "with circumscribed limits, containing **only so much** "**land** as may be *necessary* for their actual *occupancy and* "*use.*" . . . "So soon as it may be practicable and safe "for the Wichitas to remove to their new locations, you "will require them to go there, giving them to understand "that it is to be their permanent home." . . . "The same "understanding must be impressed upon the other In-"dians." On September 20, 1859, the Agent reported that he had made the selection (Sec. of Int. Rept. 1859, pages 382–3; also 533, 633), amounting to 154,240 acres, including pasture lands. The Agents of the United States made no treaty with these people in 1859, but the promise was made that they should enjoy the use of so much of this land as was set apart at that time. These Indians surrendered in Texas nothing of value either to themselves or to the Government since they had no defined reservation and no recognized rights in the State of Texas, having been purely nomadic and never sufficiently long established in any place or of sufficient numerical strength to justify any treaty with either the Spanish, Texan, or United States Government defining any area to which they were recognized as having even the right of occu-

pancy. Immediately after the Superintendent had set aside this reservation of 1859, the Civil War arose and the Wichitas fled to Kansas and did not return to the Leased District until 1867. (Report of Com. Ind. Aff. 1867, p. 23.)

The preamble recites that "**the United States desire** " that the *Choctaw Indians*" "*make provision* for the " permanent settlement, WITHIN the CHOCTAW COUNTRY, of " the Wichita and certain other tribes or bands of Indians, " FOR WHICH PURPOSE the Choctaws and Chickasaws are " willing to LEASE, **on reasonable terms,** to the United " States."

The desire of the sovereign was always a controlling force with the Choctaws, and they made the lease, with the understanding it should be "**on reasonable terms.**"

Manifestly, until it was determined *to what extent* the United States would need to use this land, what number of acres would be required for the Wichitas and the other described Indians, and what number of Indians could be located thereon, it was impossible to measure the terms which would be *reasonable.* It was of course possible that the United States would have difficulty and might be unable to locate many Indians permanently on such lands, and therefore the amount actually paid in 1855 was not unreasonably small. But on the theory the United States intended to get permanent possession of 7,713,000 acres it would have been unreasonable and fraudulent and contrary to the preamble describing the intent of parties. Twelve years transpired before the United States had made any location except the Wichitas, who, on " reason- " able terms," would not have occupied land worth ~~$800,000~~. exceeding $400,000.

The agent on September 20, 1859, selected for them only 154,240 acres out of the 7,713,239 acres in the Leased District, worth then only about $154,240.

If, however, the Government had located Indians so as to embrace permanently an area of value "on reasonable "terms" in excess of the $600,000, it would have been the manifest duty of the sovereign to have made a settlement on such terms as should have been "reasonable."

The Choctaws and Chickasaws retained the right of settlement as theretofore, but it would have been unreasonable for them to have occupied the whole of it and excluded the Government in this manner from locating other Indians.

Equally unreasonable would it have been for the United States to take it all without an adequate compensation and thus have prevented "settlement by the Choctaws "and Chickasaws" as theretofore.

The Choctaws agreed to lease on "reasonable terms," it being uncertain what use the Government could or would make of such land or to what extent the reserved rights of the Choctaws and Chickasaws might be diminished. The Government paid down $600,000 for the general privilege of locating Indians under this lease which the Choctaws agreed to make "on reasonable terms," leaving the question of settlement to depend on the extent to which the land was used and to the **good faith and justice** of the sovereign. The Government, of course, believed it would use $600,000 worth of this land, because there were three or four thousand Indians they wished to locate whose ranges were south of the Arkansas river, and was therefore justified in paying this sum.

By the treaty of 1855 the Choctaws and Chickasaws retained the right to settle within, and the legal title to, the Leased District, and jurisdiction therein, and the United States acquired only the right to locate a certain particular class of Indians within that portion of the Choctaw country "under such rules and regulations not inconsistent

" with the *rights* and *interest* of the Choctaws and Chick-
" asaws." The Choctaws continued to exercise the same political control and government within the Leased District as it had exercised previously to the lease of 1855. This alleged lease should have been designated not a *lease* but a *permit*. This district was designated Hotubbee District. (See the Choc. Const. of 1861 ; 7, 8, 13 Choct. Laws of 1869 ; Art. 3, Treaty of 1855.)

Choctaws Retain Jurisdiction.

The first article of the treaty of 1855 described the boundaries of the Choctaw and Chickasaw country, **expressly included the leased district,** provided it should remain Choctaw and Chickasaw country and that no part of the land embraced therein shall ever be sold without the consent of both tribes. Article 2 set apart the land assigned the Chickasaws, and Article 3 declared that the remainder of the country held in common by the Choctaws and Chickasaws should constitute the Choctaw District. The Choctaws retained jurisdiction of the leased district, or as they called it, "*Hotubbee District*," and had occasion to pass through the Chickasaw country in the exercise of their authority over the leased district, Article 3 therefore granted the officers of the Choctaw Nation *the right of safe conduct and free passage through the Chickasaw District*, and Article 7 of the treaty of 1855 pledged to the Choctaws the *unrestricted right of self-government within their respective limits, which included the limits of the land described in Article 3 as the Choctaw District*, and embraced the leased district, called by the Choctaws, "Hotubbee District." The Choctaws divided their country into four districts. Under their constitution the Supreme Court had jurisdiction of the three Eastern dis-

tricts and until *Hotubbee District* should be duly organized and officers elected therein (Art. 4, Sec. 2), and Art. 7, Sec. 1. General Provisions, provided "until Hotubbee Dis- "trict shall be duly organized the Principal Chief of the "Choctaw Nation shall exercise such authority over the "citizens of this nation living in that District as he might "deem expedient for the protection of persons, life and "property."

The United States neither objected to nor had occasion to object to this exercise by the Choctaw Nation of the right of government within the leased district, so called, and such rights and interests as might have grown up within the leased district of the Choctaws and Chickasaws constituted a limitation upon the rights of the United States which could only permit other particular Indians to enter, on conditions that such entry should not be inconsistent with the *rights and interests* of the Choctaws and Chickasaws in such country. Under the terms of the so-called lease of 1855, the Choctaws and Chickasaws could have practically taken possession of the whole of the leased district. The rights which the United States acquired therein for permitting settlement of a certain limited class of Indians, on reasonable terms, under rules and regulations not inconsistent with the rights and interests of the Choctaws and Chickasaws, who retained the same right of settlement as they previously enjoyed, retaining also the right of government within that district, were not very important and were attended with such conditions that it partly accounts for the small amount paid for the lease aforesaid.

The Government paid the Choctaws $400,000.00 for the lease and the relinquishment of the land west of the 100th meridian, the Choctaws having demanded $400,000.00 for the lease, ~~and the Chickasaws being paid $200,000.00 for their interest in the lease, the~~ lease actually cost the

United States $400,000.00, and the relinquishment of the land west of the 100th meridian actually cost $400,000.00. (See Sen. Ex. Doc. 13, 48th Congress, first session, p. 15; Choc. Nation *v.* U. S., 1292–1295.) The lease, therefore, cost less than ten cents an acre for the use of the land from 1855 to 1866, eleven years; or less than one cent an acre per annum for the franchise within such property. The Wichitas, the Kiowas, Comanches, and Apaches now occupying about half of this Leased District outside of the land they themselves use, received for leases for cattle grazing upon less than half of this area exceeding $200,000.00 during the single year of 1898, as shown by the report of the Commissioner of Indian Affairs. (Report Com. Ind. Affrs. 1898, page 56), so that $400,000 for the use of twice this area for eleven years would be less than one-seventh the rate which such land is actually earning now under lease for grass only.

Attention is called to this question of value to show that the United States had received full value for the money paid in 1855 for the lease when the treaty of 1866 was entered into. The officials charged with the control of Indian affairs drove an exceeding hard bargain in the treaty of 1855, in requiring the Choctaws to execute a relinquishment to the lands west of 100th meridian ceded to the Choctaws in 1820, amounting to exceeding 6,589,440 acres. At any fair valuation of this great property it was worth more than the entire consideration paid for both the lease and relinquishment of 1855. In considering the equitable rights of the Choctaws, a weak and dependent people, it is manifest that the United States, at the time of the treaty of 1866, had received more than full value for the $800,000 paid the Choctaws and Chickasaws in 1855. The United States, in seeking the relinquishment of 1855, concedes the fact of the concession of 1820.

The history (Choctaw Nation *v.* U. S., 1292 *et seq.*) shows that the Choctaws made an unavailing effort to get the officials of the United States to do that justice which the high character of the Federal Government for integrity and justice made imperatively the duty of these officials to accord. The helpless condition of the Choctaws and Chickasaws compelled the assent of these Indians to a settlement in the treaty of 1855 which merits special attention at the hands of that great court in which alone the dealings of the United States with the Indians has been beyond reproach. The full history is set forth in the record of the Choctaw Nation *v.* U. S.

The Cession of 1866.

On the 28th day of April, 1866, the Choctaws and Chickasaws entered into a treaty with the United States. The third article of said treaty is as follows (14 Stats. 769):

"Article 3. The Choctaws and Chickasaws, in consid-
"eration of the sum of three hundred thousand dollars,
"hereby *cede to the United States* the territory west of
"the 98° west longitude, known as the *Leased District*, pro-
"vided that the said sum shall be invested and held by
"the United States, at an interest not less than five per
"cent., in trust for the said Nations, until the legislatures
"of the Choctaw and Chickasaw Nations, respectively,
"shall have made such laws, rules, and regulations as
"may be necessary to give all persons of African descent,
"resident in the said Nations at the date of the Treaty of
"Fort Smith, and their descendants, heretofore held in
"slavery among said Nations, all the rights, privileges,
"and immunities, including the right of suffrage, of cit-
"izens of said Nations, except in the annuities, moneys,
"and public domain claimed by, or belonging to, said
"Nations respectively; and also to give to such persons

" who were residents as aforesaid, and their descendants,
" forty acres each of the land of said nations on the same
" terms as the Choctaws and Chickasaws, to be selected
" on the survey of said land, after the Choctaws and
" Chickasaws and Kansas Indians have made their selec-
" tions, as herein provided; and immediately on the
" enactment of such laws, rules, and regulations, the said
" sum of three hundred thousand dollars shall be paid to
" the said Choctaw and Chickasaw Nations in the propor-
" tion of three-fourths to the former and one-fourth to
" the latter—less such sum, at the rate of one hundred
" dollars per capita, as shall be sufficient to pay such per-
" sons of African descent before referred to as within
" ninety days after the passage of such laws, rules, and
" regulations shall elect to remove and actually remove
" from the said nations respectively. And should the
" said laws, rules, and regulations not be made by the
" legislatures of the said nations, respectively, within two
" years from the ratification of this treaty, then the said
" sum of three hundred thousand dollars shall cease to
" be held in trust for the said Choctaw and Chickasaw
" Nations, and be held for the use and benefit of such of
" said persons of African descent as the United States
" shall remove from the said Territory in such manner as
" the United States shall deem proper, the United States
" agreeing within ninety days from the expiration of the
" said two years to remove from said nations all such
" persons of African descent as may be willing to remove;
" those remaining or returning after having been removed
" from said Nations to have no benefit of said sum of
" three hundred thousand dollars, or any part thereof,
" but shall be upon the same footing as other citizens of
" the United States in the said Nations."

The Choctaws and Chickasaws in this article cede to the United States the leased district. The consideration named is $300,000. The Choctaws and Chickasaws are to have the consideration only contingently upon their giving forty acres of their land to each of the Choctaw

and Chickasaw freedmen, and in the event that the freedmen should elect to move, and actually remove from said Nations, then out of such $300,000.00 should be paid $100.00 to each such freedman as chose to remove from the Choctaw and Chickasaw Nations. There was at that time 3,000 freedmen, and if they had all elected to remove, it would have consumed the alleged consideration, $300,000.00, and instead of the Choctaws and Chickasaws receiving an actual consideration of $300,000.00 in exchange for the cession of 7,713,000 acres, they would have been compelled to pay the entire alleged consideration of $300,000.00 to the freedmen and 7,713,000 acres of their land to the United States without receiving any benefit in exchange. In that event they would have given up 7,713,000 acres of land, in addition to relinquishing the alleged consideration under this article. Such a transaction would have been grotesque. If the guardian intended by this transaction to acquire the full title of this property, it would have been a manifest fraud and robbery of these people. No man can be heard to charge such a crime against the United States. The Government of the United States is incapable of such ungenerous treatment of a defenceless ward.

The Relation of the United States to the Choctaw Nation is that of a Superior to an Inferior.

The relation of the United States to the Choctaws and Chickasaws is that of sovereign. The Government bears the same relation to all of the Five Civilized Tribes; not only by necessary implication but by direct contract.

On January 3, 1786 (7 Stats. 21), by treaty, the Commissioners plenipotentiary of the United States of America contracted to

"Give peace to all the Choctaw Nation and receive
" them into the favor and *protection* of the United States
" of America."

The treaty further stipulates as follows:

"Article 2. The Commissioners Plenipotentiary of all
" the Choctaw Nation do hereby acknowledge the tribes
" and towns of the said nation, and the land within the
" boundary allotted to the said Indians to live and hunt
" on as mentioned in the third article, to be under the
" *protection* of the United States of America, and of no
" other *sovereign* whosoever."

The Chickasaws, in like manner, January 10, 1786 (7 Stats. 24), were guaranteed the same protection and acknowledged the same sovereign. Article 2 is identical *mutatis mutandis*.

The Cherokees, on November 28, 1785 (7 Stats. 18), in like manner, were guaranteed protection and acknowledged the same sovereign. Article 3d of that treaty being identical with the one above quoted *mutatis mutandis*.

The Creeks, in like manner, on August 7, 1790 (7 Stats. 35), were pledged the same protection and acknowledged the same sovereign. Article 2d of that treaty being identical *mutatis mutandis*.

These people were practically moved from the east to the west at the same time from 1830 to 1836, and the act of Congress authorizing the removal reiterates assurance of protection by section 6 of said act and section 7 of said act is as follows:

"And be it further enacted, That it shall and may be
" lawful for the President to have the same superintend-
" ence and care over any tribe or nation in the country to
" which they now remove as contemplated by this act,

"that he is now authorized to have over them." (U. S. Stats. 4, p. 411.)

The treaties with the five tribes removing them from the east to the west show that **the policy of the Government was identical as to them all severally.**

The Choctaw treaty (7 Stat. 333) of September 27, 1830, cedes all the land east of the Mississippi river, and the Choctaws conform to the wish of the Government taking the land assigned to them in the southern part of Indian Territory.

The Chickasaws (7 Stats. 381), October 20, 1832, cede all their land east of the Mississippi river and agree to move west making a union with the Choctaws in 1837 under the guidance of the United States.

The Creeks (7 Stats. 366), March 24, 1832, cede all their land east of the Mississippi river and take the land assigned them in central Indian Territory.

The Seminoles (7 Stats. 369), on May 9, 1832, cede all their land east of the Mississippi river and, under the guidance of the United States, obtain a portion of the Creek land in the central portion of Indian Territory.

The Cherokees (7 Stats. 414 & 478) by treaties of February 14, 1833, and December 29, 1835, ceded all their land east of the Mississippi river and went to the land in the northern part of Indian Territory. Over 16,000 Cherokees protesting against the treaty and refusing to move were placed under arrest by Gen. Scott with an army of soldiers and compelled to move by force. **The sovereign acted in its capacity as sovereign.**

The treaties of 1866, in like manner, were made with these five nations, being negotiated at the same time, to wit, September, '65, and completed within four months of each other, from March to July, 1866. These treaties

were made for a common purpose, among others, the cession of a part of their western land to the United States to be purchased for the use of other Indians the Government might desire to colonize thereon. **These treaties were made for the same purpose in pursuance of the same design and under a fixed identical policy.**

The Seminoles made their treaty first, March 21, 1866, (14 Stats. 755) and ceded their western land "in compli-"ance with the desire of the United States to locate other "Indians and freedmen thereon," and used the term "cede "and convey." Congress, nevertheless, March 1st, 1889, construed the cession, although absolute on its face, to be a trust conveyance, and paid them for their equitable title.

The Choctaws and Chickasaws made the next treaty (14 Stats. 769) on April 28, 1866, using the language that they "cede to the United States the territory west of the "98° W. Longitude, known as the Leased District," in Article 3, which was long enough and complicated enough and with conditions and provisos and contingencies sufficiently involved to have completely befogged the most educated Choctaw.

The Creeks made the third treaty (14 Stats. 786) on June 14, 1866. They ceded their western lands also, but put in the phrase that such lands were "to be sold to and "used as homes" for friendly Indians. This cession was held by Congress to be a trust conveyance by act of March 1st, 1889, and the Creeks were paid the full value of their equitable title.

The Cherokees made the fourth and last of these treaties (14 Stats. 799) on July 19, 1866, in which they set up more completely and fully the purposes of the treaty stipulating that the lands west of 96 might be used by the United States for settling friendly Indians. (Articles

15 and 16). The land to be taken in compact form not exceeding 160 acres to each Indian, and to be paid for in a stipulated manner, etc. Under this agreement the Cherokee Nation on June 14, 1883, executed formal deeds to the United States in trust for the following tribes, to wit: The Osages, the Pawnees, the Poncas, and the Otoes and Missourias, having been instructed to do so by act of Congress of March 3, 1883. Notwithstanding these trust conveyances, Congress bought and paid for the full equitable title on March 3, 1893, paying $8,595.736.12 (27 Stats. 640). In like manner the treaty of 1866 with the Choctaws and Chickasaws was construed by Congress March 3, 1891, to be a trust conveyance, and they were paid in the same manner and at the same rate as the Creeks and Seminoles for that portion of the Leased District which was thrown open to white settlement and which had previously been occupied by the Cheyennes and Arapahoes.

The United States has recently exercised its **sovereign** authority by destroying the tribal governments and compelling them to enter into agreements for the distribution of the tribal property. It is well known as an historical fact that these Indians would never have consented to the very recent agreements entered into with the United States except for the reason that they recognized in the expressed wish of the Government the demand of their sovereign, whose power over them was absolute and whose wishes they could not disregard.

In making the treaty of amity and peace of September 10, 1865, the tribes were required to "acknowledge themselves under the *protection* of the United States" and recognize "their treaties with the Government in full "force." The United States at this time renewing its pledge of protection and recognizing the treaties of past

years in full force and guaranteeing "the security of the " persons and property of the respective nations or tribes."

The sovereignty of the United States over the Indians and their right to pass laws controlling the Indians and their property has been repeatedly passed on.

U. S. *v.* Holliday, 3 Wall. 420.

Cherokee Tobacco *v.* U. S., 11 Wall. 619.

U. S. *v.* Sariviere, 93 U. S. 193.

U. S. *v.* Kagama, 118 U. S. 375.

It has been suggested that the relation of guardian and ward could hardly be plead in behalf of these Indians because of their superior enlightenment, education, and general civilization. It is true that in isolated cases members of the Five Tribes were, even in 1866, educated men, but it is also true that the great body of these people and their leaders were not educated men; that even their spokesmen at this Council of the West and Southwest at Fort Smith in September, '65, were not educated. It will be seen (Commissioner of Ind. Aff. Report, 1865, p. 338) that one of the Chickasaw commissioners signed by mark, and that they required an interpreter because they did not understand the English language. The legislatures both of the Choctaw and Chickasaw nations, even to this day, 1899, are unable to transact business in the English language without the use of interpreters.

The relation of the United States, however, to these people has been thoroughly established as the relation of domestic dependent tribes entirely at the mercy and subject to the control and direction of the United States.

The United States has required of them, and each of them, to remove from their homes east of the Mississippi River, depart from the land where they

had buried their dead and to which they were strongly attached, and go west of the Mississippi River. When the Government would appear to negotiate the various treaties requiring the removal of the Choctaws and Chickasaws from the east of the river to the west, the Indians felt the presence and the power of an imperial hand and, making the best terms they could, invariably consented to the wish of the sovereign power. In the case of the Cherokees where 16,000 of these people protested against the treaty of '35 and declined to remove, General Scott, in charge of an army, placed them under arrest and caused their departure by force of arms, and it is thoroughly well understood as historically true, these people, and all of these people without exception, occupy a position of absolute political dependence and that a relation similar to that of guardian and ward between them and the United States is thoroughly well established. The Government for a century has held their funds in the Treasury and is even now in the act of dividing up their landed estate among their citizens with and without their consent (April, 1899).

The relation of the United States to the Choctaw Nation was considered by the Supreme Court in the case of the Choctaw Nation *v.* United States (119 U. S. 1, 28), in which the Court said:

"The recognized relation between the parties to this "controversy, therefore, is that between a superior and "an inferior, whereby the latter is placed under the con- "trol of the former, and which, while it authorizes the "adoption, on the part of the United States, of such a "policy as their own public interests may dictate, recog- "nizes, on the other hand, such an interpretation of their "acts and promises as justice and reason demand, in all "cases where power is exerted by the strong over those "to whom they owe care and protection. The parties

" are not on an equal footing; and that inequality is to " be made good by the superior justice which looks only " to the substance of the right, without regard to the " technical rules," etc.

Attorney General Taney says (2 Opin. Atty. Genl.):

" In an instrument of this sort, and made with such " persons as the Choctaws, I do not think that strict and " technical rules of construction should be applied to it. " It ought to be expounded liberally according to its spirit, " so as to give the Indians all the advantages and facili- " ties, in their removal, which appear to have been con- " templated by the general scope and spirit of the treaty."

Chief Justice Marshal, in Worcester *v.* Georgia, 6 Peters, 515, says:

" How the words of the treaty were understood by this " unlettered people, rather than their critical meaning, " should form the rule of construction."

And in the case of the Kansas Indians, 5 Wall. 737, the Court said:

" Enlarged rules of construction are adopted in refer- " ence to Indian treaties. In speaking of these rules, " Chief Justice Marshall says: 'The language used in " ' treaties with the Indians shall never be construed to " ' their prejudice; if words be made use of which are sus- " ' ceptible of a more extended meaning than their plain " ' import, as connected with the tenor of the treaty, they " ' should be considered as used only in the latter " ' sense.' "

For this reason no construction can be placed upon the Third Article of the treaty of 1866, which would place the United States in the attitude of appropriating for its own use a piece of property easily worth ten millions of dollars

without any compensation to the Choctaws and Chickasaws.

The Negotiations at Fort Smith, 1865.

Fortunately, the meaning of the Third Article is not left in doubt, because the history of the transaction, shown not by the records of the Choctaw Nation, but by the records made by the officers of the United States, clearly and forcibly demonstrate that it was not proposed to acquire the ownership of this property by the treaty of '66, but that the leased district was ceded to the United States for the purpose of *being set apart to be purchased* for the use of friendly tribes now in Kansas and elsewhere *on such terms as might be agreed upon by the parties* and approved by the Government, or such as might be fixed by the Government.

On September 8, 1865, at Fort Smith, Arkansas, the United States Commission, D. N. Cooley, president, Hon. Elijah Sells, Thomas Wistar, Brigadier General W. S. Harney, U. S. A., Col. Eli S. Parker, of Gen. Grant's Staff, Mr. Cooley being not only president of the Commission, but also the Commissioner of Indian Affairs, opened a council with the Indians of the West and Southwest for the purpose of making treaties of peace and amity with them, to wit: The Choctaws and Chickasaws, the Cherokees, Creeks and Seminoles, the Osages, the Senecas, and Shawnees, the Wyandottes and Quapaws, the Wichitas and Comanches, etc. The Indian Agents for the Choctaw, Chickasaw, and the other tribes were present.

This Council was one of great importance for the purpose of bringing about peace on the border not only between the United States and these tribes, but between the tribes themselves which were divided into inter-tribal war.

The Commissioners of the United States at this meeting drew up a treaty of peace and amity on the 10th of September, 1865, which these Indians were all required to sign, and which they all did sign. This treaty expressly declared in *consideration* of the negotiations of peace and amity, "It is the desire of the Government to "act with *magnanimity*," and the United States did promise then and there to "re-establish peace and friend- "ship with all the nations and tribes of Indians within "the limits of the so-called Indian Country; *that it will* "*afford ample protection for the security of the persons* "*and property* of the respective Nations or Tribes," and declared its "willingness to enter into treaties and "arrange and settle all questions relating to and growing "out of former treaties," &c. (Report of Com. Ind. Aff. 1865, p. 302.)

On Thursday, September 21, 1865 (p. 311 same), "The "Committee on the part of the United States Com- "mission submitted the form of a treaty for the consider- "ation of the Choctaw and Chickasaw delegations and "proposed, instead of reading the same to the Council, "to submit it to the Committee appointed on the part of "those delegations; and, to give them an oportunity to "consider it, the Council adjourned to meet at two o'clock "that afternoon. The Council accordingly convened, "being called to order by myself (Com. of Indian Affairs "Cooley). Commissioner Parker stated that the joint "committee of Choctaw and Chickasaw delegations had "reported to the Committee of the Commission certain "amendments and *modifications* of the proposed treaty; "that the Committee had had the same under considera- "tion and the Commission *declined to accede to them or* "*to change in any respect the treaty as submitted.* The "delegations would be furnished with a copy of the

"treaty, and whenever *they determined to approve it*, by "notifying the Commissioner of Indian Affairs of the "fact, they would be invited to come to Washington to "consummate the treaty."

This historical sketch by the Commissioner of Indian Affairs of the manner in which the Choctaw treaty was drawn up for the action of the Choctaw and Chickasaws without allowing them to change it in any respect and that they would be only allowed to come to Washington to consummate it when they had determined to approve the treaty precisely as it had been drawn up by the United States Commission is convincing proof that the United States was acting in the premises *as sovereign;* that it was the action of a guardian with his ward; the action of a superior to an inferior, and that the relation of guardian and ward did actually exist and was recognized to exist.

It will be observed that Commissioner Cooley in opening the council (see page 297 same) treated *the Indians as children* and the Government as the Great Father of these red children, and he says to them: "*Brothers*, "you will listen further: *your Great Father*, the Presi- "dent, hearing that the Indians in the Southwest desired "to meet Commissioners sent by him in council to renew "their allegiance to the United States and to settle diffi- "culties among themselves which have arisen in conse- "quence of a portion of the several tribes uniting with "wicked white men who have engaged in war, has sent "the Commissioners now before you to hear and consider "any matter which you may desire to lay before us, and "to make a treaty of peace and amity with all *his red* "*children* who may desire *his favor* and *protection*."

President Cooley explained to the Indians that the new treaty must contain substantially the following stipu-

lations, and in his report, (Rept. Com. Ind. Aff., 1865, pp. 298, 318) says:

"Such treaties must contain substantially the following stipulations:

"1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.

"2. Those settled in the Indian Territory must bind themselves, when called upon by the Government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory and with the United States.

"3. The institution of slavery which has existed among several of the tribes must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes on an equal footing with the original members, or suitably provided for.

"4. A stipulation in the treaties that slavery, or involuntary servitude, shall never exist in the tribe or nation, except in punishment of crime.

"5. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes in Kansas or elsewhere, on such terms *as may be agreed upon by the parties* and approved by Government, or such as may be fixed by the Government.

"6. It is the policy of the Government, unless other arrangement be made, that all nations and tribes in the Indian Territory be formed into one consolidated government, after the plan proposed by the Senate of the United States in a bill for organizing the Indian Territory.

"7. No white person, except officers, agents, and employes of the Government, or of any internal improvement authorized by the Government, will be permitted to reside in the Territory, unless formally incorporated with some tribes, according to the usages of the band."

The same language is set forth on page 318 in the minutes of Charles E. Mix, Secretary.

In making his report to the Secretary of the Interior the Commissioner of Indian Affairs restates these stipulations in briefer language and in terms which help to explain the understanding he had with regard to their significance (page 34 same) and says :

"On the next day the delegates were informed that the "Commissioners were empowered to enter into treaties "with the several tribes upon the basis of the following "propositions :

"First. That each tribe *must enter* into a treaty for per- "manent peace and amity among themselves, with each "other as tribes, and with the United States.

"Second. The tribes settled in the Indian Country to "bind themselves at the call of the United States authori- "ties to assist in compelling the wild tribes of the plains "to keep the peace.

"Third. Slavery to be abolished and measures be taken "to incorporate the slaves into the tribes with their rights "guaranteed.

"Fourth. A general stipulation as to final abolition of "slavery.

"Fifth. A part of the Indian Country *to be set apart*, "*to be purchased for the use* of such Indians, from Kansas "or elsewhere, as the Government *may desire to colonize* "*therein.*

"Sixth. That the *policy* of the Government *to unite all* "*the Indian tribes* of this region into *one consolidated* "*government* should be accepted.

"Seventh. *That no white person* except Government "employes or officers or employes of internal improve- "ment companies authorized by Government *to be per-* "*mitted to reside* in the country, unless incorporated with "the several nations.

"Printed copies of the rules of the commission involv- "ing the above **propositions** were placed in the hands of "the agents and of members of the tribes."

Proposition 5 and Stipulation 5.

A critical examination of "stipulation five" as explained by Commissioner of Indian Affairs Cooley in his annual report under the term "proposition five" is instructive. Taken together, stipulation 5 as construed by proposition 5 would read as follows: "A part of the Indian Country," to wit, "a portion of the lands hitherto owned and occu- "pied by you," must "be set apart" "to be purchased for "the use of such" friendly "Indians from Kansas or else- "where" "as the Government may desire to colonize "therein," "*on such terms*" of *purchase* "as may be agreed "upon by the parties" and "approved by the Government, "or upon such terms as may be fixed by the Government."

Stipulation 5, which requires that lands should be set apart for friendly tribes on such terms as may be agreed upon by the parties, meant upon such terms *of purchase* as may be agreed upon by the parties, and this procedure was followed in the case of the Delawares and Shawnees, who were incorporated into the Cherokee Nation upon terms which the Delawares and Shawnees at different times and places agreed upon with the Cherokee Nation and which the Government approved.

For example, the Delawares paid the Cherokees $157,600 for 157,600 acres of land under articles of agreement of 8th of April, A D. 1867. (Pp. 367 Cherokee Statutes of 1892.)

The preamble of this agreement recites:

"Whereas, by the 15th Article of a certain treaty "between the United States and the Cherokee Nation, "ratified August 11, 1866, certain terms were provided, "under which *friendly Indians* might be settled upon "unoccupied lands in the Cherokee Country, East of the "line of 96° of West longitude, *the price to be paid for*

"*such lands to be agreed on by the Indians to be thus* "*located* and the Cherokee Nation subject to the approval " of the President of the United States; and, whereas, " by a treaty between the United States and the Delaware " Tribe of Indians, ratified August 10, 1866, the removal " of the said Delawares to the Indian Country, South of " Kansas, was provided for, and in the 4th Article whereof " an agreement was made by the United States to sell to " the Delawares a tract of land, being part of a tract the " cession of which by the Cherokees to the United States " was then contemplated; and, whereas, no such cession " of land was made by the Cherokees to the United States, " but, IN LIEU THEREOF, *terms were provided* as hereinbefore " mentioned, *under which friendly Indians might be* " *settled on their lands*," &c.

The Shawnee agreement in like manner (p. 404 *ibid.*) recites the Treaty of 1866 and states that such lands may be settled "*on such terms* as may be agreed upon *by any* "*such tribe* and the Cherokees, subject to the approval of " the President," etc.

In the event that the parties had been unable to agree, then, as for example, under the terms of the Cherokee treaty, the Government could have fixed the terms of purchase. In pursuance of this clear-cut plan, the settlement of every new tribe in Indian Territory, almost without exception, was arranged.

In the case of the *Osages*, the Government of the United States made an arrangement with the Cherokees and *bought* lands, as did also the *Pawnees*, *Otoes* and *Missourias*, *Poncas*, *Nez Perces* and *Tonkawas*.

Under this stipulation or proposition as set forth in the Creek Treaty, Article 3, the *Seminoles*, *Sacs and Foxes* and *Pawnees* bought. Under the *Seminole* treaty, proposition 5, set forth in Article 3, was the basis upon which the *Pottawatomies* and *absentee Shawnees* acquired lands,

and under Article 3 of the Choctaw-Chickasaw Agreement, the Choctaws and Chickasaws insist that the land was ceded for like purpose and that the Wichitas and Kiowas, Comanches and Apaches have acquired rights there in like manner, and that either they or the United States for them should compensate the Choctaws and Chickasaws for this land which was set apart and ceded to the United States "*to be purchased*" "for the use" of these friendly Indians.

In the Choctaw treaty, Article 30, it was agreed that civilized Indians north of Indian Territory not exceeding a certain number, should have the right of being incorporated in the Choctaw and Chickasaw tribes as fellow citizens, to select 160 acres of land each in case the public domain was divided, and in Article 31 it was expressly agreed that the United States would pay to the Choctaw and Chickasaw Nations "out of funds of Indians removing into said Nations, respectively, under the provisions of this treaty, such sums as may be fixed by the legislature of said Nation, not exceeding $1.00 per acre."

In the unsigned treaty between the Commissioners and the Choctaws and Chickasaws attention is called to Article 5, which expressly shows the purpose which the United States Commissioners had in mind in negotiating the treaty of 1866. Article 5 reads as follows, to wit:

"ARTICLE 5. The Choctaw and Chickasaw Tribes agree to a modification of the 9th article of the treaty concluded at the city of Washington the 22nd day of June, A. D. 1855, by which they agree that all that portion of their common territory west of the 98th degree west longitude, leased to the United States, *may be used for* the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government desires to locate thereon, *without exception or restriction as to the character of the tribe.*"

The other limitations on the right of the United States were manifestly not intended to be changed by the U. S. Commissioners at this time, and nothing has been anywhere shown in the record to indicate any change of purpose on the part of the Commissioners, or to indicate that they had any other purpose when they drew the third article of the treaty of 1866 ceding the Leased District to the United States, while the record does show conclusively that they did understand the treaty as drawn to make only a cession in trust.

Article 5 in the proposed treaty at that time (September, 1865,) shows beyond any reasonable doubt that the Government Commissioners had no intention of doing more than modifying the Ninth Article of the Treaty of '55 so as to permit the Government to locate other tribes or bands without exception or restriction as to the character of the tribe. The Ninth Article aforesaid having previously restricted the Indians to be located on such lands to those whose permanent locations were south of Arkansas River. Under the fifth proposition or stipulation arrangement was made with the Choctaws for the location of Kansas Indians within their borders and in case the Choctaws determined to allot their country east of 98, these Kansas Indians were to have the right of selection of 160 acres each **after** the Choctaws had selected their allotments (Article 30, Treaty '66), and the United States agreed to pay not exceeding $1 an acre for such land so selected by such Kansas Indians "out of the funds of In-"dians removing into said Nation, respectively, under the "provision of this treaty." The same arrangement was made subsequently with the Cherokee Nation in the treaty of 1866, Article 15 (14 Stats. 803), upon the clearly defined principle that the immigrant Indians should pay for the lands they received upon such terms as such

immigrant Indians and the Cherokee Nation should agree, "subject to the approval of the President of the United "States, and in case of disagreement the price to be fixed "by the President." Under this provision the Delaware Indians settled in the Cherokee Nation as stated, and paid the Cherokee Nation $157,600 for 157,600 acres of land for the registered Delawares. In like manner the Shawnees settled, as stated, in the Cherokee country upon a similar basis. Commissioner of Indian Affairs Cooley distinctly reports (Rep. 1865, p. 36) that "with the "Choctaws and Chickasaws a treaty was agreed upon "*upon the basis of the seven* **propositions** *heretofore* "*stated.*"

On page 32 of same report, W. S. Paton and Robert S. Paton submit a reply to the Commissioners as follows: "Honorable Commissioners of the United States: We, "the delegation on the part of the loyal element of the "Choctaw people, . . . for answer therefore to your prop- "osition to the Civilized Tribes of Indians, we say that the "first, second, third, fourth, fifth, and sixth articles meet "our approval. . . . Wm. S. Paton, Robert B. Paton."

It will be seen that there is no substantial difference in the meaning of stipulation 5 and the proposition 5 as stated by Commissioner Cooley on page 34 of the annual report above quoted.

It will be observed that proposition 5, to wit:

"5th. A part of the Indian country to be set apart, "to be purchased for the use of such Indians, from Kan- "sas or elsewhere, as the Government may desire to "colonize therein."—

has four qualifying clauses:

1. To be set apart
2. To be purchased

3. For the use

4. Of such Indians, &c.

These qualifying clauses are of extreme importance to explain the intention of parties. The Commissioner of Indian Affairs says (page 35, *ibid.*) that printed copies of this address of the commissioners involving the above **propositions** were placed in the hands of the agents and of the members of the tribes, and he uses the above language as involving the same meaning as expressed in the record of the proceedings at Fort Smith, by *stipulation* 5 (p. 319), above quoted.

The difference between these two forms of expression is that stipulation 5 uses the word "friendly," while proposition 5 omits that term. Proposition 5 says the land is **to be purchased** for the use of such Indians, while stipulation 5 says that the land is to be set apart **"on such terms as may be agreed upon by the parties and approved by the Government,"** which means the *purchase* terms were to be agreed upon between the Choctaws and Chickasaws and the Indians who might wish to buy, or upon such terms of purchase as may be fixed by the Government in the event that the Government acted for the Indians who desired to purchase homes upon such western lands.

The history of the western lands of the Cherokees, Creeks, Seminoles, Choctaws, and Chickasaws, above recited, shows that in some cases the terms were agreed upon by the parties who desired such land so set apart to be purchased, as in the case of the Seminoles, who paid $200,000 for land set apart to be purchased out of the Creek western lands; while, in the case of the Osages, the Cherokee Nation, on June 14, 1883, conveyed the Osage reservation to the United States in trust for the benefit of the Osage and Kansas Indians. The manner in which this could be

lawfully done is more particularly set forth by the terms of the Cherokee treaty above quoted. Suffice it to say, however, that the stipulations of the Cherokee treaty were practically carried out in setting apart land to be purchased, and it was purchased for the use of the Pawnees, Otoes, Missourias, and Poncas and Nez Percés and Tonkawas, and was finally purchased in fee and thus freed from trust limitations upon terms satisfactory to the Cherokees, by the appropriation of $8,595,736.12 (27 Stat. 640), amounting to $1.42 and a fraction per acre.

It now appears from the abstract of title given in the first part of this brief that the Choctaw Nation acquired the leased district in 1820 for full consideration paid to the United States and received by the United States as full satisfaction therefor; that by the treaty of 1830 the fee simple of such land was guaranteed to the Choctaws and by the patent of 1842 delivered in due form; that the Choctaws, by the treaty of 1855, permitted the Government to locate certain roving bands of Indians upon such lands "**on reasonable terms**," **not interfering with the rights of Choctaws or Chickasaws to settle therein,** which very feeble lease was without any other consideration than that of good neighborhood, if we allow the Choctaws and Chickasaws credit at the extremely low figure of 12½ cents an acre for the lands west of the 100th meridian, which had been ceded to them by the treaty of 1820.

Allowing this basis of 12½ cents an acre for the land west of 100° the only claim adverse to the fee-simple title guaranteed to the Choctaws and conveyed to them by patent rests solely upon the third article of the treaty of 1866.

The Government desired a part of the Choctaw land "to be set apart" "to be purchased" "for the use" "of

"such Indians," &c., as the Government desired to colonize therein. It is well known that the Government had great difficulty in colonizing the roving bands that travelled from Mexico to the line of British Columbia and which continually depredated on the frontiers of Texas and other border States. The Government tried in '55 to colonize the Wichitas and establish them permanently, and leased the right to settle them among the Choctaws and Chickasaws in the so-called leased district in this hope and expectation. The guardian of the Choctaws, the United States Government, in drawing the treaty of 1855, left no period of termination to the lease, but left it an open matter; the Choctaws relying upon the Government to do what was just in the premises by subsequent arrangement, and as they stated in the Treaty of 1855 "on reasonable terms," as the Government had usually consented to do when such matters were properly presented.

Attention is called to these facts in explanation of the true meaning of the so-called lease of the leased district for the *permanent* settlement of the Wichita and such other tribes or bands as the Government may desire to locate therein. The term permanent settlement expressed the wish of the Government and the purpose for which leased. It was leased for this purpose—a purpose uncertain of fulfilment. The Government wished and Texas wished the permanent settlement of these people, who were vexing the frontier. But it was very uncertain whether these roving bands, living in tents and loving the plain life and despising a fixed habitat, could possibly be induced to permanently settle, which was the purpose and desire of the Government, if it could be accomplished. It was not until 1872, seventeen years, that the ~~United States~~ Commissioner of Indian affairs concluded an arrangement with the Wichitas and affiliated bands of

Indians, and this agreement was never ratified. The lease for the permanent settlement, in the event the Government induced these roving bands to settle permanently, should have then been followed by some equitable arrangement with the Choctaws for the acquirement of the fee simple, and its sale to such bands at a fair value. The equities of the Choctaw Nation in its relation with the United States are manifestly not impaired in their fee-simple title in this land by that lease, further than the United States may be held to have paid them therefor.

Annual Report of 1866.

Attention is further called to the report of the Commissioner of Indian Affairs of 1866, page 8, in which he states:

"We come now to **the series** of treaties made with "the tribes or nations resident in the Indian country, "south of Kansas. In the annual report of this office "for 1865 a very full report and statement was made of "the conferences at Fort Smith, Arkansas, resulting in a "preliminary treaty with these tribes." * * *

"**With this purpose in view,** the Cherokees, Creeks, "Seminoles, and Choctaws and Chickasaws appeared in "this city, in January, 1866, by their representatives, duly "chosen, there being double delegations in some cases, "respectively representing two parties in each nation— "those who had remained loyal to the Government and "true to their treaty stipulations, and those who had taken "part in the rebellion. These negotiations were carried "on, on the part of the Government, by the Commissioner "of Indian Affairs in connection with Col. E. S. Parker "and Superintendent Sells. Four principal points came "up for settlement, to wit: * * *

"Cession of lands by the several tribes **to be used for "the settlement** *thereon of Indians* who it is in contemplation to remove from Kansas." * * * "The next

"treaty **in this series** was made with the confederate "nations of Choctaws and Chickasaws; concluded April "20, 1866; ratification advised, with an amendment, June "28, 1866; amendment accepted July 2, 1866, and pro- "claimed July 10, 1866."

It is not only shown conclusively by the above record of these proceedings what the intentions of the parties were before the treaty was made—that is, that the land was set apart

to be purchased

by friendly Indians and

for the use of such Indians, &c.,

and was so understood by the Choctaws and Chickasaws, but was so understood by the Government officers immediately **after** the treaty was made, and it has been so construed continuously since, without known exception, until President Harrison's message of date February 18, 1892.

SUBSEQUENT EXECUTIVE CONSTRUCTION.

Hon. Carl Schurz, Secretary of the Interior, May 1, 1879, declares this land subject to a specific trust.

Hon. R. B. Hayes, President, February 12, 1880, declares this land "subject only to occupation by Indian tribes."

Hon. C. W. Holcomb, Acting Commissioner General Land Office, April 25, 1881, declares this land held in trust.

Hon. N. C. McFarland, Commissioner General Land Office, April 25, 1881, declares this land held in trust.

Hon. H. M. Teller, Secretary of the Interior, January 3, 1883, holds this land to be held in trust.

Hon. Samuel J. Kirkwood, Secretary of the Interior,

February 17, 1883, declares this land held in trust.

Hon. Hiram Price, Commissioner Indian Affairs, January 31, 1884, states the land to be subject "to a direct trust assumed by treaty."

Hon. H. M. Teller, Secretary of the Interior, February 14, 1884, declares this land "to be held for "Indian purposes."

Hon. Chester A. Arthur, President, July 1, 1884, declares this land "subject to Indian occupation "only."

Hon. Hiram Price, Commissioner Indian Affairs, January 26, 1885, repeats view of Secretary Schurz.

Hon. H. M. Teller, Secretary of the Interior, January 26, 1885, repeats the view of Secretary Schurz.

Nearly all of these expressions of opinions were due to attempts on the part of United States citizens to locate on such lands on the theory that they had been ceded to the United States and become public domain.

The construction of the officers charged with the duty of administering the treaty subsequently demonstrates that the treaty was understood as conveying to the United States a trust estate only.

"The construction given to a statute by those charged with "the duty of executing it ought not to be overruled without "cogent reason." (713 U.S. 571.)

All of this land except Greer county, which Texas claimed, was **immediately devoted to the settlement of Indians in accordance** with the purpose of the treaty of 1866. The Wichitas and the Affiliated Bands promptly occupied the so-called Wichita Reservation, having returned to this country in 1867. And even be-

fore the treaty of 1866 was completed the United States, in contemplation of this treaty, made a negotiation with the Kiowas and Comanches in October, 1865, above cited, and by the second article of the treaty of October 21, 1867 (15 Stats. 581), sets aside their present territory now known as the Kiowa, Comanche, and Apachee Reservations. This district was

"*set apart* for the absolute and undisturbed *use and occu-*
"*pation* of the tribes herein named, and for such other
"friendly tribes or individual Indians as from time to
"time they may be willing (with the consent of the United
"States) to admit among them; and the United States
"now solemnly agrees that no person except those herein
"authorized so to do, except such officers, agents, and
"employés of the Government as may be authorized to
"enter upon Indian reservations in discharge of duties
"enjoined by law, shall ever be permitted to pass over,
"settle upon, or reside in the Territory described in this
"article, or in such territory as may be added to this res-
"ervation for the use of said Indians," &c.

It will be observed, that this language "*set apart*" "*for* "*the use and occupancy*" of these Indians, and the stipulation that it shall *not be trespassed upon by whites*, follow with the utmost precision the pledges made to the Choctaws and Chickasaws in 1865, and which they rightfully understood to exist in the treaty of 1866, and which was so understood by the Government officers. The ratification of this agreement by the Senate of the United States shows that the legislative branch of the Government, as well as the executive branch, understood that this land was *set apart for the use of Indians only* by the Choctaw-Chickasaw treaty, and that both these branches of the Government acted strictly upon this line in dealing with the Kiowas and Comanches and Wichitas and Affiliated

Bands. It will be observed, moreover, that this treaty, article third, provides that if the tract of land set apart " contain less than **160 acres** of tillable land for each " person who at the time may be authorized to reside on " it under the provisions of this treaty, other provisions " shall be made to secure that amount of arable land."

This shows that the Commissioners of the United States and the Senate of the United States were carrying out with these people the same idea observed in the other treaties *of this series*, as in the case of the Cherokees, and which has been since carried out by the allotment of a quarter section to each of these various Western Indians who have had lands allotted to them. The purpose of this observation is to show that the officers of the United States, both Executive and Legislative, were pursuing a fixed policy with regard to these people *in the lands ceded by the Choctaws and Chickasaws* as well as in those ceded by the Cherokees, Creeks, and Seminoles. When in 1872 the unratified agreement with the Wichitas was entered into by the Commissioner of Indian Affairs to depart from the policy laid down in other cases by giving and granting to the Wichitas the land instead of setting it apart for their use, the agreement was not ratified **as it ought not to have been under the circumstances.**

Some years after the treaty of 1866 had been made, aggressive frontiersmen began to trespass upon the lands of Indian Territory upon the theory that they were open to settlement, and boomers began to organize bands of aggressive men who went into the Indian country demanding the right to homestead it on the ground that it had been ceded to the United States and that it was therefore public domain, so that this exact issue arose and had to be solved by the Executive officers of the United States. It was necessary for them to say either that this

land was land belonging to the United States and a part of the public domain or that it was not, and if it was not, to show why it was not. The following references are deemed sufficient to demonstrate the fact that the Executive Department of the United States construed that this Western land ceded by the series of treaties of 1866 was ceded in trust for the settlement of friendly Indians, to wit: Honorable Carl Schurz, Secretary of Interior, May 1, 1879, made an elaborate review of the series of treaties of 1866, and the policy of the United States from 1802. He declared that:

"The whole of this territory was included in the statute "of March 30, 1802, declaring what portion of the United "States shall be deemed Indian country, which was re- "enacted in terms by the first section of the Act of June "30, 1834. (Stats. 4, 729.)

"The intervening Act of May 28, 1830, authorized the "President of the United States to cause so much of any "territory west of the Mississippi River not included in "any State or organized Territory as he might judge to "be necessary to be set off and divided into districts for "the reception of Indian tribes. This territory was "especially selected and reserved by the Executive for the "purposes prescribed, and has ever since been known "and organized as the Indian Country, no States or "organized Territory having been created therein."

The Secretary described the history of the Cherokee title, of the Creek and Seminole lands, and states that:

"**The title acquired** by the Government by the treaties "of 1866 was secured in pursuance and furtherance of "the same purpose of Indian settlement which was the "foundation of the original scheme.

"That purpose was the removal of Indian tribes from "the limits of political States and Territory organizations "and their permanent location upon other lands sufficient

" for the needs of such tribes. These lands being ampl
" in the area for the purpose it has become a settle
" policy to locate other tribes thereon as fast as arrange
" ments can be made, and provisions have been constantl
" made by treaties, agreements, and Acts of Congress t
" effect this object.

" That purpose is expressly declared in the said trea
" ies. The cessions of the Creeks and Seminoles ar
" stated to have made ' in compliance with the desire o
" ' the United States to locate other Indians and freedme
" ' thereon.' These words may be held to create a trus
" equivalent to what would have been imposed had th
" language been ' for the purpose of locating Indian
" ' and freedmen therein.'

" The lands ceded by the Choctaws and Chickasaw
" were by Article 9 of Treaty of June 22, 1885, ' lease
" ' to the United States . . . for the permanent settlemen
" ' of the Wichitas and such other tribes or bands of In
" ' dians as the Government may desire to locate therein
" The treaty of 1866 substitutes a direct purchase for th
" lease but *did not extinguish or alter the trust.* I
" 1867 the Kiowas, Comanches and Apaches were settle
" upon these lands. In 1869 the Cheyennes and Arapa
" hoes were located by Executive order, the Wichitas be
" ing already upon a portion of the same prior to th
" purchase. . . .

" It will thus be seen that the Indian country as define
" by statute embraces the whole Indian Territory; no pa
" of it has been brought under the operation of gener
" laws or made subject to settlement as public lands.
" has attached as ' Indian Country ' for the enforcemen
" of the intercourse laws alone to the Western District
" Arkansas by Section 533 of the Revised Statutes. It
" expressly named as Indian country in the Act of Marc
" 3, 1875, ' to establish the boundaries between the Stat
" ' of Kansas and the Indian Country,' which recognize
" the proper closing of the surveys of the public land
" upon its boundaries as originally marked.

" The consolidated provisions of the Intercourse Law
" embrace two entire chapters of the Revised Statute

"Sections 2111 to 2157, inclusive. The fact that they "have not in terms re-enacted the boundaries of the In- "dian Country should not, in my judgment, be held to "destroy its previously recognized location *as the direct* "*effect of such conclusion would render inoperative the* "*entire legislation provided for its government.*" . . .
(Carl Schurz, Secretary of the Interior.)

The President of the United States on February 12, 1880, issued a proclamation sustaining this construction declaring the Indian Territory land to be "Indian Coun- "try," and as such—

"is subject to occupation only by Indian tribes, officers "of the Indian Department, military posts and such per- "sons as may be privileged to reside and trade therein "under the Intercourse Laws of the United States"—

and warns other persons that they will be removed by the United States authorities. (Issued by President R. B. Hayes, Wm. M. Evarts, Secretary of State.) The matter was further passed on by Hon. S. J. Kirkwood, Secretary of the Interior, Feb. 17, 1882, who submitted to the Senate of the United States the record compiled by the General Land Office of the United States, dated April 25, 1881, and transmitted by Hon. N. C. McFarland, Commissioner, Feb. 16, 1882.

This report of the land office recites that the entire Indian Territory is Indian country and not subject to settlement; it recites the history of the title, the treaties of 1866 with the *Choctaws*, *Chickasaws*, Seminoles, Creeks and Cherokees, and declares that:

"The lands conveyed to the United States by the fore- "going treaties *are therefore held subject to the trust* "*named*, they can be appropriated *only to the uses speci-* "*fied* and *to those uses only* by the United States, and then

"only in the manner provided by law. Miscellaneous "immigration, even by the intended beneficiaries, would "be unauthorized and illegal. The Choctaw and Chicka- "saw cession of April 28, 1866 (14 Stats. 769), was by the "tenth section thereof *made subject to the conditions of* "*the contract of June* 22, 1855 (11 Stats. 613), by the 9th "Article of which it was stipulated that the lands be ap- "propriated for the permanent settlement of such tribes "or bands of Indians as the United States might desire "to locate therein."

The Secretary of Interior transmitted to the Senate of the United States Jan. 31, 1884, the report of Hon. Hiram Price, Commissioner of Indian Affairs, quoting with approval Department letter of April 25, 1879, as follows:

"It must be further stated that no part of said territory "remains free from appropriation either *to a direct trust* "*assumed by treaty*, or by reservation for tribes thereon "under executive order, except that portion still claimed "by the State of Texas between Red River and the North "Fork of the same."

This communication, being a history of the status of the lands of the Indian Territory, is an important executive construction.

Hon. H. M. Teller, Secretary of the Interior, on February 14, 1884, in answer to a Senate Resolution of January 23, requesting advice as to the *status of lands* in the Indian Territory and whether any parts are subject to entry, states that—

"These lands were acquired by treaties with the various "Indian Nations or Tribes in that territory *in* 1866 *to be* "*held for Indian purposes*, and to some extent for the "settlement of the former slaves of some of said Indians "or portions thereof.

"*Such are the purposes for which said lands are now*

" *being used or held according to the common understand-*
" *ing of the object of the treaties* by which they were ac-
" quired, and from this arises the necessity for our obli-
" gations to keep said lands in their present condition of
" occupancy or otherwise."

Chester A. Arthur, President, Frederick A. Frelenghuysen, Secretary of State, July 1, 1884, issued a proclamation warning persons not to attempt to invade Indian Territory or settle thereon:

" Which territory is designated, recognized and de-
" scribed by the treaties and laws of the United States
" and by the Executive authorities *as Indian country*, and
" as such is *subject to Indian occupation only*."

Hon. H. M. Teller, Secretary of the Interior, January 26, 1885, in a communication to the President of the United States, acknowledging Executive reference for report of Senate Resolution making inquiry as to status of lands in the Indian Territory, quotes with approval the views of Mr. Secretary Schurz, of April 25, 1879, as follows:

" It may be further stated that *no part of said territory*
" *remains free from appropriation either to a direct trust*
" *assumed by treaty or by reservation for tribes thereon*
" *under Executive order, except that portion still claimed*
" *by the State of Texas.*" . . .

" *This status of the land* as thus determined has been
" adhered to by this Department, and on April 26, 1879,
" February 12, 1880, and July, 1884, proclamations were
" issued by the President warning unauthorized persons
" against going upon these lands. . . .

" Until the existing status of the lands shall have been
" changed *by agreement with the Indians interested*, or in
" such other manner as may be determined upon by Con-
" gress, the integrity of the treaties heretofore made with

" the Indians should be maintained, and the power of the " Government, to the extent necessary, should be exer- " cised to keep intruders and all unauthorized persons off " the lands."

Chester A. Arthur, President, January 27, 1885. The President approves the views of the Secretary of the Interior and states that—

" ' Until the existing status of these lands shall have " ' been changed by agreement with the Indians interested, " ' or in such other manner as may be determined upon by " ' Congress, the treaties heretofore made with the Indians " ' should be maintained, and the power of the Government " ' to the extent necessary should be exercised to keep off " ' intruders and all unauthorized persons.' "

Honorable Hiram Price, Commissioner of Indian Affairs, in a communication to the Secretary of the Interior January 26, 1885, quotes with approval the various findings of the Department and says:

After referring in detail to the several actions of Congress under which the Indian Territory was created and defined as Indian country, also the several early treaties with the Cherokees, Creeks, Choctaws, and Chickasaws and Seminoles, the Honorable Commissioner says:

" By this treaty title was guaranteed to the several " tribes, and it was provided that the lands should never " be included within the territorial limits or jurisdiction " of any state or territory, but should remain subject to " the intercourse laws, which laws have, as heretofore " stated, continued in force in all parts of the Territory " until the present time.

" The title acquired by the Government by the treaties " of 1866 was acquired in pursuance and furtherance of " the same purpose of Indian settlement which was the " *founding of the original scheme.*

"*That purpose was the removal* of Indian tribes from "the limits of the political state and territorial organiza- "tions and *their permanent location upon other lands* "*sufficient for the needs of such tribes.*

"These lands being ample in area for the purpose, it "has become *a settled policy* to locate all the tribes "therein as fast as arrangements can be made, and pro- "visions have been constantly made by treaty, agree- "ments, and acts of Congress to effect these objects . . ."

On the authority of the legislative constructions upon all the treaties of 1866 above quoted and set forth, the Congress of the United States not only resisted for many years the attempt on the part of interested persons to pass legislation throwing the lands west of the home tract of the Five Civilized Tribes open to settlement for the reasons which have been set forth in the various reports made to Congress in answer to Senate resolutions above cited, but Congress did, by the language used in the Kiowa-Comanche treaty, and Apache treaty, immediately after the treaty of 1866, show that Congress understood at that time the meaning of the Choctaw-Chickasaw treaty in relation to the lands of the leased district, and Congress has, in its construction of the meaning of these cessions made by the series of treaties of 1866, acknowledged in the most elaborate manner in dealing with the Creeks, the Seminoles, the Cherokees, the Choctaws, and Chickasaws and construed the treaties to mean that the lands ceded to the Government by the treaty of 1866 *were ceded in trust.* The Creeks were paid by Congress under agreement of January 19, 1889, for the lands ceded in 1866 (25 Stats. 757), March 1, 1889; the Seminoles were paid for their western lands ceded to the Government in 1866 by act of March 2, 1889 (25 Stats. 1005), and the Cherokees were paid for their lands west of the 96th meridian the value thereof by act

of Congress, $8,595,736.12 (27 Stats. 640), and the Choctaws and Chickasaws were paid for a portion of the leased district by act of Congress of March 3, 1891, the sum of $2,999,450.00 (26 Stats. 1025).

When the Cheyenne and Arapahoe reservation was thrown open to settlement, this act of Congress recites that—

"Said lands having been *ceded in trust by Article 3 of* "*the treaty* between the United States and said Choctaw "and Chickasaw nations of Indians which was concluded "April 28, 1866."

Hon. George Chandler, Acting Secretary of Interior, on September 16, 1890, transmitted to the Chairman of the Committee on Indian Affairs of the House of Representatives a report of the Indian Office on a memorial of the Choctaws and Chickasaws asking compensation for the leased district. This report of the Commissioner of Indian Affairs, September 13, 1890, recites elaborately the history of the treaties and analyzes the series of treaties in a report of a forcible character referring to the record which has been above set forth, and says, referring to the treaties of 1866, that—

"It shows quite clearly that the Indians understood "that they were parting with whatever right, title or "interest remained to them in the Leased District to the "United States *to be used for the location and settlement* "*of other Indians thereon.* The stipulations made about "that time by the United States with Indian Tribes "shows very conclusively that a policy had been care-"fully mapped out for the acquisition by the United "States of the right *to locate other Indians* upon portions "of the lands owned and occupied by the Five Civilized "Tribes in the Indian Territory.

"I am inclined, therefore, to the opinion that the

"Choctaw and Chickasaw Indians have good grounds "for their claim that the United States took the lands "*ceded by them upon the trust to settle other Indians and* "freedmen thereon, as the policy upon which the "negotiations were made clearly indicate its desire and "purpose to do.

"*Admitting*, however, *the fact of a trust as the basis of* "*their claim*, I do not think that they have any ground "upon which to demand payment for further compensa- "tion for the release and discharge of said lands from the "alleged trust *so long as the purposes of said alleged trust* "*are observed* and adhered to, that is, so long as the lands "are occupied by Indians placed upon them by the "United States. The Indians placed upon said lands as "heretofore shown are still occupying them. No negotia- "tions have been concluded with any of said occupying "tribes for relinquishment of their right, title, and interest "in and to said lands or any portion of them, nor has "the United States appropriated any of said lands to "any other use nor authorized the appropriation of any "portion of them *to any other use;* in view of this fact "it would seem that the basis of claim of the Choctaws "and Chickasaws for further compensation for the lands, "if valid, the claim itself is *prematurely* presented. [The "Commissioner overlooks the important fact that these "lands were 'to be set apart **to be purchased** for the "'use,' &c.] It is presumed, however, since the fact that "negotiations have been authorized, and under the "authority of law have been and are being pursued for "cessions 'by the Indians owning or claiming lands lying "'west of the 96th degree of longitude in the Indian "'Territory, . . . of all their title, claim or interest of "'every kind or character in and to said lands' (25 Stats. "1005) has prompted the Choctaws and Chickasaws to "bring forward this claim.

"So far as this office is aware, nothing is contained in "the instructions given to the Commission appointed to "make these negotiations which would authorize or war- "rant it in negotiating with the Choctaws and Chicka- "saws covering this claim, and this may account for its "direct presentation to Congress." . . .

"While there are clearly no words of limitation in the "treaty of 1866 as to the uses to which the ceded lands "should be put by the United States, the history of the "negotiation preceding and resulting in that treaty and "the subsequent treatment of that treaty quite clearly in- "dicate that the Choctaws and Chickasaws have quite "clear ground for claiming that the lands were to be used "for the location of other Indians and freedmen thereon. "If they have, *as seems to be the case, an equitable claim "it is for Congress to determine* what shall be the measure "of allowance to be made for its adjustment in order to "clear the land of the incumbrance.

"If anything is to be allowed, the settlement made with "the Creeks and Seminoles in 1889 of similar claims may "assist in reaching a conclusion in this case."

The Choctaws have the same understanding of the treaty as shown by their numerous records. Attention is particularly called to act No. 15, approved December 24, 1889, Choctaw Laws, wherein occurs the following language:

"Whereas * the Choctaws and Chickasaws did, by "the third article of the treaty of 1866, cede the land "west of the 98th degree of west longitude to the United "States, **in trust** for the purposes aforesaid (for the use "of friendly Indians), and under the conditions of the "existing laws and treaties of the United States herein- "before mentioned;

"And whereas, by act of Congress of March 1, 1889, "the United States departed from the long established "policy of holding the lands of the Indian Territory for "Indian settlement by purchase of the lands of the Creeks "and Seminoles **which had been sold to the United "States for the same purposes as in the case of the "Choctaw cession of the lands west of the 98th "degree** of west longitude; and whereas the United "States, by act of Congress of March 2, 1889, in pursu- "ance of this new line of policy, authorized the President

" of the United States to appoint commissioners to nego-
" tiate with all Indians owning or claiming lands lying
" west of the 96th degree of west longitude in the Indian
" Territory for the cession to the United States of all their
" title, claim, or interest of every kind or character in and
" to said lands;

"And whereas the Choctaw people recognize the
" changes which have taken place in the policy of the
" United States, and the desire of the Government to
" establish a territorial government in the western part of
" the Indian Territory, and the need to use the lands west
" of the 98th degree of west longitude for a different pur-
" pose **than the holding in trust for friendly Indians**
" **as by the cession of 1866;**

"And whereas the Choctaws have ever been willing and
" anxious to conform to the wishes of the United States
" consistently with the interest of their own people: Now,
" therefore,

"Section 1. Be it enacted by the General Council of
" the Choctaw Nation assembled, That the Principal Chief
" of the Choctaw Nation is hereby authorized and directed
" to appoint by and with the advice and consent of the
" Senate three competent sober men who shall constitute
" a delegation with full authority to represent the Choc-
" taw Nation in reference to the rights of the nation in the
" lands lying between 98th and 100th degrees of west lon-
" gitude," etc.

This delegation was authorized to negotiate with the United States for the relinquishment to the United States of their interests in the leased district.

The Term "Cede."

The term used by the treaty is "cede," the word "convey" is omitted, and the manifest meaning of this word is to relinquish the jurisdiction and unrestricted right of settlement which the Choctaws and Chickasaws had up

to this time retained. This was a proper term to use for the purpose of carrying into effect the proposition or stipulation 5 by which it was proposed to set apart a part of the Choctaw country for the use of such Indians as the Government wished to colonize therein. It was not the term proper to be used in conveying a fee simple, patented title. Governments cede jurisdiction, but fee simples are not *ceded* but sold and conveyed for adequate considerations. The Government practically had assumed, and the Choctaws recognized their sovereignty from a very early period, to wit, January 3, 1786 (7 Stats. 21, art. 2), wherein the Government acknowledged the Choctaws "to " be under the protection of the United States of Amer- " ica, and of no other sovereign whatsoever." And the Government further has exercised, and the Indians have relied on, a supervisory guardianship, wherein the Government has taken charge of their landed interests, as of the Mississippi lands of the Choctaws, handled the property as a guardian and accounted to the Choctaw Nation as a ward. [Witness the Net Proceeds case.] It was perfectly proper for the Choctaws to cede this land to the United States as trustee and for the accommodation of the United States, which was exercising guardianship over other western Indians, whose permanent settlement was important, but the Choctaws only ceded, they did not sell and convey for adequate consideration. That the sovereign and guardian could acquire the absolute fee of 4 cents an acre from the ward in a treaty made on the basis of proposition 5 or stipulation 5, and which basis was well understood by both parties to be a trust conveyance, simply because of the failure of a draftsman to insert the terms of limitation agreed on is inconceivable. The sovereign is incapable of permitting such a construction, much less of seeking it.

The term "cede" used in the third article of the treaty of 1866 is a term usually applied to the act by which one State or nation transfers territory to another for jurisdictional purposes, and does not ordinarily convey the title of land itself; usually the titles held by persons within the ceded territory are expressly provided for and understood not to be disturbed. The Choctaws had exercised jurisdiction over this country until 1866, and the word "cede" certainly extinguished the right of further exercise of authority over this territory. It did not necessarily interfere with the equitable interest of the Choctaw people in the land. The term "cede" is not the language by which a fee-simple deed is conveyed. This land was conveyed in fee simple to the Choctaws, so that each Choctaw and Chickasaw *citizen had an equal undivided interest* in the property.

The method by which the actual fee simple to land sold by the Choctaws and Chickasaws, Seminoles and Creeks under the treaties of 1866 should be conveyed, has been clearly and forcibly shown both by the Congress of the United States and by the President of the United States in the acts of Congress requiring solemn deeds of conveyance, duly authorized and executed with great formality, expressly conveying the full and complete title to the United States. This was the method in the case of a portion of the Leased District formerly occupied by the Cheyennes and Arapahoes by deed of June, 1893. This was the method in the case of the Seminole western lands in which deeds of conveyance of full title were required by the President of the United States and executed in March, 1889. The form prescribed by the executive officers of the United States as necessary and requisite to a transfer of the full title is an important executive construction. In the sale of real estate the contract for the

purchase and sale requires a concurrence of will on the part of both vendor and purchaser.

Irwin *v.* Bank of Kentucky, 5 L. A. N. 1.
4 Wheat. 228.
15 L. A. N. 521.
123 Mass. 356.
4 Am. Rep. 560.

Certainly no one can believe, in the face of the negotiations and reports of the officers of the United States as to their meaning and the methods of negotiation, that the United States *intended* by the use of the word *cede* in the third article of the treaty of 1866 to require the conveyance of the full title to this enormous estate, and much less can it be believed that the Choctaws and Chickasaws had such intent. Without such intent the estate did not pass.

The parties must be capable of contracting, and if between a guardian and ward, the transaction must be for a fair consideration, and the instrument should be so drawn as to convey the title in terms that shall be free from doubt. The Government itself has used the word "cede" in conveying lands to the Choctaws and Chickasaws when it was not intended to convey the fee simple, and it has used a very different nomenclature when it intended to convey the fee simple or complete title or when it intended to receive it. This will be observed in relation not only to the Choctaws and Chickasaws, but also in relation to the other Five Civilized Tribes.

This term "cede" was used by the Choctaws in 1820 and 1830, as to lands in which the fee was not in them. When the fee was intended to be conveyed the United States used very different language, to wit: "under a grant spe-
" cially to be made by the President of the United States

" shall cause to be conveyed to the Choctaw Nation a tract " of country west of the Mississippi river *in fee simple to* " *them and their descendants.*" (7 Stats. 33, Art. 2.)

The United States in 1820 (7 Stats. 211, Art. 2) *ceded* the Choctaws the lands west, but did not convey the fee. In the treaty of 1830, Art. 14 (7 Stats. 335), an Indian who wished to remain in Mississippi was allowed to do so and acquire not a *cession* but "a grant in fee simple." The treaty of 1830 expressly laid down the principle, Art. 18 (7 Stats. 336), that "in the construction of this treaty, " wherever well founded doubt shall arise it shall be con- " strued *most favorably to the Choctaws.*"

The United States did not understand the word *cede* to convey title to the Creek and Seminole land, and by Sec. 8 of Ind. Appro. Act of March 3, **1885,** authorized the President to negotiate with Creeks, Seminoles and Cherokees for the purpose of opening to settlement under the homestead laws the *unassigned* lands in Indian Territory ceded by them, respectively, to the United States, by the several treaties of August 11, 1866, March 21, 1866, and July 19, 1866.

The Choctaws and Chickasaws were omitted because they had no unassigned land available for opening, Greer County being then in dispute, and not because they had *ceded* a greater title to the United States.

The Creeks *ceded* and *conveyed* "to be *sold* to and " used as homes for civilized Indians," and some of this very land was immediately *sold* (not *ceded*) to the Seminoles (Treaty of 1866), and later to the Sac and Fox Indians (15 Stats. 495), Feb. 18, 1867, and to the Pawnees April 10, 1876 (19 Stats. 29), but before the *full* fee was actually acquired by the United States, Congress passed an Act (25 Stats. 757), March 1, 1889, confirming an agreement by the terms of which the Muscogee (or Creek)

Nation "absolutely cedes and grants to the United States, " without reservation or condition, *full and complete title* " *to*" the western lands in question *ceded in* 1866, and the National Council of the Creek (or Muscogee) Nation was required to pass an act confirming and ratifying the grant of title.

The Seminoles *ceded* their lands likewise under the treaty of 1866, but the term "*cede*" was not deemed sufficient to convey full title, and Congress passed an act paying them $1,912,942.02 in full "for all the *right, title, in-* " *terest*, and *claim* which said Indians may have in and to " certain lands *ceded by article three* of the treaty of " 1866."

"This appropriation to become operative upon the execu- " tion by the duly appointed delegates of said Nation, " specially empowered so to do, of a release and convey- " ance to the United States of all the right, title, interest " and claim of said Nation of Indians in and to said lands, " *in manner and form satisfactory to the President of the* " *United States*, and said release and conveyance, when " fully executed and delivered, shall operate to extinguish " all claims of every kind and character of said Seminole " Nation of Indians in and to the tract of country to which " said *release* and *conveyance* shall apply."

The President of the United States caused to be drawn a deed which the Seminoles executed for the purpose of conveying to the United States the full fee, using the following language:

"Do by these presents *give, grant, and convey* to the " United States of America the lands hereinabove men- " tioned and described and do hereby *release, surrender,* " *transfer and set over* to the United States of America " all the right, title, interest and claim of said Seminole " tribe or nation of Indians existing at law, in equity or

" otherwise." * * * " With all rights, privileges and " appurtenances thereunto belonging or in any manner " appertaining," etc.

(Record of treaties, vol. 3, p. 38.)

In the case of the title to the Cherokee lands west of 96th meridian, on which by the Treaty of 1866 the United States acquired the right to settle friendly Indians, Congress on March 3rd, 1893, passed an Act (27 Stats. 640) authorizing the Secretary of the Interior to contract to pay **$8,300,000.00** in addition to $295,736.00 in cash " to pay the Cherokee Nation of Indians for all the *right*, " *title, interest, and claims* which the said Nation of Indians " may have in and to certain lands described and speci- " fied," &c., between 96th and 100th degrees of West Longitude and the acceptance by the Cherokee Nation of any part of the money should operate " as a full and " complete *relinquishment and extinguishment* of all their " title, claim, and interest in and to said land."

The Act of Congress of June 5, 1872 (17 Stats. 228) recites that " by the Treaty of 1866 between the United " States and the Cherokee Nation of Indians, said Nation " *ceded to the United States* all its lands west of the 96th " meridian west longitude, for the settlement of friendly " Indians thereon " (and this construction of this Treaty was maintained by the Executive Department and Cherokee settlement forbidden, see Jas. Bell case *et cet.*)

The Osages were assigned their present country by this act and it was provided therein, " That said Great " and Little Osage tribe of Indians shall permit the set- " tlement within the limits of said tract of land the Kan- " sas Tribe of Indians, the lands so settled and occupied " by said Kansas Indians, not exceeding one hundred " and sixty acres for each member of said tribe," &c. The Cherokees received $1,099,137.41 from the Osage

Funds in payment for these lands and *deeded the land* to the United States by deed of June 14, 1893, in trust for the Osage Indians.

By Act of March 3, 1883 (22 Stats. 624), it was provided that the Cherokee Nation, through its proper authorities, shall execute *conveyances, satisfactory to the Secretary of the Interior,* to the United States *in trust only* for the benefit of the Pawnees, Poncas, Nez Perces, Otoes and Missourias and Osages who were occupying portions of the Cherokee Western lands, the Cherokees having been paid for these *trust* conveyances.

The Cherokees were required to sign these deeds, using the following language:

"Does by these presents *grant, bargain, sell, remise,* " *release, relinquish,* and *confirm,* etc., with *all* and *singu-* " *lar* the *hereditaments* and *appurtenances,*' etc.

This language is used in every one of the five Cherokee deeds to the United States in trust for the Pawnees, Poncas, Nez Perces, Otoes and Missourias and Osages.

When the Seminoles and Creeks agreed on a transfer of title from the Creeks to the Seminoles they were not content with the use of the word *cede,* but, August 7, 1856 (11 Stats. 699), in article 1 the Creek Nation doth "*grant,* " cede and *convey* to the Seminole Indians the tract of coun- " try," &c., and by article 3 of same treaty, "The United " States do hereby solemnly guarantee to the Seminole " Indians the tract of country" conveyed to them "*by* " *the same title and tenure by which they were guaranteed* " *and secured to the Creek Nation by the fourteenth article* " *of the Treaty of March* 24, 1832, *the* 3*rd Article of the* " *treaty of February* 14*th*, 1833, *and by the letters patent* " *issued to the Creek Nation on the* 11*th day of August,* " 1852, *and recorded in Volume four of Records of In-*

"*dian Deeds in the office of Indian Affairs, pages* 446 *and*
"447."

Even in the case of the Choctaws and Chickasaws when they executed a deed to the United States for that portion of the leased district formerly occupied by the Cheyennes and Arapahoes, the President of the United States was not satisfied with the term "cede," but this deed of conveyance (see record of treaties, vol. 3, p. 69 to 80, inclusive), uses the language:

"*Give, grant, bargain, sell, release, convey, surrender,*
"and *set over*" * * * "*all the right, title, interest,* and
"claim of the said Choctaw Nation of Indians *existing at*
"*law,* in *equity,* or *otherwise.*"

To this deed was attached the following:

"The manner and form of this release and conveyance
"are satisfactory to me. May 23, 1893.
"GROVER CLEVELAND,
"*President of the United States.*"

The United States required from the Chickasaw Nation a deed for their interest in this property (see page 80 to 90, vol. 3, record of treaties) in which the following language is used: Chickasaw

"*Give, grant, bargain, sell, release, convey, surrender,*
"*transfer,* and *set over* to the United States of America
"*all the lands* and *all the right, title, interest,* and *claim*
"of the said ~~Choctaw~~ Nation of Indians *existing at law,*
"*in equity,* or otherwise," etc.

And to this deed was attached the following certificate:

"The manner and form of this release and conveyance
"are satisfactory to me. May 23, 1893.
"GROVER CLEVELAND,
"*President of the United States.*"

It will thus be seen that in no case did the United States use the word "cede" in dealing with these Indians or any of them as the equivalent of conveyance of the full title, but that in every instance, where it was intended that the entire fee should be conveyed, the suitable and proper terms were used in every instance to express with precision what was intended.

Congressional Construction.

The Indian Committees of Congress substantially confirmed the view expressed by the Indian Office and submitted by the Secretary of the Interior in the report of September 22, 1890, which states in reference to the propositions or stipulations on which the treaties of 1866 were based as laid down by the Commission of the United States at Ft. Smith, in September, 1865, that "*upon this basis* the "different treaties of 1866 were made with the Cherokees, "Creeks, Seminoles, Choctaws, and Chickasaws, in which "treaties each of the Five Tribes or nations ceded to the "Government a large portion of their common country."

The Indian Committee of the Senate of the United States made a similar finding, and it resulted in the Act appropropriating to the Choctaws and Chickasaws payment for the Cheyenne and Arapahoe reservation. (26 Stats. 1025.) This Act of Congress required formal deeds to be made by the Choctaws and Chickasaws *in manner and form satisfactory to the President.*

In Congress the matter was debated at great length.

For the first time in the history of the country the fact that the Leased District was ceded to the United States in trust was challenged by the President of the United States in a message of February 18, 1892.

The preparation of this message for the signature of

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the President not only did the Choctaws enormous injustice, but grossly misled the President himself. The reasons suggested in the message of the President justifying the postponement of the execution of the laws were first: that the Choctaw Nation had agreed to pay their delegates and attorneys too much money; second, that one of the Choctaw delegates had presented the President an affidavit that the Choctaw Council had been corrupt; third, that the Choctaw Nation had proposed to exclude certain citizens from participation in the proposed distribution of the money appropriated by Congress; fourth, that the Chickasaws had steadfastly refused to admit freedmen to citizenship as they stipulated to do in the treaty of 1866. These four arguments were abundantly answered by the Choctaws and Chickasaws and shown to be based upon misinformation and erroneous suggestions, but certainly these four reasons cannot possibly affect the question as to whether or not the lands of the Leased District were or were not ceded in trust.

The point of importance in the opinion of the President is that he did not think the lands were ceded in trust. His reasons set forth are as follows: First. He thought the treaty contained no express limitation upon the uses to which the United States might put the territory known as the Leased District. That the lands were ceded in terms sufficiently comprehensive to have passed the full title of the Indians. Second. The stipulation to exclude white settlers might have referred solely to the National lands east of 98. The President says that: "If on adequate consideration by treaty "the United States placed upon these lands other Indian "Tribes it was competent to give them patent in full for "a certain agreed reservation. This being so, when the

" policy of allotment is put in force the compensation for " the unused lands should certainly go to the occupying " tribes, which in the case supposed had paid a fair con- " sideration for the whole reservation." The error of the President was that the premises were false. These lands were ceded to the United States and thus set apart " TO " BE PURCHASED " for the use of other Indians on terms to be agreed on by and between such Indians and the Choctaws and Chickasaws, or on such terms as the Government as sovereign over the tribe vendor and the tribe vendee should fix. It is not true that the United States was competent to give patents in fee to any other Indians without paying the Choctaws and Chickasaws for their equitable interest, neither was it true that the occupying tribes had paid a fair consideration for the whole reservation. They had paid nothing in fact to the Trustee of the Choctaws and Chickasaws.

The President says: "It will hardly be contended " that in such case the Government should pay " twice for the lands." The fact is, the Choctaws and Chickasaws are soliciting the Government to pay *once for the lands, and once only.* Whatever the Government owes the Wichitas was not due to the title to the Leased District; whatever the Government owes the Cheyennes and Arapahoes was due to other relinquishments by the Cheyennes and Arapahoes and not to any part of the title to the Leased District; whatever the Government owes the Kiowas, Comanches, the Apaches, was due to other sources than any part of the title to the Leased District, because the Government got no part of the Leased District from any of these Indians, but from the Choctaws and Chickasaws alone.

The President makes a point that the Choctaws and Chickasaws do not claim payment for the lands allotted

to the Cheyennes and Arapahoes. That is exactly what they do claim. Although Congress did not provide for pay for lands actually allotted the Cheyennes and Arapahoes, this was not the fault of the Choctaws, as they were entitled to such compensation. And the fact that they were denied a part of their right, such denial being in itself unjust, constitutes no just argument to deny them their whole right.

These are the only arguments offered by the President except his suggestion made to Congress that a failure to repeal the appropriation to the Choctaws and Chickasaws for the Cheyenne and Arapahoe reservation "would involve very large future appropriations." This question of economy suggested by the President manifestly does not affect the merit of the controversy, and this aspect was properly considered in Congress by the House of Representatives and by the Senate of the United States upon the full record and all the facts. (Senate Report 552, 52d Cong., first session.) The Senate passed the following resolution:

"*Resolved*, That for reasons set forth in the Report of "the Committee on Indian Affairs upon the President's "message of February 18, 1892, upon the appropriation "of March 3, 1891, for payment to the Choctaw and "Chickasaw Nations for their interest in the Cheyenne "and Arapahoe reservations in the Indian Territory sub-"mitted with this resolution it is the opinion of the "Senate that *there is no sufficient reason for interfering* "*in the due execution of the law referred to.*"

On June 17, 1892, the Committee on Indian Affairs of the House of Representatives submitted a full report on the same subject and recommended the adoption of the following resolution of the House of Representatives:

"*Resolved*, That for reasons set forth in the Report of " the Committee on Indian Affairs upon the President's " message of February 17, 1892, upon the appropriation " of March 3, 1891, for payment of the Choctaw and " Chickasaw Nations for their interest in the Cheyenne " and Arapahoe reservations submitted with this resolu- " tion, it is the opinion of the House of Representatives " that *there is no sufficient reason for interference in the* " *due execution of the law referred to.*" (H. R. Rep. 1861, 52d Cong., 1st Sess.)

The reasons set forth in the Reports of the Committees of Indian Affairs of the House of Representatives and of the United States Senate, which were thus endorsed by Congress in both branches, are substantially those set forth in this argument—that is, that the Leased District was held by the United States in trust only, and that the Choctaws and Chickasaws owned the equitable title to such estate.

This resolution having duly passed both the Senate and the House of Representatives, Congress declined to interfere further than to correct a palpable error in the estimate on which the appropriation of March 3, 1891, was based, to wit, 244 Cheyenne allotments from a record previous by the Cheyenne Indian Agent were deducted at 160 acres each at $1.25 an acre, amounting to $200 each, equalling a total of $48,800. This amount, by a joint resolution of Congress, was deducted from the appropriation of March 3, 1891. It will therefore be seen that the appropriatian made to the Choctaws and Chickasaws on account of the Leased District after the fullest debate in the House of Representatives, after the fullest debate in the Senate of the United States in the Fifty-first Congress and in the Fifty-second Congress (and on the second vote of the United States Senate there were only thirteen negative votes), the right of the Choctaws and

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Chickasaws to compensation for their equitable interest in the lands of the Leased District has been construed in the most forcible manner by the highest legislative authority of the Government of the United States.

Historical Conditions.

Any other construction of the third article of the treaty of 1866 is contradicted by the historical conditions.

The question arises: For what purpose did the United States need to acquire the lands of the Leased District? Did the Government require this western land for the settlement of her own citizens under the homestead laws?

It is well known as an historical fact that the Government had untold millions of acres available for the frontier settlers at this time. The Western States were sparsely settled. The Government did not need this land for such purpose, nor did the United States pass any act authorizing it to be used for any such purpose, but Congress kept it under the supervision and within the control of the statutes governing Indian country. The settlers had all the Western States, but the Indians seemed to require a district free from white intrusion.

Did the Government need this land for the settlement of other Indians at this time? And if so, why? The Government did need this land at this time for the settlement of the Kiowas, Comanches and Apaches, the Wichitas and Affiliated Bands, and immediately thereafter put these Indians on this land; the Wichitas by Executive order, and the Kiowas, Comanches and Apaches by a treaty which uses the very language which had been presented to the Choctaws and Chickasaws in the seventh proposition of the Council at Ft. Smith, in September of '65.

Consent of the Commissioner of Indian Affairs

By the Kiowa-Comanche treaty this very identical land was "*set apart*" for the "*use*" of these Indians, with a stipulation that *white persons should not be allowed to intrude thereon.* What stronger evidence could the Government have given that this land was set apart for the use of other Indians than to immediately devote the land itself for this identical purpose? Actions speak louder than words, and in this instance both the actions of the Government and the words of the Government unite to strongly support the position taken by the Choctaws and Chickasaws, that they ceded this land to the Government to be set apart for the use of such Indians as the Government might desire to colonize thereon.

No Confiscation Intended.

The construction that the United States acquired the full title to the Leased District by the Third Article of the Treaty of 1866 is impossible for the following reasons: That it would have amounted to confiscation; every dollar of the consideration, three hundred thousand, named in the Third Article of the Treaty of 1866 by its terms would have gone to the freedmen if the United States had removed the freedmen as agreed by this Article; in other words, in this contingency not one dollar of the consideration would have been received by the Choctaws and Chickasaws, there being exceeding three thousand freedmen at that time; in other words, the United States would have acquired the absolute title to 7,713,000 acres of land without the payment of a dollar. This would have been confiscation.

It has been suggested that perhaps the United States intended to punish these Indians for being in rebellion and to confiscate their property west of the 98th meridian.

Such a theory is contradicted by the express declarations of the Commissioners in dealing with these Indians. It is true that on the 5th of July, 1862 (12 Stats. 528), Congress inserted a provision in the Indian Appropriation Act, "that in cases where the tribal organizations of any "Indian tribe shall be in actual hostilities to the United "States the President is hereby *authorized* by proclama- "tion to declare all treaties with tribes to be abrogated "with such tribes IF, in his opinion, the same can be done "consistently with good faith and legal and national obli- "gation," but it is also true that the President did not by proclamation or otherwise abrogate the treaties with the Choctaws and Chickasaws nor with any of the Five Civilized Tribes.

The record of this entire transaction demonstrates that there was no intention on the part of the Commissioners negotiating this treaty to confiscate the property. In the formal address of the United States Commission at Fort Smith made by the President of the Commission, after the blessing of the Great Spirit over their deliberations had been devoutly invoked, he uses the following language:

"Brothers, it is proper that thanks should be returned "to the Great Spirit, the Creator of us all, that our lives "have been preserved to meet each other upon this occa- "sion. . . . Your Great Father, the President . . . has "sent the Commissioners now before you to hear and "consider any matter which you may desire to lay before "us, and to make treaties of peace and amity with all his "red children who may desire his favor and protec- "tion. . . .

"Under the terms of the treaty with the United States "and the law of Congress of July 5, 1862, all these "Nations and Tribes forfeited and lost all their rights "and annuities and lands; the President, however, *does* "*not desire to take advantage of or to enforce the penal-*

" *ties for the unwise action of these Nations* (Rep. 1865,
" 298). The President is *anxious to renew the relations*
" *which existed at the breaking out of the rebellion. . . .*"

Answering the Cherokees (p. 299), President Cooley read the following: " The Commission in response to the state-
" ment yesterday in behalf of the Cherokees says: The
" Cherokee Nation are at fault in interpreting what was
" said by us on Saturday as to 'forfeiture of land,' &c.,
" as a *fact accomplished*, but the Commissioners said 'all
" 'such as have made treaties,' &c., have 'rightfully for-
" 'feited,' &c., 'under the laws of Congress 1862, *which*
" '*authorized the complete forfeiture*, BUT the *President does*
" '*not desire to enforce the penalties* for the unwise action
" 'of these nations.' . . .

"And we assure you in behalf of the President, that if
" you desire to treat with the United States and *wipe out*
" *the stigma* and disability which bad men have fastened
" upon you, *the forfeitures and penalties provided by the*
" *act of Congress of July*, 1862, *will not be applied to or*
" *made operative against those who have not voluntarily*
" *aided the enemies of the Government even if found neces-*
" *sary in other cases;*" and in the articles of agreement, drawn up on the 10th of September, 1865, of the treaty of peace and amity which was required to be signed by all of the Indians, the treaty recites that whereas by entering into

" Treaty negotiations with said so-called Confederate
" States, whereby they have made themselves liable to a
" forfeiture of all rights of every kind, character, and de-
" scription, . . . and whereas it is the desire of the
" Government *to act with magnanimity* with all parties
" deserving clemency and to re-establish order and legiti-
" mate authority among the Indian tribes after providing
" that the tribes subscribing to the agreement acknowledge

"themselves under the protection of the United States,
"repudiating all other treaties and *recognizing their trea-*
"*ties with the Government in full force*,"

the treaty provides:

"In consideration of the foregoing stipulations made by
"the members of the respective nations and tribes of In-
"dians present, the United States, through its Commis-
"sioners, promises that it will re-establish peace and
"friendship with all the nations and tribes of Indians
"within the limits of the so-called Indian country; that
"it will afford ample protection *for the security of the*
"*persons and property of the respective nations or tribes.*"

The Choctaw and Chickasaw Commissioners (p. 310) replied that they were ready to sign the agreement and

"We recognize the Government of the United States
"as having maintained its supremacy and as offering to
"resume by treaty its *former relations with us as Nations.*
"We are ready and willing to resume such relations and
"sign the treaty of peace and amity in all sincerity, claim-
"ing no rights but those properly belonging to us."
R. M. Jones, President of the Choctaw Commission.
J. H. Kingsbury, Assistant Secretary.
David Berney, President *pro tem* Chickasaw Commission.
G. D. Jones, Secretary.

The treaty itself with the Choctaws and Chickasaws (14 Stats. 769) pledges the peace and friendship of the United States, and in—

Article 10 "reaffirms all obligations arising out of treaty
"stipulations or acts of legislation with regard to the
"Choctaw and Chickasaw Nations entered into prior to
"the late rebellion and in force at that time not incon-
"sistent herewith," and in—

Article 45 "all the rights, privileges, and immunities

" heretofore possessed by said nations or individuals " thereof or to which they were entitled under the " treaties and legislation heretofore made and had in " connection with them shall be and are hereby declared " to be in full force so far as they are consistent with the " provisions of this treaty." There is nothing in the treaty of 1866 inconsistent with the idea that the leased district was ceded to the United States in trust " to be " purchased " for the settlement of friendly Indians and that such land was to be held by the United States for Indian purposes only. Such land, therefore, is subject to the previous declarations of treaty which declared that no part of the land conveyed to the Choctaws and Chickasaws should be embraced within the limits of a State or Territory and that such lands should be free from white settlement. It was not the policy of the United States to pass acts of confiscation against her Indian wards who had been coerced into making treaties with the Confederacy. The plea of these Indians to excuse their fault was that the United States having agreed to protect them from domestic strife and against intestine war withdrew its military posts from Fort Smith, Fort Gibson, Fort Arbuckle, Fort Washita, the Indians were threatened with invasion from Texas, received hostile communications from the authorities of Arkansas, were subject to the danger of immediate annihilation and were compelled under the duress of military force to enter into an alliance with the Confederate States; that it was not optional with them; that they were not permitted to be neutral and that their act should be treated with clemency because of these facts. This view was understood by the United States, and not only were the Indians not subjected to confiscation laws but even the white people who had made war on the Government and coerced these Indians were not subjected to confiscation laws.

The Indians themselves were not permitted to enforce confiscation laws against their own people (14 Stats. 799). Article 3 of the Cherokee treaty reads as follows, showing the policy of the Government at this time: "The "confiscation laws of the Cherokee Nation shall be re- "pealed and the same, and all sales of farms and im- "provements on real estate made or pretended to be "made in pursuance thereof, are hereby agreed and de- "clared to be null and void, and the former owner of "such property so sold, their heirs or assigns, shall have "the right peaceably to reoccupy their homes, and the "purchaser under the confiscation laws, or his heirs or "assigns, shall be repaid by the treasurer of the Cherokee "Nation from the national funds, the money paid for "said property and the cost of permanent improvements "on such real estate, made thereon since the confiscation "sale."

The amount of the land in the leased district outside of Greer county was slightly in excess of 6,000,000 acres. The Choctaws and Chickasaws having been paid $[illegible]00,000.00 in 1855, on such leased district the further allowance of $300,000.00 in 1866, they adopting their freedmen as the Creeks and Seminoles did, would have made about 12 cents an acre for this land, which was *about the same as the Seminoles received* for their land, so that the Choctaws and Chickasaws were treated in about the same way that the Seminoles were in regard to this western land, and nothing appears to show any prejudice against the Choctaws and Chickasaws in this negotiation.

The lands of the Leased District could not have been transferred by the Third Article of the Treaty of 1866 as a matter of barter and sale, for the reason that the United States occupied the position of Guardian to its Ward, and could not buy an estate worth 7,713,000.00

dollars for the sum of 300,000 dollars which the ward was not to receive except under remote contingencies, because such a transaction would have been a colossal wrong and, although not intended, would have operated as a stupendous fraud on the ward in favor of the guardian.

"The Indian Nations may perhaps be more correctly "denominated domestic dependent Nations; their relation "to the United States resembles that of a ward to a "guardian."

Cherokee Nation *v.* Ga., 5 Peters, 1.
Worcester *v.* Ga., 6 Peters, 590.
Elk *v.* Wilkins, 112 U. S.
The U. S. *v.* Kagama, 118 U. S. 382.

COMPARISON WITH SEMINOLE CASE.

The third article of the treaty of 1866 proposes to give $300,000.00 to the Choctaws and Chickasaws for the cession of the Leased District, but provides that all of the $300,000.00 was to go to the freedmen in case they were removed. This article may be considered in the light of stipulations or propositions 5, 6, and 7. Proposition 3 stipulates for the incorporation into the Tribes of the freedmen on an equal footing with the original members, or "suitably provided for." "A suitable provision" was set up in the third article in the matter of forty acres apiece. This would have given each family of four persons 160 acres, the ordinary homestead provision for a frontier settler. In case the Choctaws failed to make this provision, then each freedman was to have $100.00 apiece when the Government removed such freedman. This would have given $400.00 in money to each family of four persons, and would have enabled them to buy land elsewhere. So that the $300,000.00 which would have

been required to be paid out in case the freedmen removed should not be considered the less a partial payment on the Leased District, except in so far as it was made compulsory on the Choctaws and Chickasaws, who, it will be remembered, were not permitted to amend or modify the treaty submitted to them September 21, 1865 (see page 311), and which shows that they should not be held entirely responsible for any draft of the treaty made by the Government officers.

Considering, for argument's sake, that the Government had a right to compel the Choctaws to give the sum of $300,000.00 to their freedmen, still this $300,000.00, together with the $[illegible]00,000.00 paid in 1855 for the Leased District as above explained, would only make a total of $[illegible]00,000,00 for the lands of the Leased District. These lands, outside of Greer county, amounted to a fraction over 6,000,000 acres, and the joint payments would have been 12 cents an acre. Attention is called to this especially for the reason that this is the same allowance which was provided for the Seminoles for their Western lands. It is not pretended by the Government that the 15 cents an acre which the Seminoles received for the cession of their lands to the United States by the treaty of '66, a cession in terms absolute on its face, although "done" in compliance with the desire of the United States to locate other Indians and freedmen thereon, was in full settlement and payment of the title or that the Government by such payment acquired the fee.

If, then, the Guardian did not acquire from the Seminoles the full title to the land when the Seminoles were paid 15 cents an acre and when the Seminoles used the words "*cede*" *and* "*convey*," how can the Guardian, or any one on behalf of the Guardian, insist that the same amount of 12 cents an acre paid to the Choctaws for their

Western lands should give the Government a good title when the Choctaw treaty only used the word "*cede*" and did not use the term "*convey*"? No one can be heard to say that the Guardian armed with sovereign power and addressing the ward as his child, speaking of the Government as the Great Father, will allow the Great Father to acquire this huge estate for the pitiful sum of 15 cents an acre. Such a transaction in the name of the Government of the United States would put upon the Government the dishonor of defrauding and wrongfully depriving its weak and defenceless child of its inheritance. Although it is possible that in some instances officials of the Government may have attempted sharp practices upon the ignorance of the Indians under the safety of great power and under the protection of the shrewd use of language not well understood by the Indians, it is not true that the Government of the United States has ever been willing either to defraud an Indian or to let an Indian be defrauded in behalf of the Government. And in no instance have the courts of the United States erected by that Government ever failed to do exact and painstaking justice by the Indian people. The theory that the Government is capable of depriving the Choctaws and Chickasaws of their estate without giving them an adequate compensation therefor is absolutely and entirely untenable and cannot be entertained.

What is the Measure of the Trust.

If, then, it be established that the Leased District is held by the United States in trust for certain purposes, it remains to determine with precision what these purposes were. They were ceded in trust and "set apart to "be purchased for the use of such Indians from Kansas

" or elsewhere as the Government might desire to col-
" onize therein on such terms as may be agreed upon by
" the parties and approved by Government or such as
" may be fixed by the Government."

Stipulation 5 set forth in Commissioner Cooley's Report, p. 299, as President of the Southern Treaty Commission, states that "A portion of the lands owned and " occupied by you *must be set apart* for the friendly " *tribes in Kansas and elsewhere* **on such terms** as may be " *agreed upon by the parties* and *approved by the Govern-* " *ment*, or *such as may be fixed by the Government*." The Commissioner says that copies of this proposition were prepared and furnished to each agent, with instructions that they be fully interpreted and explained to the Indians. The explanation of the meaning of this proposition is vitally important. The official report of the proceedings of the Council at Fort Smith (p. 19) uses the same language as to the Fifth Stipulation, and says: "The " President then stated that the agents will be supplied " with printed copies of the address and are requested to " go with an interpreter to their respective tribes for the " purpose of fully explaining what is said therein." The manner in which Stipulation 5 *was understood by the Indians* is made clear by *the express understanding* of *Hon. D. N. Cooley himself*, in his report to the Hon. James Harland, Secretary of the Interior, October 31, 1865, *which was submitted to Congress* for its *information*. He uses the language (p. 34) as to the Fifth Proposition, as follows:

" 5. A part of the Indian Country *to be set apart* TO BE " PURCHASED for *the use* of such Indians from Kansas or " elsewhere as the Government may desire to colonize " therein."

The Cherokee treaty made in pursuance of this understanding of the 5th proposition sets forth an elaborate scheme by which the Government was authorized "**To purchase** *for the use of other Indians*" Cherokee lands west of 96, and by which other Indians could buy lands east of 96 "*on such terms as may be agreed upon* by any such tribe and the Cherokees, subject to the approval of the President of the United States (14 Stats. 803, Article 15), and in regard to the lands west of 96, the United States were to settle friendly Indians under certain conditions: "Said lands thus disposed of **to be paid for** to "the Cherokee Nation *at such price as may be agreed on* "*between the said parties in interest*, subject to the ap- "proval of the President, and if they should not agree, "*then the price to be fixed by the President*," and

The Creek treaty (14 Stats. 786, Article 3) states that—

"In compliance with the desire of the United States "to locate other Indians and freedmen thereon, the "Creeks hereby cede and convey to the United States "**to be sold to** and used as homes for such other civil- "ized Indians as the United States may choose to settle "thereon, to wit, half of their entire domain." Before this they were paid 30 cents an acre, and afterwards, in 1889, the balance, making $1.25 an acre.

The Seminole treaty (14 Stats. 757, Article 3) recites:

"In compliance with the desire of the United States "to locate other Indians and freedmen thereon, the Semi- "noles cede and convey to the United States their entire "domain, being the tract of land ceded to the Seminole "Indians by the Creek Nation," &c., at 15 cents an acre, the balance up to $1.25 having been paid them in 1889 as above set forth. In the same article the United States conveys to the Seminoles out of the land granted by the Creeks 200,000 acres, for which the Seminoles **paid** 50

cents an acre, in pursuance of the plan by which the lands set apart for the use of other Indians was **to be sold** for a price paid and which was thus paid by the Seminoles.

The Choctaw-Chickasaw treaty (14 Stats. 769, Art. 3) recites:

"The Choctaws and Chickasaws, in consideration of "the sum of $300,000.00, hereby cede to the United "States the territory west of the 98th degree west longi- "tude known as the Leased District," &c.

These people were all in Washington at the same time, in daily intercourse with each other, understood perfectly well the purpose of the treaties of 1866, had no doubts whatever as to meaning of the Government and of themselves, and it is not at all strange that having a thorough understanding of the meaning of the treaties, the Choctaws were not suspicious and let the third article read as it does, simply ceding the land, not entertaining the idea that the Government would be capable of putting a totally different construction upon the treaty to that which the Commissioners of the United States had explained to them so fully, and about which there was no misunderstanding whatever. Not only do these treaties with the Five Civilized Tribes exhibit the purpose of the Government at this time, but a number of the other Indian treaties exhibit the same; for example: The Delaware treaty (14 Stats. 794, Art. 4) recites:

"The United States agrees **to sell** to the said Del- "aware Indians a tract of land ceded to the Government "**by the Choctaws and Chickasaws** the Creeks or the "Seminoles, or which may be ceded by the Cherokees in "the Indian country to be selected by the Delawares, "&c.," and the Delawares did in fact **buy** 157,600 acres from the Cherokees east of 96 for $157,600.00. The

Leased District land **alone** was ceded the United States by the Choctaws and Chickasaws, and in 1867 we find the United States proposing to *sell*, thus showing it was set apart "*to be purchased.*"

October 14, 1865, the United States agreed with the Cheyennes and Arapahoes (Stats. 14, 704, Art. 2) that certain lands on the Cherokee and Creek lands should be "*set apart for the absolute and undisturbed use* and occupation of the tribes who are parties to this treaty and of such other friendly tribes as they may from time to time agree to admit among them, and that *no white person except officers, &c., . . . shall go upon* or settle within the country embraced within said lands. . . . Provided, however, that said Indians shall not be required to settle upon such reservation until such time as the United States **shall have extinguished** all claims of title thereto *on the part of other Indians* [Cherokees or Creeks], so that the Indians parties hereto may live thereon at peace with all other tribes."

The Kiowas and Comanches by the treaty of October 21, 1867 (15 Stats. 582, art. 2), were given the right to locate on their present reservation, which was

"*Set apart for the absolute and undisturbed use* and occupation of the tribes herein named and for such other friendly tribes or individual Indians as from time to time they may be willing (with the consent of the United States) to admit among them, and the United States now solemnly agrees that *no person except those herein authorized so to do and* except such officers, agents, and employes of the Government as might be authorized to enter upon Indian reservations in discharge of duty enjoined by law, shall ever be permitted to pass over, *settle upon*, or *reside in the territory described in this article* or in such territory as may be added to this reservation for the use of said Indians."

It will be observed how closely this language follows the stipulations of the Commissioners in the Council at Fort Smith. The Kiowas, Comanches, and Apaches did not pay for their privilege *in money*, so that the Government received nothing in the form of money for this right of use and occupancy of that portion of the lands of the Leased District. **The considerations received by the United States** in exchange for this cession of land to the Kiowas, Comanches, and Apaches were as follows:

First. Article I. "War between the parties to this "agreement shall forever cease."

Article II. The Kiowas and Comanches "relinquish all "right to occupy permanently the territory outside of their "reservation as herein defined" [a huge country].

Third. "They will withdraw all opposition to the con- "struction of the railroad now being constructed on the "Smoky Hill river."

"They will permit the peaceable construction of any "railroad not passing over their reservation as herein de- "fined."

"They will not attack any persons at home, nor travel- "ling, nor molest nor disturb any wagon-trains, coaches, "mules, or cattle belonging to the people of the United "States or to persons friendly therewith."

"They will never capture or carry off from the settle- "ments white women or children."

"They will never kill nor scalp white men nor attempt "to do them harm."

"They withdraw all pretense of opposition to the con- "struction of the railroad now being built along the Platte "river and westward to the Pacific Ocean."

"They will not in the future object to the construction "of railroads, wagon roads, mail stations, or other works "of utility or necessity, which may be ordered or per- "mitted by the laws of the United States."

"They agree to withdraw all opposition to the military "posts now established in the western territories," etc., etc.

These assets which were received by the United States were not available as a fund with which to liquidate the indebtedness of the Government to the Choctaws and Chickasaws for their equitable title to this territory. Nevertheless *it saved the Treasury of the United States a very large sum of money* which would have been otherwise necessary in dealing with these wild Indians who were on the war-path.

On a similar basis the Apache Indians (15 Stats. 590, Art. 1) confederated with the Kiowa and Comanche Indians and relinquished their personal rights to lands and became a part of the Kiowa and Comanche Indians.

With the Cheyenne and Arapahoe Indians on October 28, 1867, (15 Stats. 594, Art. 2) land

"Is hereby *set apart for the absolute and undisturbed* "*use* and occupation of the Indians herein named, and "for such other friendly tribes or individual Indians as "from time to time they may be willing, with the consent "of the United States, to admit among them; and the "United States now solemnly agrees that *no persons*, ex- "cept those herein authorized so to do, and except such "officers, agents, and employés of the Government as "may be authorized to enter upon Indian reservations in "discharge of duties enjoined by law, shall ever be per- "mitted *to pass over, settle upon, or reside in the territory* "*described* in this article, or in such territory as may be "added to this reservation for the use of said Indians."

These Indians practically engaged to do the same identical things which were above recited in the Kiowa-Comanche treaty. They will *relinquish their old territory, allow railroads to be built, quit scalping white men* and *carrying off white women*, and *allow military posts* and *mail routes to be established.*

The Government thus used this western estate in the

Indian Territory to *buy peace*. It would have cost a **great sum in money** if the United States had been compelled to buy with money or to have used money in the continued maintenance of an army to deal with these warlike tribes. The Government **received considerations** of great value to the Government, but of no value to the Choctaws and Chickasaws. The Government received considerations for the estate which were not available to the Choctaws and Chickasaws as purchase money, and consequently no offer was made by the Government of these very "incor-" poreal" assets.

The Pottawatomie Indians (15 Stats. 532, Art. 2) by treaty of February 27, 1867, are given the right of a reservation in Indian Territory, and the treaty recites: "In "case the new reservation shall be selected upon the "lands purchased by the Government from the Creeks, "Seminoles, or **Choctaws, the price to be paid** *for the* "*reservation shall not exceed the cost of the same* to the Gov-" ernment of the United States, and **the sum to be paid** "**by** *the tribe* for the said reservation shall be taken from "the amount provided to be paid by the Leavenworth, "Pawnee and Western Railroad Company for the lands "sold to them," &c.

Article 3 recites that "after such reservation shall have "been selected and set apart for the Pottawatomies it shall "never be included within the jurisdiction of any State "or Territory unless an *Indian Territory* shall be organ-" ized as provided for in certain treaties made in *1866* "**with the Choctaws** and other tribes occupying the "Indian country.

This Pottawatomie treaty of February 27 1867, is thus not only an executive construction of the highest character, made immediately subsequent to the Choctaw-Chickasaw treaty proclaimed July 10, 1866 (only seven months

apart), but is a construction by the Senate of the United States and by the Congresses that made the appropriations thereunder that

" the lands purchased by the Government from the * * * " Choctaws " might be selected at a " price to be paid," etc., and that the Leased District was set apart " to be " purchased."

The Leased District was the only land that by any possibility could be described as lands purchased of the Choctaws, and as the Pottawatomies were required to pay a certain price for such lands the report of the Commissioner of Indian Affairs that these lands were set apart " to be purchased " for the use of Indians is forcibly verified by the Pottawatomie treaty of February, 1867, as well as by the Delaware Treaty above quoted.

The Choctaws and Chickasaws (14 Stats. 777, Art. 30) agree that they

" Will receive into their respective districts east of the " 98th degree of west longitude, in the proportion of one- " fourth in the Chickasaw and three-fourths in the Choc- " taw Nation, civilized Indians from the tribes known by " the general name of the Kansas Indians, being Indians " to the north of the Indian Territory, not exceeding ten " thousand in number, who shall have in the Choctaw and " Chickasaw nations, respectively, the same rights as the " Choctaws and Chickasaws, of whom they shall be fellow- " citizens, governed by the same laws, and enjoying the " same privileges, with the exception of the right to par- " ticipate in the Choctaw and Chickasaw annuities and " other moneys, and in the public domain should the same " or the proceeds thereof be divided per capita among said " Choctaws and Chickasaws, and among others the right " to select land as herein provided for Choctaws and Chick- " asaws, after the expiration of the ninety days during " which the selections of land are to be made, as aforesaid, " by said Choctaws and Chickasaws," etc.

And Article 37 provides, "In consideration of the right "of selection hereinbefore accorded to certain Indians "other than the Choctaws and Chickasaws, the United "States **agrees to pay** *to the Choctaw and Chickasaw Na-* "*tions out of funds of Indians removing* into said nations "respectively, under the provisions of this treaty, such "sum as may be fixed by the legislatures of such nations "not exceeding **one dollar per acre** . . . with the under- "standing that at the expiration of twelve months the "actual number of said immigrating Indians shall be "ascertained, and **the amount paid** that may be actually "due at the rate aforesaid; and should still further im- "migrations take place from among said Kansas Indians, "*still further payments* shall be made accordingly from "time to time," and none of these Indian Tribes were expected to give up any land except at a reasonable price.

The Fifth Proposition as construed by Commissioner of Indian Affairs Cooley, in his report to the Secretary of the Interior, shows that the land was to be set apart for friendly tribes upon such terms **of purchase** as might be agreed upon by the parties vendor and vendee and approved by the Government, or, in case the parties vendor and vendee could not agree, then upon such terms as might be fixed by the Government. This western land was to be set apart **to be purchased** for the use of such tribes of Indians from Kansas or elsewhere as the Government might desire to colonize therein. The Government did desire to colonize therein a number of different tribes: the Osages; the Kaws; the Otoes and Missourias; the Poncas and Tonkewas; the Nez Perces and Pottawatomies; the Sac and Fox; the Iowas; the Kickapoos; the Pawnees; the Cheyennes and the Arapahoes; the Kiowas, Comanches, and Apaches; the Delawares and Shawnees; and the question is, in setting this land

apart *to be purchased*, was it intended *to be purchased* in fact in good faith at a fair and just value? The land was not set apart for the use of friendly Indians only; it was set apart **to be purchased** of the Five Tribes for the use of friendly Indians.

The Delawares, the Shawnees, the Osages, the Pawnees, the Otoes, the Missourias, the Poncas, &c., bought lands from the Cherokees, and the Cherokees were paid therefor at varying prices and their remaining equitable rights were finally bought outright as above set forth, so that it was a question *of purchase and sale for fair consideration with the Cherokees.*

The same thing is true with regard to the *Creeks*, whose land was set apart to the Sac and Foxes, Pawnees, Iowas, and Kickapoos. They were paid a considerable sum in 1866 and the remainder of *a fair purchase price* was paid them in 1889.

In case of the Seminoles they were paid a part of the price in 1866, the Pottawatomies and absentee Shawnees and Cheyennes and Arapahoes were located upon their lands and the Seminoles were paid the balance *of a fair price in* 1889, and the question now to be determined is as to the Choctaws and Chickasaws, who were paid substantially the same amount per acre that the Seminoles received in 1866, except that the Choctaws received ten cents an acre in 1855, five cents an acre in 1866, making a total of fifteen cents at that time, if they are not in like manner entitled equally to a fair price for their land.

Attention is called to the language of the treaties with the various Indians who were located upon this western country, for the reason that it exemplifies the policy which the Government of the United States had and which it did actually apply to all of the lands of the Indian Territory in-

differently, without making any exception whatever in the case of the Choctaw-Chickasaw lands west.

COMMISSIONER COOLEY.

Commissioner Cooley states (on page 35, Report 1865) that all the delegates had signed treaties on the breaking up of the Commission, including the Choctaws and Chickasaws; that—

"With the Choctaws and the Chickasaws a treaty was "agreed upon *upon the basis of the seven propositions* [**not "stipulations**] *heretofore stated* and in addition to which "those tribes agreed to a thorough and friendly union be- "tween their own people and forgetfulness of past difficul- "ties; to the opening of the leased lands to the settlement "*of any tribes* whom the Government of the United States "may desire to place thereon, and the cession of one-third "of their remaining area **for the same purpose;** the "United States *to restore this tribe to their rights,* forfeited "by the rebellion. This treaty, after its approval by the "Choctaws and Chickasaws, is to be signed in this city by "three delegates from each nation, sent here for that pur- "pose."

It will be seen from this language that the Commissioner understood that the opening of the leased lands to the the settlement of any tribes whom the Government of United States may desire to place thereon is strictly in accord with Article Five of the treaty drawn up at Fort Smith, as follows, to wit:

"ARTICLE FIVE. The Choctaw and Chickasaw tribes "agree to a modification of the 9th article of the treaty "concluded at the city of Washington the 22nd day of "June, A. D. 1855, by which they agree that all that por- "tion of their common territory west of the 98th degree "west longitude, leased by us to the United States, may

" be used for the permanent settlement of the Wichitas " and such other tribes or bands of Indians as the Gov- " ernment may desire to locate thereon, without exception " or restriction *as to the character of the tribes.*"

Attention is particularly called to the statement of Commissioner Cooley above quoted, in which he says that the Choctaws and Chickasaws agree to a treaty upon the basis of the *seven propositions heretofore stated* and "to " the opening of the leased lands to the settlement of any " tribes," &c., and "the cession of one-third of their re- " maining area *for the* SAME PURPOSE."

The purpose of the cession of one-third of their remaining area is absolutely clear. It is the cession of land for 10,000 possible immigrant Indians of 160 acres each at $1.00 an acre. It is a proposed sale of land at $1.00 an acre. If this cession is for *the same purpose* which the Commissioner understood obtained in "the " opening of the Leased Lands," then the Commissioner did understand that the cession of the Leased Lands was intended to enable immigrant Indians **to purchase homes** or to enable the Government to purchase homes for such immigrant Indians, they being indigent, as has been otherwise abundantly shown. The Commissioner says an agreement was made **with the Choctaws and Chickasaws** on the basis of the seven **propositions heretofore stated.** The fifth proposition, expressly referred to, reads, " **to be set apart to be purchased**," so no doubt can possibly exist that the Commissioner of Indian Affairs fully understood the **Leased District** was " **to be set apart to be purchased** " **for the use of other Indians.**

It having been represented to the Choctaws and Chickasaws by the agents of the Government that in common with the other members of the Five Civilized Tribes their western lands were to be set apart *to be purchased* for the

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use of other Indians upon such terms as should be agreed on, to be held for the use of such Indians, and the Government of the United States having located the Wichitas upon such lands and the Kiowas, Comanches, and Apaches upon such lands, it is the duty of the United States to provide for the Choctaws and Chickasaws **a fair purchase price** not only for the lands now rented to cattlemen by the Wichitas, the Kiowas, Comanches and Apaches, but also for the lands which will be occupied by the Wichitas, Kiowas, Comanches, and Apaches for allotments. The Choctaws and Chickasaws can raise no reasonable objection to the setting apart of one hundred and sixty acres to each Wichita and to each member of the Affiliated Tribes, but when such land is set apart for the individual use of these Indians, it should be remembered that it is set apart "*to be purchased*" for the use of these Indians upon such terms as may be agreed upon by the Choctaws and Chickasaws and Wichitas, or in the event that they fail to agree, upon such terms as may be fixed by the United States. If the Wichitas and Affiliated Tribes have no means with which to pay the Choctaws and the Chickasaws, and the United States proposed to place upon these lands impecunious purchasers, then the United States, assuming this right, becomes obliged as sovereign and guardian of the impecunious Wichitas to provide a full fair value to the Choctaws and Chickasaws of the land set apart to be purchased for the Wichitas. It cannot be maintained that having set this land apart to be purchased by the Wichitas, it shall in fact be set apart *to be given* to the Wichitas. The language that it is set apart to be purchased for the Wichitas means that it shall be purchased by the payment of **a fair purchase price** and nothing less than this; *no other conscientious construction can be given to this*

language. The Choctaws and Chickasaws have been required by the treaty of '66 to set apart this land for the use of friendly Indians. The conditions under which they have agreed to do so are fully set forth by the Commissioner of Indian Affairs in the citations above made from his language. He has explained very fully that these people were all dealt with on the same basis; no distinction anywhere appeared by which it was intended to treat one tribe better or worse than another tribe, but these treaties were all made upon *the same basis.* The seven propositions or stipulations were printed and given to each and every one of the tribes, including the Five Tribes and the others; it was explained to them, and the Commissioner himself explained what he understood by it, and that the land was to be set apart *to be purchased* for the use of other Indians. The terms of the purchase *to be agreed on* between the interested parties, or, in the event of their failure to agree, the President of the United States was to fix the price. The language is that the land is to be set apart

"to *be purchased* on such terms *as may be agreed upon*
"by the parties and approved by Government or such *as*
"*may be fixed by the Government.*"

It is shown by the Cherokee treaty, Articles 15, 16, that the method by which the Government would act was that the President should act and fix the price where the vendor and vendee failed to agree. In the case of the Choctaws and Chickasaws, the Wichitas being abjectly poor, and the Kiowas, Comanches and Apaches being on the war-path and being without funds and giving up to the United States a vast domain to which it was conceded they had occupant rights, a manifest reason is apparent why the officers of the Government did not bring the Kiowas,

Comanches, Apaches, and Wichitas into conference with the Choctaws and Chickasaws for the purpose of arranging the terms of purchase, when, if such terms were agreed upon, the purchase price could only be paid by applying to the Government to furnish the purchase price. The question of purchase price has been allowed to remain in abeyance all these years waiting the convenience of the Government.

The Kiowas, Comanches, and Apaches sold their right to a vast domain to which they were recognized as having the Indian occupant's title. They engaged to do things of great value to the United States and they were paid with Choctaw lands. The Choctaws are entitled to the full value of this property, whatever that value be, and when they are kept out of a settlement for the property, whatever increment of value has attached to the property in equity and in good conscience belongs to the Choctaws and Chickasaws.

Whatever obligations exist between the Kiowas, Comanches, Apaches, and the Wichitas and the United States should be determined by the relations existing between these Indians and the United States.

The United States cannot receive the title as trustee of the Choctaws *to be sold* to certain Indians and then convey such title to such Indians in any other capacity than trustee. The United States is responsible as trustee and must make a fair and equitable settlement. The Government had no rights in such property except as trustee of the Choctaws.

No theory can be allowed which would permit the United States as trustee to use the trust estate to liquidate the debts of the United States on any other account, but the United States in its relations to the Choctaws and Chickasaws must account to the Choctaws and Chick-

asaws as trustee of this estate and provide that the Choctaws and Chickasaws are secured a fair compensation for the trust estate, which is held by the United States *for the purpose of being sold to or purchased by friendly Indians*, which was the declared object of the United States in receiving this title in 1866.

CONCLUSION.

The land in question was patented to the Choctaws in fee simple 1842.

1855.

For a certain cash payment of about 10 cents an acre they leased the land for *a use not then of determinable extent* on a basis that was to be "reasonable."

1866.

For a contingent payment of 5 cents an acre they ceded the land to the United States as their trustee to be sold to and purchased by friendly Indians for Indian use.

1899.

These friendly Indians are now renting the unused part of the property at a substantial income of exceeding $200,000 per annum without ever having paid any purchase price. These immigrant Indians are entitled to 160 acres each, the standard fixed in 1866, on the payment to the Choctaws of a fair purchase price. The remainder of the land should be returned to the Choctaws and Chickasaws or sold to the highest market bidder for the use and benefit of the Choctaws and Chickasaws.

Respectfully submitted.

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Nos. 337, 338 & 339

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OCTOBER TERM, 1899.

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THE WICHITA AND AFFILIATED BANDS OF INDIANS
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THE CHOCTAW NATION and THE CHICKASAW NATION, *Appellants*,
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REPLY BRIEF FOR THE CHOCTAWS.

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IN THE

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REPLY BRIEF FOR THE CHOCTAWS.

$300,000 Consideration.

one reads the first or cession clause of the third article e treaty of 1866 the conclusion is that the $300,000 is sideration for the lands west of the 98th degree of lon- e, but the proviso shows clearly that if the Choctaws hickasaws pass certain laws, rules, and regulations for enefit of their freedmen, then the $300,000 are to be

transferred as a consideration for the grants made to the freedmen. The Choctaws have made those grants. Congress provided in the act of June 28, 1898, known as the Curtis act, that when the lands of the Choctaw and Chickasaw nations should be allotted, the Chickasaw freedmen should have forty acres each of the lands allotted to them. There are about 9,000 (Dawes Commission Records) of the Choctaw and Chickasaw freedmen, and to give to each of them forty acres of land of average value it amounts to 360,000 acres of land, to say nothing of the other benefits the freedmen have enjoyed. These latter lands and the benefits of the treaty for the freedmen are what under the proviso of the said third article of said treaty the $300,000 are to pay for. In the meantime said freedmen have been provided for in pursuance of the fourth article of said treaty of 1866.

It is not possible that this amount of money was intended to pay both for these 360,000 acres of land and other benefits east of the 98th degree of longitude and for the lands of the Leased District west of the 98th degree of longitude.

Fee of Choctaw Delegation.

As to the allusion of counsel for the United States to the act of the General Council of the Choctaw Nation of December 24, 1889, which provided a contingent fee for the prosecution of the claim of the Choctaws to an interest in the lands of the Leased District, we beg to say that all which could be brought to bear on that part of the subject was gone into fully by the Interior Department, the President, and both houses of Congress, and the court is respectfully referred to the Choctaw memorial in reply to the President's special message of February 17, 1892, Senate Report No. 552, 52d Congress, 1st session, and to the debates in Congress on the subject.

The Fifth Stipulation, Fort Smith.

Counsel for the United States insist that there is but one form of the fifth stipulation, and that is as stated in their original brief (pp. 146 and 147) and their reply brief (p. 14).

In both instances it is quoted in parallel columns with the fourth article of the unsigned treaty of 1865, and insisted that the said fifth stipulation is embodied in the said fourth article.

Said fifth stipulation reads thus:

"A portion of the lands hitherto owned and occupied by you," &c.

They overlook the meaning of the word "*hitherto.*" Its equivalent is "heretofore," "previous to this time," "in time preceding the present," and "up to this time." There was no question as to the status and occupancy of the lands east of the 98th degree of longitude, and if the said fifth stipulation had been intended to apply to the latter lands, it would have been written thus:

"A portion of the lands *now* owned and occupied by you," &c.

The status and occupancy of the lands west of the 98th degree of west longitude as fixed in articles 1, 2, 3, and 9 of the treaty of 1855 still obtained at the time the said fifth stipulation and unsigned treaty of 1865 were presented to the Choctaws and Chickasaws at Fort Smith. The United States fully intended, and the Choctaws and Chickasaws well understood, that the occupancy of the last-named lands was to be controlled by the United States for more Indians from that time.

Up to that time the Choctaws had occupied the lands west of the 98th degree of longitude. By reading the first,

second, and third articles of the treaty of 1855 together, it will be clearly seen that the United States agreed that they should be a part of "the Choctaw district," and the Choctaws continued to exercise the jurisdiction over those lands. They organized a regular district there and called it Hotub-bee district (see Choctaw constitution, District Boundaries), and the Choctaw citizens residing there were represented in the government of the Choctaw nation.

The fifth stipulation as above quoted is a recognition and admission by the commissioners of the United States that the lands which were *hitherto* owned were also *hitherto occupied*. The Choctaws, the Chickasaws, and the United States had solemnly agreed in 1855 that the lands of the Leased District, together with the lands east of the Chickasaw district, should constitute the Choctaw district. The Choctaws were then in control of those lands and continued to exercise governmental control there. It is admitted that there were no Wichita or other foreign Indians there in 1865 and 1866. The Wichitas and other small bands of Indians had been placed on those lands in 1859, but they had gone away and were not there in 1865 and 1866, and were not returned to those lands until two years after the Choctaw and Chickasaw treaty of 1866 had been made. There were no persons there to oppose or prevent Choctaw and Chickasaw settlement there. They had the fullest right to be there and they were there.

The said fourth article of the unsigned treaty refers only to the lands east of the 98th degree of west longitude.

The said fifth stipulation, further followed up, reads thus:

"A portion of the lands hitherto owned and occupied by you must be *set apart* for the friendly *tribes* in Kansas and elsewhere," &c.

The fifth stipulation was the most important of those submitted at the Fort Smith conference to the Indian tribes

owning lands in the Indian Territory. The first clause in this stipulation, "A portion of the lands hitherto owned and occupied by you," is merely descriptive. They are not of the essential importance with those which follow, "*must be set apart* for the friendly tribes now in Kansas and elsewhere." This is the language of command. It is the language of a superior to an inferior. "The lands *must be set apart*." The words are imperative, the requirement is absolute and unconditional. It is dependent on no future act, nor on the will or the wishes of any one whomsoever. The lands *must be set apart*, in compliance with the demand of the superior. There is no attempted compliance with an absolute demand of this character in the fourth article of the unsigned treaty. In that case there was simply an agreement of the Choctaws and Chickasaws to open their country to the settlement of friendly Indians from Kansas and elsewhere upon such terms *as may hereafter be agreed upon by the respective parties* and approved by the Government, but the fifth stipulation *demanded* that the lands *must be set apart* on such terms as may be agreed upon by the parties, *or such as may be fixed by the Government*.

And it is utterly impossible to find any compliance with this requirement in articles 30, 31, and 37 of the treaty of 1866. These articles are dependent on articles 11 and 12 of that treaty. Article 11 provided "that should the Choctaw and Chickasaw people, through their respective legislative councils, agree to the survey and dividing their lands on the system of the United States, the lands east of 98° shall be surveyed and laid off," &c. Now, this was entirely dependent, conditional, on the will of the Choctaw and Chickasaw legislature, and this refers to all the lands east of 98°, and no Indians were to be admitted to these lands except under these terms. We repeat, that it is utterly impossible, in the nature of things, that a compliance conditioned on the future will of the Choctaw and Chickasaw legislature should be a compliance with the absolute, imperative, and unconditional demand made in the fifth stipulation.

Again, the lands "*must* be set apart." Webster defines to *set apart* "to separate from the rest," and that is the common acceptation of the term. The lands required "must be set apart"—that is, separated from the rest of the lands—to be occupied by the Choctaws and Chickasaws as their homes. Now, the Leased District was the only land so set apart. The land east of 98°, *with the consent of the Choctaw and Chickasaw legislatures*, was to be surveyed and divided into lots on the system of the United States. The Choctaws and Chickasaws were to exercise a first selection as to these lands, and after these Kansas Indians, to a number not exceeding ten thousand, were to be admitted in and among them, becoming fellow-citizens of the Choctaws and Chickasaws, and make their selections. Now, these lands were not to be set apart—separated from the Choctaw and Chickasaw lands. These lands were to be occupied by Indians who were to dwell in and among the Choctaws and Chickasaws and were to become their fellow-citizens. The scheme of survey was never assented to by the Choctaw and Chickasaw legislatures, and of course all the articles of the treaty from 11 to 37, inclusive, became inoperative and void.

Besides, the lands were to be *set apart*—separated from the rest of the Choctaw and Chickasaw lands—for *friendly tribes*. In order to provide for tribal occupation by other tribes, it became necessary that the lands should be set apart—separated from the rest of the lands of the Choctaws and Chickasaws—and this establishes beyond controversy that only the Leased District was so "set apart" in compliance with the absolute requirement of the fifth stipulation, and that it is utterly impossible to find in the terms of the treaty of 1866, in reference to the lands east of 98°, any such compliance with this imperative and absolute requirement.

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Supreme Court of the United States,

OCTOBER TERM, 1899.

Filed Mar. 14, 1900.

THE UNITED STATES
v.
THE CHOCTAW NATION ET AL.
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THE WICHITA AND AFFILIATED BANDS OF INDIANS
v.
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THE CHOCTAW NATION ET AL.
v.
THE UNITED STATES ET AL.
No. 329.

APPEALS FROM COURT OF CLAIMS.

Supplemental Brief for Choctaws and Chickasaws.

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Appeals from Court of Claims.

SUPPLEMENTAL BRIEF FOR CHOCTAWS AND CHICKASAWS.

I.

Duress.

The attorney general, in his oral argument, conceded that the Choctaws and Chickasaws were placed under duress by the United States, in the negotiation of the treaty of 1866. In effect, he conceded that this treaty was extorted from them by the United States. But he

reminded the court that our late treaty of peace was extorted from Spain, by the United States. He suggested that the Choctaws and Chickasaws demanded a reformation of the treaty on the ground of duress. And he insisted that, as in the case of Spain, so also in the case of these Indians, international law interdicted the reformation of treaty stipulations, on the ground of duress put upon one of the parties to the treaty. His opinion apparently is that the relation between the United States and the Choctaws and Chickasaws, at the close of our civil war, was identical with the relation which exists between a victorious sovereign state and a vanquished sovereign state, at the close of an international war, and that this relation justified the United States in extorting from the Choctaws and Chickasaws an absolute title to 7,000,000 acres of land in the leased district, without any compensation therefor. He seems to be of the opinion that, inasmuch as a majority of the Choctaws and Chickasaws sided with our southern citizens, in a war waged, not between two sovereign powers, but between citizens of the same nation, the relation of the Choctaws and Chickasaws to the victorious government, at the close of the war, was identical with the relation which exists between the conqueror and the conquered, at the end of an international war.

It would have been difficult, I think, for the attorney general to state a rule based on more solid principles of international law than the rule that mere duress, imposed by a victorious sovereign state upon a vanquished sovereign state, in the negotiation of a treaty of peace, at the close of an international war, constitutes no valid ground for the reformation of the treaty. If such were not the law, it would never be possible to make a binding treaty of peace.

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But I am not convinced that the relation between the victorious government of the United States and the Choctaws and Chickasaws, at the close of our civil war, was identical with the relation of the conqueror to the conquered, at the close of an international war,—that is to say, with the relation of the United States to Spain, at the end of our recent war. Our civil war was not a war between sovereign nations. The belligerents, on both sides, were citizens of the same nation. The Choctaws and Chickasaws took both sides. The majority of these Indians sided with the southern minority of our white citizens, the minority sided with the northern majority. If it can be truly said that, during that war, the northern majority constituted a sovereign power, a nation, the attorney general will hardly contend that the southern minority constituted a sovereign nation, at the outbreak of the war, or during the war, or at its close. And unless a mere handful of Choctaws constituted a sovereign power waging war against 2,000,000 of our northern soldiers, there was no sovereign nation opposed to the north in that war.

The Choctaws and Chickasaws do not ask for a reformation of the treaty of 1866, on the ground that duress was put upon them by the United States, in the negotiation of that treaty. The only effect of that duress suggested by them is this: In the Choctaw case, 119 U. S. 1, 27, this court prescribed the following rules for the interpretation of Indian treaties:

> As was said by this court recently in the case of United States *v.* Kagama, 118 U. S., 375, 383: "These Indian tribes are the *wards* of the nation; they are communities *dependent on the United States;* dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. *From this very weakness and helplessness*, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised,

there arises the *duty of protection* and with it the power. This has always been recognized by the executive and by congress, and by this court whenever the question has arisen."

The recognized relation between the parties to this controversy, therefore, is that between a *superior* and an *inferior*, whereby the latter is placed *under the control* of the former, and which, while it authorizes the adoption, on the part of the United States, of such a policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing; and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules, framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws.

The counsel for the United States contend that these rules, although they were applicable to the treaty of 1820, are not applicable to the treaty of 1866. They allege that, although these Indians were an "unlettered people" in 1820, they were not an unlettered people in 1866. As evidence of their "lettered" condition in 1866, the attorney general says that they are represented in the bar of this court in 1900. Thirty-three years have elapsed since 1866, and yet no Choctaw, or Chickasaw, is, or has been, to my knowledge, a member of the bar of this court. The counsel insist that it was the relation of *knowledge to illiteracy* that constituted the basis of the foregoing rules of this court. On the contrary, we think that the basis of these rules, as expressly announced by the court, is not the relation of *knowledge to illiteracy*, but is the relation of *sovereignty to dependence*, of *strength to weakness*, of *power to helplessness*, of *superiority to inferiority*, of the *guardian to the ward*. And we contend that there is stronger reason for the application of these rules to the treaty of 1866 than for their application to the treaty of 1820, because the treaty of 1866 was, in fact, extorted by duress from the Choctaws and Chickasaws. We have imputed to that duress no other bearing upon the issues in the case at bar.

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I am unable to see upon what ground it can be plausibly contended that the rule of international law, which excludes the reformation of a treaty between independent sovereign nations, on the mere ground of duress, also excludes proof that a deed absolute upon its face is, in fact, a conveyance in trust, or a mortgage,—that a deed from a ward to his guardian, absolute on its face, is a mortgage, or a deed in trust. I cannot understand how this rule of international law can, in any way, or to any extent, impair or interfere with our right to show, by legitimate proofs, that a deed from the Choctaws and Chickasaws, even if absolute upon its face, is, in fact, a conveyance in trust. In a proper case, would it not be lawful for this court to permit a cession by one sovereign to another, although on its face absolute, to be shown, by legal proofs, for the purposes of the case, to be a conveyance in trust? How could such judicial action possibly conflict with the rule which interdicts the reformation of treaties between sovereign States on the mere ground of duress?

II.

Measures of the value of the land.

In order to show the court how little the land west of the 100th meridian was worth in 1855, and how little the leased district was worth in 1866, the attorney general, in his oral argument, stated that in 1803 France ceded the entire province of Louisiana to the United States, for the sum of sixty millions of francs. There was a slight inaccuracy in this statement. But that is immaterial. The amount paid was eighty millions. In 1803 Napoleon Buonaparte was First Consul of the French republic. As such he ceded Louisiana to the United States. Why

did he part with the province? Why did he sell it at such an insignificant price? The answers to these questions will be found in documents printed on pages 547 to 552 of volume 2, American State Papers, Foreign Affairs, which documents are copied on pages 121, 122, 123 of my brief in Cause No. 338.

Buonaparte was about to engage in a long and bloody war with England France and England were both preparing for the inauguration of the momentous struggle. He foresaw that, upon the breaking-out of war, England would seize New Orleans. He knew that the seizure of New Orleans meant England's permanent acquisition of the province of Louisiana. He knew that he was powerless to resist the British fleet. President Jefferson proposed to purchase New Orleans. He did not ask for, nor did he desire a cession of Louisiana. But M. Talleyrand, the French minister, said to Mr. Livingston, the minister of the United States, that, if France should part with New Orleans, the rest of the province would be of little value to France, and urged upon him the purchase of the entire province. The result was that the sale was made on the 30th day of April, 1803. Eighteen days thereafter the king of England declared war against France. Before the middle of March, Buonaparte had said to the British ambassador in Paris, "I must either have Malta or war." On the 17th of March, Minister King had written, from London to Secretary Madison: "War seems more and more probable. Indeed it seems inevitable." Before the end of March, Mr. Addington, the British minister, had said to Mr. King, that if war should break out, one of the "first steps" of the English would be to seize New Orleans. Buonaparte preferred to sell Louisiana for a song, to a friendly power, rather than see it forcibly seized by the hereditary enemy of France. In

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view of these facts, was it reasonable for the attorney general to measure the value of the leased district and the land west of the one hundredth meridian, by the price for which Buonaparte sold Louisiana?

But then, between the year 1803 and the years 1855 and 1866, great changes had been wrought in the province of Louisiana. States had been erected. Territories had been organized. Populous cities had appeared. Vast interests had been developed. Was it reasonable to measure the value of these lands, in 1855 and 1866, by the price paid for Louisiana by President Jefferson, or by the price by which land could have been bought, in that province, in 1803? Would it not be as reasonable to measure the value of a square foot of land on Massachusetts Avenue, or Connecticut Avenue, in Washington, in the year 1900, by the price at which the same land could have been bought in 1803?

Again, in order to show how little the leased district was worth in 1866, my brother Lipscomb, in his oral argument, asserted that the Choctaws and Chickasaws made a present of that district to the Confederate States, in 1861. If he meant anything pertinent to this case, he meant that the Choctaws and Chickasaws executed a gratuitous and absolute conveyance of the entire beneficial ownership of that district to the Confederate States. But nothing could have been further from the truth of history. The transaction was not an absolute conveyance of the land. It was merely a substitution of one government for another, in the lease of 1855. The condition to settle friendly Indians on the land was expressly continued. The lease, which had been perpetual, was made terminable at the expiration of a period of time, therein limited. If any consideration had been paid for the lease, by the United States, it enured to the ben-

efit of the Confederate States. But in the treaty the Confederate States stipulated to pay the Choctaws and Chickasaws the sum of $3,124,947.98, without designating the consideration for that payment. That the transfer of the lease entered into that consideration can admit of little doubt.

I submit that the attempt to transform this lease into an absolute conveyance, and thereupon to make this fabricated conveyance a measure of the value of the leased district in 1866, must necessarily fail.

III.

The Trust.

I am unable to find, either in the United States, or in the Choctaw or Chickasaw nation, any constitutional or statutory authority for the application of the English statute of frauds to this case. I am not advised of any reason why a trust may not, in this case, be proven, as well as created, by parol. But, for the purposes of this argument, I will concede the applicability of the statute of frauds to the case. That concession is, of course, unfavorable to the Choctaws and Chickasaws. I will concede that, in this case, an acknowledgment of an express trust, in order to be legal proof of the trust, must be in writing. I submit, then, that the following propositions are sound in law:

If A, by deed, convey land to B, in trust for C, without otherwise defining the trust, the law will recognize, in these words, a full, clear and accurate definition of the trust. It will be an express trust, of the class known as "general," "simple," or "dry" trusts. The naked legal title will vest in the trustee; but the entire beneficial in-

terest will vest in the *cestui que trust*. The trustee will be accountable for the rents and profits of the land while he holds it, and for its proceeds, if he dispose of it; and he must faithfully endeavor to secure full values in either case. If B, by an instrument in writing, referring to and identifying A's deed, acknowledge it to be a deed in trust, without otherwise defining the trust, and without naming the *cestui que trust*, he will, in effect, acknowledge the trust to be a general, or simple, trust in favor of C.

If A, by a deed absolute on its face, convey land to C, with no declaration of trust and no designation of the *cestui que trust* in the deed, but, at the same time, declare, by parol, a general, or simple, trust in favor of C, the deed will be valid in law, but must be proven by a written instrument. If B, then, by a written instrument, referring to and identifying A's deed, acknowledge it to be a deed in trust, without otherwise defining the trust, and without designating the *cestui que trust*, his acknowledgment will be proof that the trust is a general, or simple, trust in favor of C.

If A, by deed, convey land, in trust for himself, to B, the deed will be valid. The trust will be a general, or simple, trust; and A himself will be the *cestui que trust*.

If A, by a deed absolute on its face, convey land to B, and thereafter B, by a written instrument, referring to and identifying A's deed, acknowledge it to be a deed in trust, without otherwise defining the trust, and without designating the *cestui que trust*, then, in the absence of legal proof defining the trust and designating the trustee, B's acknowledgment will be legal proof that the trust is a general, or simple, trust, and that the grantor, A, is himself the *cestui que trust*.

If, from the case at bar, our claim and proof that the trust is a special trust, to settle Indians on the land, were

eliminated, then the acknowledgment made by the United States in the act of 1891, declaring that the cession of 1866 was a cession in trust, would be an aknowledgment that the trust was a general, or simple, trust, and that the Choctaws and Chickasaws themselves were the beneficiaries of the trust.

In that case, the United States would be accountable to the Choctaws and Chickasaws for the rents and profits of the land held by the United States between the years 1866 and 1900, and for the proceeds of sales of lands disposed of, and would also be held to reasonable care and diligence in the management of the estate.

But our claim and proof that the trust is a special trust, to settle Indians on the land, has not been eliminated from this case, and, therefore, the acknowledgment, made by the United States in 1891, that the cession of 1866 was a cession in trust, is an acknowledgment that the trust is a special trust, to settle Indians on the land.

This alternative, therefore, confronts the United States. If the attempt to exclude our claim and proof that the cession of 1866 was a cession in trust, to settle Indians on the ceded land, shall fail, the liability of the United States will not exceed, in extent, the compensation per acre heretofore paid, in like cases, to the Choctaws, Chickasaws, Creeks, and Seminoles. But if that attempt shall succeed, the government will become the trustee of a general, or simple, trust, accountable for rents, profits, and proceeds of sale; and the sum total of its indebtedness to the Choctaws and Chickasaws will be very great. Its magnitude may be approximately estimated upon consideration of the following statement, contained in the report of the senate committee on the special message of President Harrison relating to the Cheyenne and Arapahoe case, which statement is printed on pages 207 and 208 of the Appendix to the Record:

The commissioners having, in pursuance, as your committee infer, of the instructions of the Secretary of the Interior, refused to negotiate with the Choctaws and Chickasaws for the relinquishment of their interest in the "leased district," the governor of the Chickasaw Nation, it appears, sent B. C. Burney and Overton Love, citizens of that nation, to Washington to apply to Congress for protection against the threatened invasion of their rights. Your committee are informed that before making their formal application to congress the Chickasaw delegates, Messrs. Burney and Love, had an interview with a well-known financier and capitalist, now a distinguished member of the executive department of the government, in which he said to them that, if they could obtain from congress authority to sell the lands embraced within the "leased district" at private sale, a syndicate could be organized to purchase them at the price of $5 per acre, at which rate the lands, being in area 7,713,239 acres, would amount to $38,566,190, and at the same time he expressed the opinion that the proposed syndicate would be able to sell the lands for $10 per acre, at which rate the lands would have yielded the syndicate a profit of more than $35,000,000.

The trust in this case is of an unusal character. There are three beneficiaries. Such Indians as the United States should select were to become beneficiaries, because they were to have homes on the land. The Choctaws and Chickasaws were to be beneficiaries, because they were to secure a "buffer" of red men on their western border. And the government of the United States was to become a beneficiary, for it was to secure land for the colonization of other Indians. Moreover the conveyance was a conditional conveyance as well as a conveyance in trust.

I think that this cession is not absolute on its face. I believe it to be an indisputable principle of law, that when the *apparent* meaning of terms used in a contract involves injustice and absurdity, that fact alone suffices to raise a doubt as to the *real* meaning of the contract, and it becomes competent for the court to ascertain that meaning, by recourse to outside facts. I believe that this cession of 1866, if it were absolute, would involve most monstrous injustice and absurdity. As a result of such a cession, the United States would have acquired from these Indians more than 15,000,000 acres of land, worth more than $50,000,000, for the sum of $800,000, and, without the pay-

ment of a single dollar, would have secured the substitution of an *absolute title* to more than 7,000,000 acres of the land in the leased district, in lieu of a mere *lease* which was subject to the following conditions, viz: (1) that the land should be used for Indian settlement; (2) that the Choctaws and Chickasaws themselves should retain the right to settle on the land; (3) that the land should remain a part of the Choctaw district; (4) that the Choctaw government should retain jurisdiction over Choctaws and Chickasaws residing in the district; and (5) that no regulations should be enforced, in the district, inconsistent with the rights and interests of the Choctaws and Chickasaws.

In my judgment, therefore, this cession is not on its face absolute. But, then, if it were absolute, or should be held by the court to be absolute, it would, nevertheless, be subject to the rule under which a deed, absolute on its face, may be shown, by legal proofs, to be a mortgage, or a deed in trust.

An acknowledgment of a trust, lawfully made, is irrevocable. Now the acknowledgment by the United States, in the act of March 3, 1891, that the cession of 1866 was a cession in trust, was at once an interpretation of that cession and also an acknowledgment of a trust. As a mere interpretation of the cession, it was subject to repeal by Congress. But, as a matter of fact, it has never been repealed. Congress did, in effect, in the joint resolution of December 17, 1892, declare that this interpretation should not "be held in any way to commit the government to the payment of any further sums to the Choctaw and Chickasaw Indians, for any alleged interest in the remainder of the lands situate in what is commonly known and called the leased district." This did not revoke the interpretation. Its only effect was to provide

that the interpretation should not, of itself, commit the government to further payments. That is to say, it left the door open for any defences which might be made to such payments, notwithstanding this interpretation. And there might have been scores of such defences based on the relations, old or new, between the United States and the Choctaws and Chickasaws, the Wichita and affiliated bands, the Kiowas and Comanches and Greer County, and, also, on the relations between the Choctaws and Chickasaws and the Wichita and affiliated bands, the Kiowas and Comanches and Greer County.

But, as an acknowledgment of a trust, this action of congress is, like any other acknowledgment of a trust legally made, absolutely irrevocable. Mr. Binney, on page 37 of his "reply brief," says:

> The Paine brief (pp. 28, 29) relies on the supposed legal effect of the act of 1891, as an acknowledgment of a trust, by a trustee. Granting all the authorities cited state, there is no authority for holding that when the one who has made such an acknowledgment realises that he was mistaken, he cannot afterwards cancel or withdraw the acknowledgment, or declare that it shall not be taken to affect any other property than that in regard to which it was specifically given.

As I have just shown, the joint resolution of December 17, 1892, only provided that the acknowledgment of 1891 should not of itself countervail any defences which might be set up against further payments. It did not purport to "cancel or withdraw the acknowledgment," but merely declared that it should not have any effect to close the door to any one of numerous possible defences.

But suppose that, in this joint resolution, congress had expressly spoken as follows: "The acknowledgment of a trust, made in the act of March 3, 1891, is hereby revoked." Would that have been effectual to revoke the trust? Is it possible that the United States, after voluntarily entering a court of equity, can trample under foot the rules of equity which govern private litigants? As

between the grantor and grantee, is not the written acknowledgment of the trustee conclusive and irrevocable proof of the trust? As between the grantor, grantee and *cestui que trust*, is not the trust an integral part of the deed itself? If, as in the case at bar, it import that the trust is coeval with the deed, will not the trust be a part of the deed itself, from its date, as certainly as if originally incorporated into the written instrument? If the written instrument create as well as prove the trust, will not the trust, from the date of the acknowledgment, be an inseparable part of the deed? Can the trustee change his mind and tear it from the deed? Is not his relation to the deed exactly what it would be, if he had been designated as trustee, in the deed itself? Is an acknowledgment of a trust mere testimony subject to correction by the witness? Is it a promise unsupported by a consideration and revocable at pleasure? When the trust acknowledged is coeval with the deed, is not the acknowledgment a binding recognition of an obligation for which the grant constitutes an unquestionable consideration? When the trust is created, as well as proved, by the acknowledgment, is not the grant a sufficient consideration to support the undertaking of the trustee? Does not an acknowledgment that a deed is a conveyance in trust amount to *contract* as well as *testimony?*

But, then, it is not to be forgotten that this acknowledgment of the trust, which was made by the 51st congress, was, after the most searching investigation, ratified by the 52d congress, by a vote approaching closely to absolute unanimity. President Harrison, prompted by Secretary Noble, refused to permit the money appropriated by the 51st congress, to be paid to the Choctaws and Chickasaws. In his special message on the subject to the 52d congress, he stated the reasons of his refusal,

premising that "after a *somewhat* careful examination of the question," he did not believe that the cession was a cession in trust. These reasons are all exhaustively considered in the senate report which is printed on pages 187 to 240 of the Appendix to the Record. An examination of that report will enable the court to understand how thorough was the investigation by the senate, and also how "careful" was the president's "examination" of the subject. With the report the committee submitted the following resolution:

Resolved, That for reasons set forth in the report of the Committee on Indian Affairs upon the president's message of February 18, 1892, upon the appropriation of March 3, 1891, for payment to the Choctaw and Chickasaw nations for their interest in the Cheyenne and Arapahoe reservation, in the Indian Territory, submitted with this resolution, that it is the opinion of the Senate that there is no sufficient reason for interference in the due execution of the law referred to.

The debate commenced April 27, 1892; and on the 9th of May the senate came to a vote. An amendment was proposed as follows:

Provided, however, that, in the opinion of the senate, the president should require the leases and the conveyances, which shall be executed by the Choctaw and Chickasaw nations of Indians, mentioned in said appropriation, to contain a full and complete relinquishment of all the right, title, interest, and claim of said nations of Indians in and to all the lands between the 98th and 100th meridians of west longitude, formerly owned by them, and of all claim to reimbursement and compensation for and on account of the same.

This amendment was rejected by a vote of yeas 13, nays 41. The resolution was then adopted by a vote of yeas 43, nays 13. Cong. Rec. 52d Cong. 1st sess., p. 4093. The house of representatives by a vote of yeas 163, nays 47, adopted a resolution in the identical words of the senate resolution.

IV.

Ratification of the Spanish Treaty.

Mr. Binney, in his oral argument, asserted that the senate did not, on the 19th of February, 1821, advise the president to ratify the Spanish treaty; but did advise the senate to exchange with Spain prior ratifications of the treaty. This was a strange misunderstanding of the facts of history. The senate resolution of February 19, 1821, advising the second ratification of the treaty, as originally reported by the committee, was framed as follows:

> Resolved, (two-thirds of the senators present concurring therein) That the senate do advise and consent to the ratification of the treaty of amity, settlement, and limits, made and concluded at Washington, on the 22d day of February, in the year of our Lord 1819, between the United States of America and his Catholic Majesty.

As adopted by the senate, the resolution took the following form:

> Resolved, (two-thirds of the senators present concurring therein) That the senate, having examined the treaty of amity, settlement, and limits, between the United States of America and his Catholic Majesty, made and concluded on the 22d of February, 1819, and seen and considered the ratification thereof, made by his said Catholic Majesty, on the 24th day of October, 1820, do consent to and advise the president of the United States to ratify the same.

There may possibly be room for doubt whether the resolution, in its original form, required a *subsequent* ratification by the president. The words were: "Resolved, That the senate do advise and consent to the ratification of the treaty." There is, however, no room for doubt as to the import of the resolution actually adopted. The senate obviously consented to and advised a *subsequent* ratification. The words of the resolution are: "Resolved, That the senate do consent to and advise the president of the United States to ratify the same."

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V.

Compensation for land west of one hundredth meridian.

On page 16 of Mr. Binney's "reply brief," referring to the land west of the 100th meridian, he insists that if the Choctaws had any right to that land *in specie*, the Chickasaws had the same right, because, as he alleges, the United States, by approving the agreement of 1837 between the Choctaws and Chickasaws, had practically granted that right directly to the Chickasaws, and, therefore, the three facts (1) that the Chickasaws did not join in the quit-claim, (2) that they received one-fourth of the $800,000, and (3) that they were owners of one-fourth in common of the leased district, show that the entire sum of $800,000 was, in fact, paid for the leased district.

But the truth is this: On the 19th of February, 1821, the United States sold this land out from under the Choctaw nation to Spain. This sale was valid; for Spain was a sovereign state invested with the power of eminent domain. The Choctaw title to the land *in specie* was thereby divested. The right to compensation for the land took the place of the land itself. In 1837 the Chickasaws purchased certain interests from the Choctaws, which included one undivided fourth part of this right to compensation for the land. When the quit-claim of 1855 was executed, the Chickasaws, having never had any right to the land *in specie*, had no place, as grantors, on the quit-claim. But they were entitled to one-fourth of the compensation for the quit-claim, as well as to one-fourth of the compensation for the lease, and, therefore, were entitled to receive and did receive one-fourth of the entire sum of $800,000.

VI.

Import of the word "Cede."

On page 17 of Mr. Binney's "reply brief," he says that the word "cede" is "the word regularly used by nations, in transferring territory, and conveys whatever rights the nations have in such territory." In his oral argument, he also said that the word "cede" conveyed whatever the ceding party had power to cede.

This is obviously erroneous. When the United States ceded to the Choctaws the land in controversy, the United States held the right of paramount dominion in that territory, and could have ceded it to the Choctaws. But the word "cede" did not convey that right. When France ceded Louisiana to the United States, France had the right to cede any and all private property in that province; but the word "cede" did not convey that private property. When Spain ceded Louisiana to France, in 1800, Spain had the right and power to cede any and all private property in Louisiana; but the word "cede" did not convey that property. When Spain ceded Florida to the United States, in 1820, Spain had the right and power to cede all private property in Florida; but the word "cede" did not convey that property.

But then the next sentence in Mr. Binney's brief exposes the error of his contention that the word "cede" *per se* imports a conveyance of whatever the grantor has power to convey. He says of this word "cede" that, "when used of grants by the United States to Indians, it does not import the conveyance of more than a full Indian title." This of course means that the word "cede" imports sometimes one thing and sometimes another; that it does not *always* convey all the ceding party has the power to convey; that it does not *per se* convey an absolute title. And therefore in order to ascertain its meaning, in a particular

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case, recourse must be had to the context, or to outside facts. In order to ascertain its import in a cession to Indians, it is necessary to have recourse to outside facts,—to the relations of the parties, which, when scrutinized, show that the word "cede" does not *per se* convey to them either paramount dominion, or absolute titles to property. And so the counsel undermines and overthrows his own position.

VII.

Requirement of the "third stipulation."

On page 18 of Mr. Binney's "reply brief," he refers to my statement that the sum of $300,000, if it was ever to be paid to the Choctaws and Chickasaws, was to be paid to them for the grant of citizenship and forty acres of land to each of their freedmen, and he says:

> This bold assertion wholly overlooks the fact that the third stipulation required that the freedmen should be incorporated "into the tribes, on an equal footing with the original members [*i. e.*, on an equality as to citizenship, land ownership and suffrage] or suitably provided for," without the payment of any consideration whatever by the United States, and that this stipulation was literally complied with by the Creeks, Cherokees and Seminoles, without any compensation.

Does not the counsel perceive that this requirement of the third stipulation is an alternative requirement? Does he not see that this stipulation requires the Chickasaws to do one of two things, *either* to grant citizenship and land to their freedmen, or otherwise *suitably to provide for them?* Does he not know that, although the Chickasaws refused to grant citizenship and 40 acres to them, they have, for a period of 33 years since 1866, furnished all their freedmen with all the land they have chosen to cultivate or use? Is he oblivious of the fact that, if the Seminoles and Creeks have granted citizenship and lands to their freedmen without compensation therefor, so also have the Chickasaws made suitable provision for their freedmen, by giving them, without compensation, all the land they wanted free from rent and taxes for 33 years?

Mr. Binney, as I have said, denies that the sum of $300,000 was offered to the Choctaws and Chickasaws, as compensation for the grant of citizenship and forty acres of land to each of their freedmen. He thinks the treaty required the Choctaws and Chickasaws to make the grant a gratuitous grant. He considers this a justifiable penalty for disloyalty. At the same time he asks that you award the entire Wichita reservation to the Wichita and affiliated bands, who made their treaty with the Confederate States on the 12th of August, 1861. You are asked to *punish* the Choctaws and Chickasaws for disloyalty, by confiscating, for the benefit of the 9,000 freedmen enrolled by the Dawes Commission, 360,000 acres of their land outside the leased district, and by confiscating, for the benefit of the Wichita and affiliated bands, 7,000,000 acres of their land in the leased district. But, at the same time, you are asked to *reward* the disloyalty of the Wichita and Affiliated Bands by awarding to them 7,000,000 acres of land in the leased district. Justice would seem to be "out of joint" in the mind of the counsel.

But is it true that the sum of $300,000 was not to be paid to the Choctaws and Chickasaws, as compensation for the grant of citizenship and forty acres of land to each of their freedmen? Did not the United States, in the treaty, say, in effect, this: If within two years you give citizenship and forty acres of land to each freedman, you shall have the $300,000; but if you do not, you shall not have that money? Is the import of that language doubtful? Did not the United States also say: If your freedmen leave your country they shall have the $300,000; but if they refuse to go and you refuse to grant to them citizenship and land the money shall be the property of the United States? Has the English language lost its identity?

HALBERT E. PAINE,
Counsel for Chickasaws.

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Nos. 337, 338 & 339
Answer of Appellees to motion to
Filed Oct. 16, 1899.

Supreme Court U. S.
FILED
OCT 16 1899
JAMES H. MCKENNEY
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, *appellant*,
v.
THE CHOCTAW NATION AND THE CHICKASAW NATION. } No. 337.

THE WICHITA AND AFFILIATED BANDS OF INDIANS, *appellants*,
v.
THE CHOCTAW NATION AND THE CHICKASAW NATION AND THE UNITED STATES. } No. 338.

THE CHOCTAW NATION AND THE CHICKASAW NATION, *appellants*,
v.
THE UNITED STATES AND THE WICHITA AND AFFILIATED BANDS OF INDIANS. } No. 339.

Answer of Chickasaw Nation to Motion of Solicitor General to Return the Record to the Court of Claims.

The only relief sought by the Solicitor General is the reproduction, in their entirety, of five maps, designated on page 3 of his motion. And, in order to accomplish that result, he asks that the case may be temporarily re-

turned to the Court of Claims, to enable that court to make its action, on a certain motion of the counsel for the United States, "a matter of record," which he asserts that the Court of Claims has not yet done.

In reply, we submit, (1) that the court of claims has made its action on said motion "a matter of record" and could only dispose of it again on a rehearing after a vacation of its order, the time for which would seem to have passed; (2) that the Supreme Court and that court alone is competent to order that reproductions of these entire maps shall be included in the printed record; and (3) that the counsel for the Choctaws and Chickasaws have not and never had the slightest objection to an order by the Supreme Court requiring the printed record to contain full reproductions, by photo-lithography, by hand, or otherwise, not only of the five maps of which the Solicitor General desires full reproductions, but also of any or all of the other sixty-one maps, which this court may require to be reproduced in their entirety. But it is due to the court to say that, on many of these ancient maps, the boundaries are delineated in yellow, red and blue colors, with small and faint dots between, and it may be difficult, if not impracticable, to reproduce them by the photo-lithographic process. Moreover, to be useful the reproductions must be made nearly on the scale of the originals. The cost of such work will of course be very great.

The Solicitor General, on page 2 of his motion says:

> All tracings of maps are objected to as inadmissible. If the evidence of maps is required, the originals themselves should be produced, or properly verified photographs, or certified copies in case the originals are government records.

In the brief appended to his motion, it is alleged that a

part of a map, or book, cannot be made evidence; that the context of a map may be as important as the context of a book. He appears to be of the opinion that copies of maps, or books, proven to be correct by depositions, taken subject to cross-examination, are inadmissible; that President Jefferson's short message, relating to the Southwestern Indians, cannot be introduced, in evidence, from the Fourth volume of the American State Papers, Indian Affairs, without making evidence of all the multitudinous messages and other official documents contained in that large book; that the Supreme Court must study the map of the western hemisphere, in its entirety, in order to comprehend the little Wichita Reservation.

The main question, in these cases, is whether, by the treaty of 1866, the Choctaws invested the United States with the absolute beneficial ownership of the "leased district," or ceded the land in trust for the settlement of other Indians thereon. Among the numerous subordinate questions, involved in the determination of this main question, are these: (1) whether the United States, in 1803, owned the land west of the 100th meridian, ceded to the Choctaws in 1820, and (2) whether the Wichitas ever held a title by occupancy to the Wichita Reservation. For the purpose of corroborating our other proofs, on these and other questions, we found it convenient to present the evidence furnished by sixty-six maps, published in London, Paris, Amsterdam and the United States, in different years, commencing in 1701. We encountered, at the outset, a difficulty which will be understood upon an inspection of the originals of the five maps, which the Solicitor General thinks should be reproduced, in their entirety, for the *printed* record. The first of t ese is Map No. 5, vol. 1, De l'Isle's Atlas Nouveau. We produced an accurate tracing from that map, of the boundaries

of the old province of Louisiana, for the sole purpose of showing that the western boundary of that province was west of the 100th meridian, in 1803. The original map itself embraces the entire western hemisphere, including North, South and Central America, Greenland, the Azores, parts of Australia and New Zealand, and multitudes of islands in the Pacific and Atlantic oceans. The other four maps are almost as comprehensive as the first. We could see no logical connection between New Zealand, or Greenland, or South America, and this case, and therefore concluded to avoid the great expense of producing in evidence the entire maps, and offered in evidence tracings therefrom, of the province of Louisiana, proven by depositions, taken under cross-examination, to be accurate. The original maps could not be produced in court, as will appear from the papers now on file in the Court of Claims. The following motion was allowed by the Court of Claims on the 28th of December, 1897 :

The claimants ask the court to request the director of the library of congress to deliver to the clerk of this court, on or before January 17, 1898, the books and maps described in the annexed schedule, the same to remain in the custody of said clerk, for the inspection of the court, during the trial of this cause.

J. M. WILSON,
GEO. T. BARNES,
Counsel for Choctaws.
H. E. PAINE,
Counsel for Chickasaws.

The schedule included twelve (12) books and nine (9) maps. The Director of the Library responded as follows :

LIBRARY OF CONGRESS,
WASHINGTON, *January* 10, 1898.

DEAR SIR: I have the honor to acknowledge the receipt of a request, under the seal of the court of claims, that I furnish said court certain books and maps, now in the library of congress, for use as evidence in a case pending in said court at this time, viz: "The Choctaw Nation and the Chickasaw Nation, Complainants, *v.* The United States and the Wichita and Affiliated Bands of Indians, Defendants, Case No. 18,932."

In reply to this request, I beg to call the court's attention to the requirements of law, (Sections 92–94, R. S.) by which no maps are permitted to be taken from this library by any person, and the privilege of taking books is confined to certain designated persons, or classes of persons.

In view of this law, I apprehend it would be improper for me to attempt to comply literally with the Court's request, even if other considerations of library management were left out of account. If, however, it shall prove agreeable to the Court, in this matter, it will be possible to arrange that one of our attendants in the library should, each day, take the books,—not the maps,—asked for by the Court, to the Court room while the cause is being heard, and return with them each day to the Library. The books would thus be constructively, at least, at all time in the custody of the Librarian. I trust this may, in a measure at least, meet the wishes of the Court, for it is unnecessary to assure you that I am anxious to oblige Your Honor in any manner in my power.

Very respectfully,
JOHN RUSSELL YOUNG,
Librarian of Congress.

HON. CHARLES C. NOTT,
Chief Justice,
Court of Claims,
Washington, D. C.

On the 14th of February, 1898, a motion was filed, in the following words:

And now come the defendant Indians, by their attorneys J. M. Vale and A. A. Lipscomb, and move the court that the tracings of maps, filed in evidence by the claimants, may be temporarily withdrawn, by Mr. Philip Walker, counsel for the said Indians, for the purpose of comparing them with the originals, in the library of congress and elsewhere.

J. M. VALE,
A. A. LIPSCOMB,
Attorneys for Defendant Indians,
by PHILIP WALKER,
Of Counsel.

The foregoing motion bears the following indorsements:

Allowed. C. C. N.

Withdrawn under inclosed order Evidence in Rebuttal No. 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 42, 45, 50, 52, 53, 55, 56, 59, 62, 63, 65, and 138. Also 38, 41, 43, 44, 46, 47, 48, 49, 51, 57, 58, 60, and 61. Also Evidence in Chief 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 45, 46, 47, 48, 49, 53.

PHILIP WALKER,
Of Counsel.

FEB'Y 14, 1898.

Subsequently, in open Court, and in the presence of Mr. Binney and Counsel for the Choctaws and Chickasaws, and for the Wichita and Affilliated Bands, Mr. Walker returned said tracings to the files. He submitted to the Court no written report of the result of his comparison of the tracings with the original maps; but he stated orally that he had found only two (2) or three (3) inaccuracies in the tracings; and these were apparently immaterial, for he neither explained their nature, nor indicated the tracings in which they occurred. By their silence, the

counsel for all the parties seemed to acquiesce in this result.

The Choctaws and Chickasaws presented in this cause, two hundred and thirty items of documentary proof. On the 27th of April, 1899, after judgment had been rendered by the Court of Claims, the attorney for the United States moved to exclude from the record all of those proofs, except thirty-three.

This motion of the attorney for the United States contained this statement:

The reasons for this motion are as follows:

First. All the papers above mentioned were filed subject to a reserved right of objection on the part of the United States, and objections were made, in writing, July 7, 1897, which objections have never been overruled by this court.

The motion filed July 7, 1897, was in the following words:

Now comes the attorney.general in behalf of the United States and objects to exhibits Nos. 1 to 54, filed by the claimants on April 21, 1896, and to exhibits in rebuttal Nos. 1 to 163, filed by the claimants July 30, 1896, as follows:

First. All tracings of Maps are objected to as inadmissible. If the evidence of maps is required, the originals themselves should be produced, or properly verified photographs, or certified copies, in case the originals are government records.

Second. All extracts from public documents are objected to as inadmissible. If the evidence of such documents is required, they should be produced entire.

Third. All uncertified copies of records and papers in the Indian office, or other offices of the government, are objected to for lack of the statutory certificate.

Fourth. All extracts from historical or other like books

are objected to. Such books may be cited in argument, but, if they are to be treated as evidence, the entire volume should be produced.

These objections are made, under the right of objection reserved at the time of the taking of the deposition of Halbert E. Paine, on April 25, 1896, and under the general objection, made at the time of the taking of the deposition of Halbert E. Paine, July 23, 1896.

J. E. DODGE,
Assistant Attorney General.

CHARLES C. BINNEY,
Assistant Attorney in charge of case.

The court's order of May 17, 1899, disposed of the said objections filed by the attorney for the United States, July 7, 1897, (1) by excluding from the record proofs of which the court could take judicial notice; (2) by including in the record the following tracings taken April 25, 1896, and also the originals of those tracings, viz: Nos. 21 to 39 inclusive, Nos. 45 to 49 inclusive, and No. 53; (3) by including in the record extracts and translations filed July 30, 1896, as follows: Nos. 4, 6 to 12 inclusive, 15, 16, 64, 68, 69, 152, 153, 154 and 163; (4) by including in the record tracings taken July 23, 1896, as follows: Nos. 24 to 63 inclusive, and No. 138; (5) by including in the record tracing No. 65, filed July 30, 1896, and also the original of that tracing; (6) by including in the record extracts Nos. 66 and 67, filed July 30, 1896, and also the originals thereof. Inasmuch as none of the original maps had been filed as evidence in court, or had even been inspected by the court, the order would seem to have made them, not actually, but only constructively a part of the record.

HALBERT E. PAINE,
Counsel for the Chickasaw Nation.

DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine having been duly sworn says that the statements made in the foregoing answer are true.

Subscribed and sworn to before me this 13th day of October, 1899.

[SEAL.] S. OLIVIA MOORE,
Notary Public, D. C.

No. 338 & 339.

FILED
MAR 3 1900
JAMES H. MCKENNEY,

Bef. & Lipscomb, Vale & Walker for Wichitas &c.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Mar. 3, 1900.

THE WICHITA AND AFFILIATED BANDS OF INDIANS, *Appellants*,

vs.

THE CHOCTAW NATION, THE CHICKASAW NATION, AND THE UNITED STATES.

No. 338.

THE CHOCTAW NATION AND THE CHICKASAW NATION, *Appellants*,

vs.

THE UNITED STATES AND THE WICHITA AND AFFILIATED BANDS OF INDIANS.

No. 339.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE WICHITA AND AFFILIATED BANDS OF INDIANS.

ANDREW A. LIPSCOMB,
JOSIAH M. VALE,
Attorneys for Wichita and Affiliated Bands of Indians.

PHILIP WALKER,
WILLIAM C. SHELLEY,
Of Counsel.

John F. Sheiry, Printer, 498 D Street.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE WICHITA AND AFFILIATED BANDS OF INDIANS, *Appellants*,

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THE UNITED STATES AND THE WICHITA AND AFFILIATED BANDS OF INDIANS.

No. 339.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE WICHITA AND AFFILIATED BANDS OF INDIANS.

STATEMENT OF THE CASE.

In 1803 the United States acquired from France the Province of Louisiana, extending from the Mississippi to an indefinite western boundary. Its interior was utterly unknown, even to the few whites who lived upon its eastern borders and traded with the Indians who inhabited it. White settlement was pressing on the tribes who lived east

of the Mississippi, and especially upon the Choctaws, who were residents of the (now) State of that name, and it became necessary for the peace of the locality that a new home should be found for them. With this end in view measures were taken to extinguish the Indian title west of the great river. First, by a treaty made in 1808 (7 Stat., 107), the Osages ceded those portions of Missouri and Arkansas lying between the rivers bearing those names; while in 1818 they ceded a small tract north of the Arkansas in the northeast corner of the Indian Territory. (7 Stat., 183.)

On the 24th day of August, 1818, a treaty was made with the Quapaws, a tribe consisting of about one thousand Indians, living on the Arkansas river, near its mouth, by which they ceded to the United States lands bounded as follows:

> Beginning at the mouth of the Arkansas River; thence extending up the Arkansas, to the Canadian fork, and up the Canadian fork to its source; thence south, to Big Red River, and down the middle of that river to the Big Raft; thence, a direct line, so as to strike the Mississippi River, thirty leagues in a straight line, below the mouth of the Arkansas.

In addition certain lands east and north of the Mississippi and Arkansas rivers were quit-claimed, as are shown on the map accompanying the treaty and printed in the Government brief (7 Stat., 176), and by the red line on the map at the end of this brief.

The following year a treaty was made with the King of Spain, which was immediately ratified by this country, although the Cortez did not authorize its ratification until the fall of 1820 and these were not exchanged until February, 1821. This treaty placed the boundary between the American and Spanish possessions, at the one-hundredth meridian, at the latitude of the Quapaw cession.

In the meantime a treaty was made with the Choctaw Nation, by which it ceded its lands east of the Mississippi River, and in consideration therefor received the western portion of the Quapaw tract, which grant was limited, by a subsequent treaty made with the Choctaws, in 1830, to the western limits of the United States, or longitude 100, as fixed by the Spanish treaty.

This paper title of occupancy remained in the Choctaws, subject to an interest to which the Chickasaws were admitted in 1837, up to the time of the treaty made in 1855 between the United States and the two last-mentioned tribes. West of the Cross Timbers, however, the emigrant tribes, as they were called, had never settled; that is, essentially, west of the 98th meridian. What tribes really occupied that country the Government did not know, when it made the various treaties, with the Quapaws, in 1818, and with the Choctaws, in 1820 and 1830, nor does it seem to have cared, until later exigencies forced the matter upon its attention.

Important among these was the admission of Texas into the Union in 1845, and the necessity of taking care of the Indians who inhabited its territory. By the agreement of annexation Texas retained all of her public lands,* and the United States had none there for Indian reserves.

By the treaty of Council Springs, made in 1846, with the Indians of Texas and its neighborhood, the Texas Indians acknowledged themselves subject only to the United States, and the latter declared its sole right to regulate

* "Said State * * * shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of the said republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as the State may direct." (5 Stat., 798.)

trade and intercourse with them. Among these Texas Indians were the affiliated bands who are parties to this cause. The gradually extending boundaries of white settlement in Texas so encroached upon them that, in 1854, the Government made an arrangement with the State to set aside a reservation on the Brazos, near the mouth of Clear Fork; here the affiliated bands were colonized, and with such good results that Agent Neighbors, in charge of the Texas Indians, being in Washington, in 1855, suggested to the Indian Department the propriety of leasing from the Choctaws a part of the country around the Wichita mountains for the settlement of the Wichitas and roving prairie Indians.* At this time the Wichitas and some Wacos were living just east of the 98th meridian about midway between the Red and Washita rivers. The rest of the affiliates were in Texas.

This residence of the Wichitas, north of Red River and west of the Cross Timbers, had been continuous for nearly a century, although some members of the tribe had from time to time lived and hunted in Texas, which was separated from their true habitat but by a shallow, fordable stream.

In pursuance of Neighbors' suggestion a lease of the lands between the Red and Canadian rivers and the 98th and 100th meridians was made by the Choctaws and Chickasaws to the Government, as a part of the treaty of 1855, its object being, as therein stated:

> For the permanent settlement of the Wichita and such other tribes of Indians as the Government may desire to locate therein, excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas River, but including those bands whose permanent ranges

*Sen. Ex. Doc. No. 13, 48th Cong., 1st Sess., p. 15.

> are south of the Canadian, or between it and the Arkansas, which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the President for their government. (11 Stat., 611.)

Under this lease the Government, so far as the Choctaws and Chickasaws were concerned, had placed at its disposition a large tract of land, which enabled it to do justice to the Wichitas, by providing them a permanent home, free from molestation, on the lands which they had always occupied, and which the United States, in ignorance of the fact, had ceded to the Choctaws.

The affiliated bands continued to live on the Brazos reservation, constantly improving in condition and peacefully, until 1859, when they were attacked by white desperadoes who conspired to drive them out of the State, and so much trouble was caused that the Government concluded to locate them north of Red River, with the Wichitas.

The leaders of the various tribes were therefore brought together at Fort Arbuckle in the Chickasaw Nation, and it was agreed that the Texas Indians should cross the Red River to live with the Wichitas, and a location for their villages was selected between the Washita and Canadian rivers, on the lands at issue in the present cause. The limits of the present reservation were not laid out, however, until later.

During the civil war the Wichitas and affiliated bands remained loyal to the Government, and were forced to seek refuge in Kansas. They returned to their recent homes, after several years of great privation, in the latter part of 1867, and settled down to the planting of their crops, for they were agricultural in their habits.

The Choctaws and Chickasaws, however, joined forces with the South during the contest, being slaveholders, and when it was terminated it became necessary to readjust their treaty relations with the Government. This was done in 1866, when they *ceded* the so-called Leased District to the United States. (14 Stat., 769.)

In 1867 the greater and southern portion of this district was set apart by agreement to the Kiowa and Comanche Indians (15 Stat., 581), while most of the balance was reserved to the Cheyennes and Arapahoes, by executive order of August 10, 1869.

In 1872 some of the headmen of the Wichita and affiliated bands were brought to Washington, and an agreement was entered into between them and the Commissioner of Indian Affairs, in which the present reservation was laid out and given to the Indian signatories as a home. Congress, however, did not ratify this agreement, although the Executive called it to its attention several times, but it did, by its acts of appropriation, recognize the reservation as in existence.

In 1889 (by the Indian Appropriation Act, approved March 2; Sec. 14) Congress provided for a commission to treat with the Cherokees and other Indians owning or claiming lands lying west of the 96th degree of longitude in the Indian Territory, for the cession of their title, claims or interest therein to the United States. This commission concluded an agreement with the Cheyennes and Arapahoes on the 13th day of November, 1890, which was transmitted to Congress and approved by the Act of March 3, 1891. (26 Stat., 1022.)

In the spring of that year, the commission visited the Wichita and affiliated bands of Indians, and proposed to them that an agreement should be made between them and the United States whereby they should cede their reserva-

tion to the Government, and be each allotted one hundred and sixty acres of land within the reservation limits, and that the Government should pay them $286,000, of which $53,000 should be paid to the Indians equally per capita, upon the approval of the agreement; a like sum within a year be used for the benefit of the Indians and their allotments; and the balance of $180,000 be placed in the Treasury, at 4 per cent interest, which should be used for the benefit of the tribes. The sum proposed was about fifty cents per acre for the surplus lands. But the Indians, in view of the fact that the United States proposed to sell the lands thus to be acquired for $1.25 an acre, protested that the Government should pay them that amount, and not try to make money by the transaction, and they therefore asked $715,000 for the surplus lands. To this, however, the Commission would not agree, and the Indians, desiring to terminate a useless discussion, proposed to the Commission that there should be an agreement executed in which all matters determined upon should be fully set down, and that the question of compensation for the surplus lands should be left to Congress. This being agreed upon, such a paper was executed, the fifth article of which reads as follows:

ARTICLE V.

In addition to the allotments above provided for, and the other benefits to be received under the preceding articles, said Wichita and affiliated bands of Indians claim and insist that further compensation, in money, should be made to them by the United States, for their possessory right in and to the lands above described in excess of so much thereof as may be required for their said allotments. Therefore it is further agreed that the question as to what sum of money, if any, shall be paid to said Indians for such surplus lands shall be submitted to the Con-

> gress of the United States, the decision of Congress thereon to be final and binding upon said Indians; provided, if any sum of money shall be allowed by Congress for surplus lands, it shall be subject to a reduction of each allotment of land that may be taken in excess of one thousand and sixty (1,060) at that price per acre, if any, that may be allowed by Congress.

But a new element had been injected into the controversy by the action of the Choctaws and Chickasaws, who, in 1890, for the first time, put forward the claim involved in this cause—that the cession of 1866 was in trust for the "settlement of friendly Indians," and that the allotment of lands in severalty to these Indians and the sale of the surplus to white men, would determine the trust and entitle the Choctaws and Chickasaws to compensation for such surplus land so fast as taken up. This claim was presented by a bill introduced March 31, 1890 (H. R. No. 12, 106, 51st Cong., 1st Sess.), fortified by memorials from the two nations. (S. Mis. Doc. 107, 51st Cong., 1st Sess., and H. R. Rep. 3147, 51st Cong., 1st Sess., p 16.) Congress recognized this contention in 1891, by appropriating $2,991,450 to the Choctaws and Chickasaws for this alleged interest in the Cheyenne and Arapahoe reservation, at the same time providing for the latter tribes all that their agreement called for. (26 Stat., 1025.)

This same claim applied to the Wichita reservation, and was urged when the agreement made with the Wichita and affiliated bands of Indians came before Congress. This was presented to the Fifty-second Congress, which took no action thereupon, and it laid over until the third session of the Fifty-third Congress. Then the agreement was approved without determining the amount of compensation to be paid for the surplus lands. On the other hand the act provided as follows:

> That as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, which claim is controverted by the United States, jurisdiction be, and is hereby, conferred upon the Court of Claims, to hear and determine the said claim of the Choctaws and Chickasaws, and to render judgment thereon, it being the intention of this Act to allow said Court of Claims jurisdiction, so that the rights, legal and equitable, of the United States, and the Choctaw and Chickasaw nations, and the Wichita and affiliated bands of Indians in the premises shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party in the hearing of said claim.

The act also provided that the compensation for all Indian claims to this land should not exceed $1.25 per acre.

In this way the agreement made between the Cherokee Commission and the Wichita and affiliated bands of Indians, that Congress should determine whether these Indians should receive more than 50 cents per acre for their surplus lands, and if more, how much, was perverted and made the foundation of a suit to determine matters in controversy between the United States and the Choctaw and Chickasaw nations, in which the Wichitas had no concern, and the determination of which adversely to the United States would, wrongfully and inequitably, be a determination adversely to the Wichitas.

The cause having been fully heard by the Court of Claims, that tribunal found in favor of the retention of the allotments by the Wichitas, but held that they had no interest in the surplus lands and were not entitled to compensation therefor, and further, that the cession of 1866 was burdened with a trust for the settlement of Indians, and when said trust should cease by the sale of any of such

lands, that then the Choctaws and Chickasaws should be entitled to receive from the United States the proceeds of such sale. (Rec., 442-3.)

From this decree of the court below all parties have appealed to this court, the United States and the Wichita and affiliated bands of Indians, generally, and the Choctaw and Chickasaw nations from so much thereof as allowed the retention of the allotments by the Wichitas.

ASSIGNMENTS OF ERROR.

The Court of Claims erred:

1. In holding that the Wichita and affiliated bands of Indians are not entitled to all the rights incident to the usual Indian title by occupancy in the lands at issue in this cause, and known as the "Wichita Reservation."

2. In holding that the Wichita and affiliated bands of Indians are not entitled to payment for the surplus lands of the Wichita Reservation after allotments have been made to the individual Indians.

3. In holding that the lands at issue in this cause are held by the United States subject to a trust for the settlement of Indians thereon.

4. In holding that the Choctaw and Chickasaw nations are the owners of the remainder in said lands after satisfying the provisions in favor of the Wichita and affiliated bands of Indians imposed by said trust.

BRIEF OF ARGUMENT.

We will consider the assignments of error in their order.

I.

THE COURT BELOW ERRED IN HOLDING THAT THE WICHITA AND AFFILIATED BANDS OF INDIANS ARE NOT ENTITLED TO ALL THE RIGHTS INCIDENT TO THE USUAL INDIAN TITLE BY OCCUPANCY IN THE LANDS AT ISSUE IN THIS CAUSE, AND KNOWN AS THE WICHITA RESERVATION.

In discussing this assignment of error we shall discuss, first, the rights of the Wichita Indians; second, the rights of the affiliated bands; and third, their joint rights.

a. *The Wichita Indians have occupant title to the lands at issue herein as the possessors thereof before white discovery.*

The lower Mississippi was first explored by the French priest, Marquette, who, in 1674, descended as far as the mouth of the Arkansas, and learned from the Quapaw Indians, living there, that it flowed into the Gulf of Mexico. Two years later than this La Salle returned from Canada to France to obtain royal assent and financial aid for extending these discoveries and bringing them under French sovereignty. With him returned to Canada Henry de Tonti. After several unsuccessful efforts the two, with a party, succeeded in reaching the mouth of the Mississippi in 1682. La Salle went again to France, leaving Tonti in the Illinois country, and returned with a fleet in an endeavor to find the mouth of the river from the sea, an effort in which he was unsuccessful, and which ultimately cost him his life. In 1686 Tonti, having no news of La Salle, descended to the mouth of the river in an effort to find him, in which he failed. On his return he established "Arkansas Post," among the Quapaws, on the Arkansas, a short distance above its mouth. In a work attributed to him, but

the authorship of which he denied,* and which was published in 1697 in Paris, is the first mention of the Wichita Indians. It is printed at page 94 of the record, and relates that Tonti had been requested by the Taensas to go to Natchitoches to settle some tribal disputes, and among the Indians seen there were some chiefs of the "Ouasita" tribe, "who make one people," with the Natchitoches and the Capiches. The work does not say where they lived or how numerous they were. French's Historical Collections of Louisiana (Part 1, page 72), places this date at 1690. (Rec., p. 102.)

During the next few years after Tonti's alleged visit to the Natchitoches, the French built new posts on the Mississippi and Red rivers, and in 1700 Bienville went on a voyage of inspection up the Mississippi as far as the Taensa Indians, living in the present parish of this name in Louisiana. Thence he struck across the intervening swampy country to Natchitoches. The first day out he met the Ouachita tribe of Indians in several canoes loaded with salt. They were on their way to the Taensa village, having abandoned their own on the Ouachita or Black River. At this latter village Bienville found but five cabins and seventy men. (Rec., p. 147.) The Taensa Indians subsequently sought refuge among the Mobiles. We do not

*"Our Illinois live in a very agreeable country. It is, however, not so enchanting as it is represented to us by the author of the new relation on Southern America, which has appeared under the name of M. le Chavalier de Tonti. I have heard M. de Tonti himself say that he disavowed this work, and that he only knew that his name was at its head."

Letter of Father Gabriel de Marèst, from Cascaskias, Nov. 9, 1712; Lettres Edifiantes, Lyons, 1819, Vol. 4, p. 196 (198).

It may be added that the portion ascribed to Tonti, of the "Rélation de la Louisiane," Amsterdam, 1720, is a reprint of the work of 1697 (Denieres decouvèrtes de la Salle dans l'Amérique septentrionale) and is equally spurious.

know what became of the Ouachita immigrants. In 1758, Du Pratz stated that the Ouachitas had been in great part destroyed by the Chickasaws, and that the remnant had retired among the Cadodaquioux. (Rec., p. 98.) Jeffreys, in 1761, reports the same story. (Ibid.) The term "Cadodaquioux" was generic, and includes the Caddos, Natchitoches, and others of the same blood and tongue. But neither Du Pratz nor Jeffreys gives the date of this migration, and it is quite possible that it was concurrent with or immediately subsequent to the movement of 1700. In any event the addition to the Caddos and Natchitoches seems to have been of slight importance, because La Harpe, who was among them in 1719, makes no mention of the Ouachitas in this neighborhood, which he would have done, as he met others farther north, as will be hereafter related. We may safely conclude, therefore, that their near kinship enabled them to become absorbed among the tribes to whom they came.

Continuing the policy of throwing out posts upon the frontier, and especially towards New Spain, in 1719 Bernard de la Harpe established himself near the Caddos at a point on Red River by the present western boundary of Arkansas. He made urgent inquiries among the Caddos about the Indian nations living to the northwest, through whom he wished to reach the Paducahs, amongst whom, it was reported, the Spaniards found great wealth. The Caddos informed him that one hundred leagues to the northwest were powerful nations living on the banks of a great river, but that these countries were unknown to them. (Rec., p. 149.) He sent his colleague, Du Rivage, up the Red River to see what information he could get of these nations, and on his return the latter informed him that seventy leagues away he encountered some nomadic Indians who stated that they knew the "nations situated

towards the north on the banks of a great river" and that they were their allies and that "the principal of these nations was called the Touacara." (Rec., p. 151.) From these nomadic nations, therefore, and not from the Caddos, La Harpe procured his guides, strong evidence that the Touacaras, and the Ouisitas, whom he found with them, were not the same as the Ouachitas who fled for refuge among the Natchitoches or Cadodaquioux, as related by Du Pratz and Jeffreys.

Proceeding several days' journey towards the northwest he came to a large branch of the Arkansas, on the banks of which was the "Touacara" village, extending a league along the river, not far above its mouth. This branch of the Arkansas may have been the Canadian, but other indications point to the Cimarron—though the distinction is unimportant here. The Indians met with were theTouacaras (Towakonie), Toayas and Ouistas (Wichita), Cannouches (Nacaniche), Ardeco (Anadarko), Ascanis (?) Quatoquon (?), Quirasquiris (Wichita), and Houechas (Wacos), practically all Wichitas or close affiliates in blood or language. There were about four thousand resident Indians present and three thousand visitors, among them the Ascanis and Ouisitas, who lived farther to the north. (Rec., p. 156.) Beaurain thinks them the "Mento." (Ib. note.)

To explain their presence in this section of the country we must revert to Pawnee tradition, which asserts that all the Pawnee tribes came from Red River and emigrated north; that the Wichitas started with them, but became dissatisfied and returned. (Rec., p. 219.) The Wichitas also have a tradition that they came from the north before they had horses (Ib., p. 221), and we know of these among the

Pawnees as early as 1682,* and La Harpe tells us that the Indians he met in 1719 were well mounted. (Rec., p. 155.) However unsatisfactory Indian tradition may be, it may here tend to clarify an unimportant matter. Suffice it to say, however, that these Indians were clearly in the course of a general movement from north to south, and not Louisiana and Texas Indians "summering on the Canadian" as counsel for the United States contended in the court below. All of La Harpe's narrative refutes this.

Twenty-three years later (1742), Fabry de la Bruyiere ascended the Arkansas and Canadian to ninety-six degrees west longitude, where he wintered. He reports the remains of a Mento (Wichita) village on the Canadian, abandoned five years before (1737); that before residing there they had lived further up on the Arkansas (Quaere:) where La Harpe found them on the Cimarron, in 1719); but that now (1742) they had moved towards the Caddos. He wasted much time looking for the Mentos, to purchase horses, but failed to find them. From his camp on the Canadian, in longitude ninety-six degrees,† he crossed

*In the original of the extract from La Salle, on page 93 of the Record, the following also appears, being written at the fort of the Illinois, and 200 leagues, therefore falling in the present Nebraska: "They are neighbors and allies of the Gattacka and Manrhoat, who are south of their villages, and who sell them horses which they apparently steal from the Spaniards of New Mexico."

†See Pike's map with correction for error in longitude. This correction is reached by noting that Pike places the mouths of the Arkansaw and Canadian 5¼ degrees of longitude apart instead of the true difference, 4 degrees, while he accurately shows the distance by miles. This shows his meridians too near each other as 4 is to 5¼. He places Fabry's camp at 21¼ degrees (98¼ degrees). Applying this correction, we find the camp at 96 degrees. Further, Fabry did not go far enough west to find the Canadian flowing from the northwest, which it does west of 96½ degrees.

directly to the Red River, twenty leagues distance, and three days above the village of the "Tavakava" and "Kitsaiche," who may, as has been suggested, have been the "Touacara" and "Kichai," though this is improbable, as Fabry visited these villages and in no way connects them with the "Mentos" whom he sought so diligently.

However, in 1759, we find the Wichitas installed in a village on Red River west of longitude ninety-seven degrees, which Mesieres afterwards named San Teodoro. To this point Colonel Parilla was sent by the Spanish authorities, in 1759, to chastise the Northern Indians for an attack made the previous year upon the mission of San Saba. "They advanced against the towns of the Tavoayases, and the region of what was later called San Teodoro," found a force of six thousand Indians of various tribes, who put the Spanish to flight. (Rec., p. 203.)

Between 1759 and 1778, Padre Calahora was sent to these villages and made peace with the inhabitants.*

In 1788, Col. Mesieres marched with an expedition to these Indians to give them assurances of Spanish good will and induce them to move nearer the Spanish settlements. From the Brazos River to the towns of the "Taovaises" on the Red River this expedition passed in sight and to the west of the Cross Timbers (Rec., p. 208), a landmark the position of which in Texas, is well defined, and the western edge of which lies between the 97th and 98th meridians, as shown on the map at the end of this brief. He found the Wichitas living in two villages on Red River, one of 123 houses on the south side and one of 37 houses on the north side. (Ibid.) This residence was the same as that of 1759, because Mesieres demanded and obtained from the inhabitants thereof a brass cannon which they had cap-

* "Doccumentos para la historia ecclesiastica y civil de la Provincia de Texas," 2 vols. MSS. Lib. Cong., Vol. 1, p. 33.

tured from Parilla (Ibid., p. 221), and he named the two villages San Teodoro and San Bernado (Ibid., p. 210), the former, it will be remembered, being the place designated as that near which Parilla's fight took place.

We shall therefore contend that from at least as far back as 1759 the Wichita Indians have resided in the Great Prairie west of the Cross Timbers. For many years they lived in these villages on Red River, which became landmarks of a fixed nature, whose exact location it was not necessary to designate in report or narrative. Later they moved north and west to other villages which were each occupied for a series of years, near which they cultivated their annual crops and to which they returned after each annual hunting trip. As evidence of this we cite the following references:

In the diary of the journey of F. X. Fragoso, from Santa Fé to Natchitoches, under date of July 20, 1788, while he was on the Red River, is the entry "reached the Taguayachi villages." Here he remained six days. These villages were just west of Cross Timbers.*

In 1805, Dr. Sibley was deputed to make a report on Red River and its inhabitants. He informs us that the Wichitas lived in two towns on the south bank of Red River about thirty miles by land and sixty miles by the river above the mouth of the False Washita. He also says they were 800 miles above Natchitoches by river and 340 by land.† (Ib., p. 723.)

Brackenbridge practically reproduces the latter account given by Sibley. (Rec., p. 125.)

In 1807, a work on Louisiana appeared in Paris, under the authorship of one Robin, who was in the province in

*Report of Texas Boundary Commission, H. R. Ex. Doc. No. 21, 50th Cong., 1st sess., p. 49.

†Am. St. Pap. Indian Aff., Vol. I, p. 729.

1803, and his information is therefore concurrent with that of Sibley. He derived it from Dublanc, the French governor of Natchitoches, who seems to have gathered much from Vial, the companion, in 1788, of Fragoso. He (Robin) places the Wichita villages on each bank of Red River, 129 leagues above Natchitoches; as shown at longitude 101 degrees west from Paris on his map at page 109 of the Record.

In 1806, Captain Sparkes started up Red River hoping to go in boats as far as "the country of the Pawnee Piquas," but was turned back by the Spaniards.*

Long, who in 1820, made an expedition in which he intended to come down the Red River from its sources, constantly informed the Indians whom he met that he desired to descend the river "on which the Pawnee Piquas had their permanent residence."†

These are the last references we find to the dual village on Red River west of the Cross Timbers. Major Long, in his map published by Carea and Lea,‡ in 1823, indicates a village of Pawnee Indians, deserted in 1810, at the mouth of the Bluewater River, which is east of the False Washita, at which point we have no historical evidence of any village existing. Melish's map of 1818 shows a Wichita village south of Red River below the mouth of the Blue, but Melish got his information from Darby,§ who, while on pages 28-9 of his work on Louisiana¶ gives the Wichita villages

*Long's "Pittsburg to the Rocky Mountains," London, 1823, Vol. III, p. 166.

†Ibid., p. 29.

‡Reproduced in Record, Greer County Case, Vol. III.

§A geographical description of the United States, etc., John Melish, Phila., 1818, p. 10.

¶Geographical description of the State of Louisiana, Wm. Darby, Phila., 1816.

east of the Blue, on page 51, says the Washita flows into the Red seventy miles above the Blue and a short distance below the Wichita towns.

In a report, made in 1835 (Rec., page 173), to the Commissioner of Indian Affairs, Major Armstrong said that a trading post had been established "at the old Pawnee village on the Red River, about twenty miles above the Cross Timbers, and 100 miles below the Pawnee village visited by Colonel Dodge. The trading house established is about seventy-five miles on a direct line above the mouth of the False Washitam." This would be just east of the 98th meridian, is the most accurate placing of record, and corresponds with the narratives of Mesieres and Fragoso, who are the only two writers who went to these villages and the only two who mention them in connection with the Cross Timbers, a landmark of great importance which Sibley entirely ignores, although probably accurate in his description of the river up to this point.

Sibley's information about upper Red River was derived from Grappe, who claimed knowledge to the Pawnee towns, but says that the country is all prairie except a fringe of woods along the river, thus ignoring the Cross Timbers, which no actual visitor could have done. Dr. Sibley himself never went up the river much above Natchitoches.

It must be remembered that the site of these villages was Spanish territory until 1819, and that the Spaniards were very jealous of encroachments by either the French or Americans, and that exploration was therefore rare. The land was penetrated only by hunters, who have left us no record of their travels; thus what records we have are none too distinct up to the time we have covered.

Admitting, then, that Long's date (1810) is correct as to the desertion of the Red River villages, though his lo-

cation of them is erroneous, we shall attempt to follow the Wichita Indians in their further movements.

A statement, in 1882, of Uts-tuts-kins, a member of the tribe, is to the effect that he was born on Red River, near the mouth of the Little Wichita, and that, when he was a child, the villages on Red River were deserted for one at the mouth of Cache Creek. That while living at the latter place they had smallpox and lost more than half their people.*

That the prairie tribes were visited by this scourge in 1816 we know from the report of Jedidiah Morse, to the Secretary of War, on Indian Affairs, in 1822 (App., p. 259). Uts-tuts-kins tells us further that from the mouth of Cache Creek the tribe moved to the mouth of Otter Creek, where they were visited by soldiers.† This was Dodge's expedition of 1834, which found them somewhat north of Otter Creek and opposite the mouth of Elm Fork, under the western spur of the Wichita mountains, known as "Mount Webster."

In 1832, Albert Pike and a party crossed the Llano Estacado from Taos, New Mexico, and traversed the country southeast of the Wichita Mountains on their way to Fort Smith. They "expected to find a tribe of Indians known to the old hunters and trappers as Pawnee Piks, whom one of our party of five knew and talked much about, living, he and others said, in the vicinity of mountains north of Red River, in a village or villages, and cultivating the soil."‡

In 1830, when the Choctaw treaty was before the Senate, A. P. Choteau, a well-known Indian trader, gave in-

*Senate Executive Document, No. 13, 48th Cong., 1st Sess., p. 36.

†Document 13, supra, p. 36.

‡Document 13, supra, p. 29.

formation in response to an inquiry, that the band of Indians nearest to the Choctaw country was the Pawnis Pick, whose village was about 250 miles from Fort Gibson. (Rec., page 328.) From this latter post in an air line to the Pawnee Pick (or Wichita) village by Mount Webster, visited by Dodge in 1834, the distance is 235 miles.

It has been argued in the court below that the village referred to by Choteau was in Texas, but this is improbable, as in 1834 Texas was a part of Mexico, and Dodge, starting with a military expedition from Fort Gibson for the Pawnee Pick village, certainly did not intend to invade foreign territory.

In the annual report of the Secretary of War for 1834, (pp. 33-4), we are told that because of depredations by prairie tribes, particularly the Comanches and Kiowas, this military expedition (at first under General Leavenworth), was sent to make a display of force to impress the savages with the power of the United States and their own relative weakness. The illness of the commanding general en route devolved the command on Colonel Dodge. The artist Catlin and a young trader named Chadwick, accompanied the expedition. We have two naratives of it, one from the pen of Lieutenant Wheelock, the military recorder, and one in Catlin's own book.*

Dodge found the village of the Pawnee Picks or Toyash "situated immediately under mountains of granite, some 600 feet in height. In front of the village runs the river."† Catlin says that this Pawnee village lay on the bank of Red River (i. e., the North Fork thereof), en-

*Report of the Secretary of War, 1834, p. 70 et seq.; Catlin's "Manners, customs and condition of the North American Indians," New York, 1844, Vol. II, p. 70 et seq., reprinted in Record, pages 214 et seq.

†Report supra, p. 79.

closed by a stupendous range of mountains of reddish granite. Catlin illustrates the village (all of the drawings in this work being from the original oil paintings in the Catlin collection in the National Museum), and while he explains that he was not personally present, being left in a sick camp on the road thither, he loaned his sketch book to the trader, Chadwick, who made the original sketch for him. Captain Scott, in a deposition in this cause (Rec., p. 194), says that this is a picture of the old Wichita village, "at the base of the Wichita Mountains, in what is known as 'Devil's Canyon.'" It is reproduced in the record at page 216, and in this brief at page 27.

The remains of the Devil's Canyon village were unearthed by the Texas Geological survey some years ago, as evidenced by the deposition of W. F. Cummins in the Greer County case in this court, a map attached to which shows that it was on the North Fork of Red River just below and opposite the mouth of Elm Fork. (Rec., U. S. vs. Texas, map following p. 984 and of this record, p. 238.)

Catlin's map attached to his work and republished in the volume on "Indians" (p. 45) of the census of 1880, shows a Wichita village and a Waco village on either side of Red River.

The report of the Texas Boundary Commission* gives a statement of Shot Arm, a Waco chief and an old man in 1858, who said that he was born at a village on North Fork at the foot of Mount Webster. This would indicate a long residence of the Wacos on the south side of the North Fork of Red River at this point.

An intelligent Wichita Indian told Dodge that their old men were born farther south,† which would agree with the

*House Executive Document No. 21, 50th Cong., 1st Sess., pp. 64 to 67.

†Report Sec. War, 1834, p. 87.

statement of Uts-tuts-kins, who, in 1834, was a young man, that the tribe had moved from the Red River village during the lifetime of their then older men.

As hereinafter mentioned, Colonel Dodge took back with him to Fort Gibson delegates of the Pawnee Picks (Wichitas), as well as the Comanches and Kiowas, and they there made arrangements for the treaty executed the following year, which we shall discuss later.

It was evidently fear of the Osages that drove the Wichitas to their stronghold at the western end of the mountains, for when this fear was relieved by the assurances of the Osages, who accompanied Dodge, and also those received at Fort Gibson, they moved farther east, near Mount Scott, where Fort Sill now is. Mr. Mooney testified in the Greer County case that he had been told by old Indians that this movement took place in 1834, "the year after the stars fell." (Rec., p. 137.)

They continued to reside at Mount Scott until 1850. Niastor, a Wichita Indian, was born there in 1837. (Rec. 221.) General Bee, of the Texas forces, visited them there in 1843 (Rec., p. 234); and Marcy, in 1852 found the remains of their villages at this spot, and was told they had been deserted two years before.*

From the Mount Scott (Fort Sill) village they removed "because it was so situated as to be easily approached under cover by their enemies"†—the roving tribes—"and because it was at times surrounded by deep water and often overflowed." This caused excessive malaria, which decimated the tribe.‡ They went to a point just west of Cross Timbers at Rush Springs, and here Marcy found them in

*Explorations of the Red River of Louisiana, in 1852, Randolph B. Marcy, U. S. A., p. 72.

†Albert Pike, in Document 13, supra, p. 29.

‡Rector, in Document 13, supra, p. 20.

1852,* and here they remained until 1858, when an incursion of the Comanches drove them to the protection of Fort Arbuckle, a short distance to the east.† They remained there till the following year, when they were taken in hand by the Government, joined by the Caddos and others of the affiliated bands, and placed around the agency constructed on the Washita River within the limits of the reservation at issue in this cause.

It will be well, at this point, to examine the habits of the Wichitas from our first knowledge of them to the present day. These habits are shown to be non-nomadic by their permanent habitations and their devotion to agriculture.

La Harpe (1719) says of the village on the Cimarron thus (Rec., pp. 155 and 158):

> These villages make but one, the houses being joined to each other running from east to west, for a league, in the most beautiful situation that one could see. * * *
>
> These peoples quit their village in the month of October to go on their hunt, whence they only return in the month of March to sow their corn, beans, and pumpkins, upon which they feed in the summer. * *
>
> The savages here cultivate a prodigious quantity of tobacco, which they press into small cakes after having powdered it. * * *
>
> Their cabins are raised, the greater part built of straw and reeds, coated with earth, forming a dome; above the door each chief of the nation has his arms painted on a piece of round leather; they represent the sun, the moon, and the stars, and different animals.

Mesieres (1778) tells us of the dual village on Red River near the Cross Timbers (Rec., p. 208):

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*Exploration of Red River, p. 77.

†Indian Report, 1859, pp. 216-7.

> The Taovaise Nation is divided into two villages, one situated north of the "Rio Bermejo" or of Natchitoches, and the other opposite. The former village is composed of thirty-seven houses, and the latter of 123 houses. Every house contains from ten to twelve beds, from which it is computed that the number of men, including the youths, reaches beyond 800. The number of women and children of both sexes is very large.
>
> Their foresight in supplying themselves with food is creditable to their industry. There is no house where there are not four or five bulls and vessels full of corn, containing ordinarily four and and a half "fanangas," with a great quantity of beans and pumpkins, the latter being kept one year to be curiously adorned, like mats. They raise also melons and tobacco in abundance.

Sibley, in 1803, reports (Am. State Pap. Ind. Aff., Vol. I, p. 723):

> They have many horses and mules. They raise more corn, pumpkins, beans, and tobacco than they want for their own consumption; the surplus they exchange with the Hietans for buffalo rugs, horses, and mules; the pumpkins they cut round in their threads, and when it is in a state of dryness that it is so tough it will not break, but bend, they plait and work it into large mats, in which state they sell it to the Hietans, who, as they travel, cut off and eat it as they want it. Their tobacco they manufacture and cut as fine as tea, which is put into leather bags of a certain size, and is likewise an article of trade.

Of the village on the North Fork (1834), Dodge's historian says (Report of Sec'y of War, 1834, p. 78):

> Passed their cornfields on our way to the town; these fields are well cultivated, neatly enclosed and

very extensive, reaching, in some instances, several miles; we saw also here melons of different kinds, squashes, &c.

We counted near 200 grass lodges; these are made of poles fixed firmly in the earth, fastened together at the top, and thatched substantially with prairie grass and stalks from their cornfields; many of these lodges are thirty feet high and forty feet in diameter; in the center of the floor a shallow excavation serves as a fireplace; around the sides are comfortable berths large enough to accommodate two persons each.

From conversation with one of the Indians we learn * * * that Comanches exchange buffalo meat for agricultural products of the Toyash.

(P. 87.)

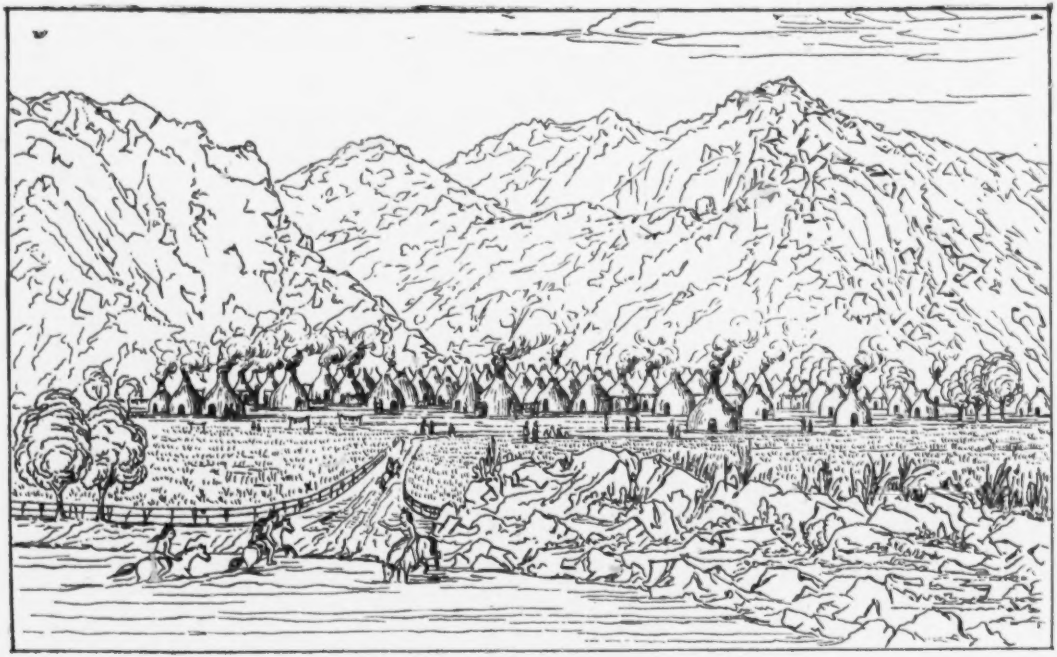
Of the same village Catlin (1834) says (Rec., p. 214):

We found here a very numerous village, containing some five or six hundred wigwams, all made of long prairie grass, thatched over poles which are fastened in the ground and bent in at the top; giving to them, in distance, the appearance of straw beehives, as in plate 173 (see opposite page), which is an accurate view of it, showing the Red River in the front and the "mountains of rock" behind it.

To our very great surprise we found these people cultivating extensive fields of corn (maize), pumpkins, melons, beans, and squashes; so with these aids, and an abundant supply of buffalo meat, they may be said to be living very well.

Marcy (1852) thus speaks of the village on Rush Creek (Marcy's "Exploration of the Red River of Louisiana," p. 77):

There are two villages here occupied by the Wichitas and Wacos, respectively; they are situated in the rich and fertile valley of the creek, where



WICHITA VILLAGE, 1834, AFTER CATLIN.

they have cultivated corn, pumpkins, beans, peas, and melons. * * *

The village of the Wichitas has forty-two lodges, each containing two families of about ten persons. These lodges are arranged by erecting a framework of poles placed in a circle on the ground, with the tops united in an oval form, and bound together with numerous withes or wattles, the whole nicely thatched with grass, and when completed it makes a very commodious and comfortable domicile. The interior arrangements are such that every person has a bunk, raised from the ground and covered with buffalo hides, forming a couch which is far from being uncomfortable. When seated around their fires in the center of the lodges, they have an air of domestic happiness about them which I did not expect to find.

The lodges are about twenty-five feet in diameter at the base, twenty feet high, and in the distance have very much the appearance of a group of haystacks. With the exception of a few families that live on the Canadian, the whole Wichita nation is concentrated at this place; their numbers do not exceed five hundred souls.

The following appears in the report of the Commissioner of Indian Affairs for 1869:

(P. 85.)—About 3 o'clock we left the agency grounds and rode over to the Wichita village, about three miles northeast up the Eureka Valley. What a strange spectacle met the eye—"A level plain, dotted with huge haystacks," exclaimed friend R—. But how symmetrical and beautiful—thirty to forty feet high, and as regularly built as though they were laid out by rules of geometry.

As we neared them we soon discovered that our haystacks were the houses of the Wichitas, built of straw, thatched, layer upon layer, with stout bindings of willow saplings, tied together with buffalo

hides or stripped hickory. Out of the top the smoke issued, and around an oval opening, or door, at the side a crowd of naked men and women hovered in questioning solicitude at our coming.

On one side of the door a porch is erected, running along some twenty feet or more, with coverings of small branches for shade, and a raised floor of hickory poles, two feet from the ground, for a summer afternoon's siesta.

The men are good-natured and the women cheerful, though more naked than any we had seen. Their dwellings are commodious, clean, and comfortable. In the center is the fire, small and economical, as the Indian always makes it. Around the sides the beds are fitted up on bunks raised three feet from the floor, built of split boards tied together with cords made from buffalo hide. The floor is hard packed earth, clean as it well can be. The builders have wisely and unconsciously made the best of their circumstances. The grass, willow saplings, buffalo hides, etc., are all found close at hand; and out of these, which would have been to us impracticable materials for house building, the Wichitas have constructed most convenient habitations.

Watermelon patches, with neat fences, are near at hand. The fields show marks of earnest cultivation, and the people, though evidently very, very poor, are yet glad hearted and hopeful. (Report of Special Commissioner Colyer.)

(Ib., p. 383.) These Indians have, from time immemorial, been accustomed to raising small lots of corn. They still continue it, and this year have many of them on the banks of the Wichita River, which they have planted and cultivated without any assistance from the whites. * * * The Wichitas, Caddos, and affiliated bands claim to be the prior occupants of this district of country, and that they have never ceded it to the United States or received any compensation therefor; and there is nothing in this office to show that there has been

> any part of the country reserved to them. They are, however, occupying both sides of the Wichita (or Washita) River. I would urge the attention of Congress to the claim of the Wichita Indians. (Report of Agent.)

Indians of the habits of the Wichitas, as here shown, are certainly as sedentary as any of the tribes known to the whites. Their villages were, as we have seen, so constructed as to make it impracticable, nay, almost impossible, to permit of their frequent change. The tribe removed but short distances at each abandonment of a residence. Considering them in 1719 at the mouth of the Cimarron, they moved some seventy miles to the Canadian, which they left in 1738. Then as much farther to the Red River, and again about one hundred miles to the mouth of the Little Wichita, or thereabouts. Here they remained for over fifty years. Thence to Cache Creek was but thirty to forty miles; seventy more to Mount Webster; fifty back to Mount Scott, and finally thirty miles to Rush Springs. Within a circle having a radius of fifty-five miles they resided for a century.

We are in the habit of considering the Cherokees as a sedentary race, but even that tribe changed its villages from time to time, using them as centers of habitation around which they cultivated their crops, and from which they moved as the exigencies of tillage or tribal defense required. The Wichitas were as non-nomadic as they, and they are entitled to the same occupant rights, acquired in the same manner.

We claim, as we have said, that the Wichitas have such rights through being "occupants by virtue of a discovery made before the memory of man," as this court said of the Cherokees in Worcester vs. Georgia; and these rights entitled them to the whole of "the Great Prairie west of the

Cross Timbers, to the western limits of the United States," in the language of the treaty of 1835. (7 Stat., 474.) These western limits were then at the 100th meridian, and the Cross Timbers lay just to the east of the 98th.

We have three records of the size of these villages in the Great Prairie, as stated above. In 1778 (Mesieres) they contained eight hundred men and youths, and a large number of women and children, living in 160 wigwams, or grass houses. (Rec., 208.) Smallpox intervened at Cache Creek.* In 1834 (Dodge) there were two hundred lodges.† Malaria, at Mount Scott, attacked them fiercely.‡ In 1852 (Marcy) there were but 42 lodges, containing 500 persons.§ It was a small tribe, but compact, keeping together in one town.

Its paucity of numbers does not preclude its having property rights. If the whole leased district were accorded to the Wichita and affiliated bands of Indians, now numbering about one thousand, each would have 7,800 acres, preposterous, if you will, from the white man's view; but General Clark, in making the treaty of 1818 with the Quapaws, thought he was getting 30,000,000 acres (Am. St. Pap. Ind. Af., Vol. 2, p. 179), which was nearly 30,000 acres for each of the 1060 members of that tribe. (Rec., p. 159.) Why should not the Wichitas have acquired as great territorial rights as the Quapaws, of equal numbers?

As already stated, Colonel Dodge, from his visit to the North Fork of Red River, in the summer of 1834, returned to Fort Gibson, accompanied by delegates of the Comanche, Kiowa, and Wichita tribes. Here they were met by members of the emigrant tribes, the Choctaws and others, and,

*Executive Document 13, p. 36.

†Rep. 1834, supra, p. 79.

‡Executive Document 13, p. 20.

§Explorations of Red River, p. 77.

with representatives of the United States, held council "where, for several days in succession, free vent was given to the feelings of men civilized, half civilized, and wild; where the three stages of men were freely asserting their rights, their happiness, and friendship for each other. The vain orations of the half-polished (and half-breed) Cherokees and Choctaws, with all their finery and art, found their match in the brief and jarring gutterals of the wild and naked man."*

Unfortunately we have no record of the proceedings of this council, or of that which took place at Camp Holmes in the following summer (August, 1835). This camp was on the site of the subsequently located "Choteau's Trading House," on the north bank of the Candian, near the present town of Purcell, just west of Cross Timbers.

The direct result of the last named council, and the indirect result of the first, was the treaty to be found in the Seventh Statutes at Large, at page 474. It is between the United States and the Comanche and Wichita nations, and their associated bands or tribes (as stated in the title, although no associates executed the document) and between these nations and the Cherokee, Muskogee, Choctaw, Osage, Seneca, and Quapaw nations. It is as follows:

> Article 1. There shall be perpetual peace and friendship between all the citizens of the United States of America, and all the individuals composing the Comanche and Witchetaw nations and their associated bands or tribes of Indians, and between these nations or tribes and the Cherokee, Muscogee, Choctaw, Osage, Seneca, and Quapaw nations or tribes of Indians.
>
> Article 2. Every injury or act of hostility by

*Catlin's "Manners and Customs," supra, Vol. II, p. 82; Record, p. 215.

one or either of the contracting parties on the other, shall be mutually forgiven and forever forgot.

Article 3. There shall be a free and friendly intercourse between all the contracting parties hereto, and it is distinctly understood and agreed by the Comanche and Witchetaw nations and their associated bands or tribes of Indians, that the citizens of the United States are freely permitted to pass and repass through their settlements or hunting grounds without molestation or injury on their way to any of the provinces of the Republic of Mexico, or returning therefrom, and that each of the nations or tribes named in this article, further agree to pay the full value for any injury their people may do to the goods or property of the citizens of the United States taken or destroyed, when peaceably passing through the country they inhabit, or hunt in, or elsewhere. And the United States hereby guaranty to any Indian or Indians of either the Comanche or Witchetaw nations, and their associated bands or tribes of Indians, a full indemnification for any horses or other property which may have been stolen from them; *Provided*, that the property so stolen can not be recovered, and that sufficient proof is produced that it was actually stolen by a citizen of the United States, and within the limits thereof.

Article 4. It is understood and agreed by all the nations or tribes of Indians, parties to this treaty, that each and all of the said nations or tribes have free permission to hunt and trap in the Great Prairie west of the Cross Timber, to the western limits of the United States.

Article 5. The Comanche and Witchetaw nations and their associated bands or tribes of Indians, severally agree and bind themselves to pay full value for any injury their people may do to the goods or other property of such traders as the President of the United States may place near to their settlements or hunting ground for the purpose of

trading with them.

Article 6. The Comanche and Witchetaw nations and their associated bands or tribes of Indians, agree, that, in the event of any of the red people belonging to the nations or tribes residing south of the Missouri River and west of the State of Missouri, not parties to this treaty, should visit their own towns or be found on their hunting grounds, that they will treat them with kindness and friendship and do no injury to them in any way whatever.

Article 7. Should any difficulty hereafter unfortunately arise between any of the nations or tribes of Indians parties hereunto, in consequence of murder, the stealing of horses, cattle, or other cause, it is agreed that the other tribes shall interpose their good offices to remove such difficulties, and also that the Government of the United States may take such measures as they may deem proper to effect the same object, and see that full justice is done to the injured party.

Article 8. It is agreed by the Commissioners of the United States, that in consequence of the Comanche and Witchetaw nations and their associated bands or tribes of Indians having freely and willingly entered into this treaty, and it being the first that they have made with the United States or any of the contracting parties, that they shall receive presents immediately after signing, as a donation from the United States; nothing being asked from these nations or tribes in return, except to remain at peace with the parties hereto, which their own good and that of their posterity require.

Article 9. The Comanche and Witchetaw nations and their associated bands or tribes of Indians, agree, that their entering into this treaty shall in no respect interrupt their friendly relations with the Republic of Mexico, where they all frequently hunt and the Comanche nation principally inhabit; and it is distinctly understood that the Government of the United States desire that perfect peace shall

exist between the nations or tribes named in this article, the said republic.

Article 10. This treaty shall be obligatory on the nations or tribes parties hereto from and after the date hereof, and on the United States from and after its ratification by the Government thereof.

First, therefore, the treaty prescribes peace between all the parties and forgiveness for past offenses. It provides (Art. 3) that citizens of the United States shall have free passage through "the settlements and hunting grounds" of the Comanches and Wichitas *on their way to the Republic of Mexico.* It therefore declares, beyond reasonable dispute, that these settlements and hunting grounds were *on the way* to Mexico and not *in* that republic, but within the limits of the United States, which did not then include Texas.

It further provides (Art. 4), that all the Indian signatories should "have free permission to hunt and trap in the Great Prairie west of the Cross Timber to the western limits of the United States." It was in this prairie that Dodge, in 1834, found the Wichita village, and bands of hunting Comanches and Kiowas, and in this prairie, though contained in the cession to the Choctaws, the latter had made no settlements. It was in this prairie, too, that the Wichitas had one of their villages in 1778, when visited by Mesierres; here also that General Bee visited their village in 1843, the remains of which Marcy found, in 1852; and in the same prairie that Marcy found their new village in the latter year. The grantors under this fourth article of the treaty were, therefore, the Comanches and Wichitas, and they gave permission to the eastern Indians to hunt in their domain. It does not appear on the record, nor have we been able to find evidence of the fact (if it be one) that the Comanches and Wichitas were told or had knowledge of the extent of the Choctaw cession.

Further (Art. 5), the Comanches and Wichitas agreed to pay for injuries to American traders occurring near their settlements or in their hunting grounds; obviously relating to the same "great prairie." It is not to be supposed that the Choctaws and other Eastern tribes were incapable of inflicting such injuries, but still they enter into no such obligation to compensate therefor. The discrimination was obviously made because the Wichitas and Comanches possessed the settlements and hunting grounds and not the Choctaws and others, who were intruders thereupon, if actually there at all.

Again it is the Comanches and Wichitas, and not the Choctaws and others, who agree (Art. 6) to kindly treat other Northern tribes, not parties to the treaty, who may be found on their hunting grounds, that is, the "great prairie." This again because these northern Indians were liable to come in contact with only Comanches and Wichitas in this locality.

And finally (Art. 9), the execution of the treaty was not to injure the friendly relations of the Comanche and Wichita nations with the Republic of Mexico, "where they all frequently hunt and the Comanche nation principally inhabit." Can anything short of positive averments to that effect, in the treaty itself, more conclusively show that the Wichita Indians in 1835 resided within the limits of the United States, although they crossed the frontier on their hunting trips, while the Comanches principally inhabited Mexico, although their hunting grounds extended into the United States.

It is well that we should here discuss the reports of the various agents and officials of the Government, as to the habitat of the Wichita Indians around the Wichita Mountains, and in the Great Prairie north of Red river and west of the Cross Timbers, the greater portion of which has

since become known and is known in this cause as the "Leased District." They are here especially important as fortifying our claim that the treaty of 1835 was a virtual acknowledgment by the United States of the Wichita residence in this region, amounting to a legal occupancy.

Prior to the making of the treaty Colonel Dodge had said to the Indians assembled at the village at Mount Webster:

> You say that the Indians over Red River are your enemies, they kill you when you meet; these are Mexican Indians, and do not make treaties with our Great Father, the President.*

And yet, as a result of this conference, the "Great Father, the President," on behalf of the United States, and acting through Commissioners Stokes and Arbuckle, did, the following year, make the treaty with the Wichita Indians which we have already discussed. Hence they were not Mexican (Texan) Indians.

In forwarding this treaty to the Government these commissioners used, in part, the following language. (Rec., p. 176.):

> As some confusion has existed, both here and elsewhere, with respect to the names of the nations of the Great Western Prairie, who reside or hunt to the west and southwest of this post (Fort Gibson), we deem it proper to inform you that there are but three distinct nations of these Indians, with the exception of one or two small tribes who reside far south of Red River, in the Province of Texas. These three nations are the Comanches, who are the most numerous, but who have no fixed or permanent villages, and follow the herds of buffalo with their movable lodges, and are sometimes north

*Rep. Sec. War, 1834, p. 84.

> and at other times south of Red River. The Wichitas consist of several bands, some residing north and some south of Red River. Those residing north of Red River are the Toweeash and Wachos. They have fixed villages, and raise some corn and vegetables. The Kioways have no fixed villages, but wander from the Cross Timber on the Arkansas, Canadian and Red River, to the Rocky Mountains, and are sometimes, but not often, south of Red River.

After this treaty went into effect some dissatisfaction arose among the wild tribes, parties to it, especially the Comanches, and a special agent was sent in 1837 to confer with them, and in the instructions given to him the Commissioner of Indian Affairs referred to the treaty as made between "indigenous and emigrant Indians and the United States." The former were the Wichitas and Comanches, and the latter the Choctaws and others. The agent was also instructed to be vigilant to detect "the earliest indications of a purpose on their (the indigenous Indians') part to form an alliance with the Indians in Texas and Mexico."*

Evidently the Wichitas were then officially regarded as inhabiting the United States and subject to its jurisdiction at a time years before the annexation of Texas.

It was not, however, seriously contended by our opponents below that the Wichita residence was other than we have described it, just prior to 1836, but the claimants below did contend that about that time the Wichitas removed to Texas, and there remained for fifteen or sixteen years, and thus abandoned the country, and could not thereafter acquire occupant rights.

The court below seems to have been so much impressed with this contention of the claimants that the Wichitas were Texas Indians and had no right of occupancy north

*Report Commissioner of Indian Affairs, 1837, p. 558.

of Red river that we venture to point out what seem to us the fallacies of its reasoning, taking up the opinion at page 371 of the Record.

> Catlin's North American Indians shows the Pawnee Picts and Wacos on the Red River about latitude 35° 10′ N., longitude 103° 15′ W. This would be in the "panhandle" of Texas.

This map is wrong as to longitude. It shows Fort Smith at 96° when it should be at 94½°, while Santa Fé is shown at 107° when it should be at 106°. If these well known points are more than a degree out of longitude, how can we expect a true location of two Indian villages out on the prairie, reached by a circuitous route by the Dodge expedition, of which Catlin was a member. Capt Scott's identification (Rec., p. 194) of Catlin's picture (Ib., p. 216) as being of a village at Devil's Canyon, which is almost in the center of the so-called "Leased District," should dispose of this contention.

The court further says:

> General Bee found a Wichita village on Cache Creek about thirty miles from its mouth. It does not appear how many of the tribe lived upon Cache Creek, nor how long they had lived there. The proofs are numerous that the residence of the Wichitas was in Texas between 1836 and 1850. (Rec., 371.)

From Bee no proof of size or length of residence appears, it is true; but the proof still exists as to the latter. Mooney says (Rec., p. 137) that the Wichitas moved in 1834 from the Devil's Canyon village to that near Fort Sill, the village visited by Bee. Niastor, a Wichita Indian, was born there in 1837. (Rec., p. 222.) Marcy visited the spot in 1852 and said that the village had been deserted two years

before.* So we have absolute evidence of residence at this point in 1834, 1837, 1843, and 1850. This is exactly the period during which the court below finds numerous proofs of residence in Texas. (Rec., 371.) Let us examine them.

First, there are several maps showing a Towiash village at various points, in the years 1836 to 1849. There seems to be no doubt (from these maps) that such a village existed, but we have absolutely no account of it from any actual visitor; nor does its mere existence preclude a residence by a majority of the tribe at Fort Sill.

We again quote from the opinion below:

> A Wichita chief called Ta-wak-onee Jim testified that he was born in 1843 in Texas, and came to Fort Sill when about ten years old, and that the Wichitas used to live at the To-wak-onee Hills in Texas. (Rec., 372.)

It is a well known fact that the Tawakonees, of which Jim is a member, form a clan of Wichita blood, the same as the Touacaras of La Harpe, who lived in Texas at least as far back as 1778, and then on to 1859, when they were brought to the Territory. The conclusion that the Wichitas lived in Texas is here derived from a garbled extract of Jim's statement as found in the record in this cause. It omits the salient clause in the original deposition, which relieves the situation of all doubt, and which will be found in the record in the Greer County case (p. 634), which says: "The Wichitas were at the foot of the hill, Medicine Lodge, about a mile and a half from where Fort Sill is now located."

Speaking of the treaty of 1846 (that of Council Springs) the court below says:

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* "Exploration of Red River," p. 72.

> This treaty was made in Texas with Texas tribes, because of the sovereignty which the United States had acquired over them by annexation. (Rec., 372.)

In 1843 a movement was set on foot by the Indian Department to make a new treaty with the Indians of the "Southwestern Prairies."* Texas was not yet a part of the Union, but an independent republic. Pursuant of this movement, which did not immediately mature, instructions were issued to commissioners, on September 12, 1845, after the annexation, to effect an understanding with the Comanche and other wild tribes of Indians of the southwestern prairies. This was effected the following year by a treaty,† which the court below says was with Texas tribes, although there is no warrant for this conclusion in the treaty itself. In forwarding this treaty through official channels to the Senate, it is variously referred to as follows:

By the treaty commissioners:

> A treaty of peace and friendship made and concluded on the 15th day of May last at Council Springs, State of Texas, on the Brazos River, with the various tribes of Indians inhabiting the western prairies on the borders of Texas, to wit: The Comanches, Ionies, Anadacas, Caddoes, Lepans, Tonkawas, Keechies, Tahwahcarros, Wichitas, and Wacoes.‡

By the Commissioner of Indian Affairs:

> A treaty, etc., with the Comanche and other wild tribes of Indians of Texas and the southwestern prairies.§

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*Confidential Ex. Doc. No. 13, 29th Cong., 1st sess., p. 13.

†9 Stat. L., 844.

‡Confidential Doc. 13, supra, p. 9.

§Ib., p. 8.

By the Secretary of War and the President:

> A treaty, etc., with the Comanche and other tribes and bands of Indians of Texas and the south-western prairies.*

That we may be left in no doubt, however, of the portion inhabited by the Wichitas, the following from the report of the commissioners who negotiated the 1846 treaty, giving the habitat of the various signatories, is important:

> The tribes with whom we were in negotiation at Comanche Peak, and with whom we concluded a treaty at Council Springs on the 16th of May, a copy of which has been sent to the department, are as follows:
>
> * * * * * * * *
>
> The other little bands, viz: Witch-a-taws, Towzash, To-noc-co-nies, Keechies, and Wacoes, are inconsiderable in number and degenerate in character. They do not exceed one hundred and fifty souls each. They plant corn and pumpkins for their own use and raise some for trade. They live in villages, and have temporary huts made of skins and straw.
>
> The Witch-a-taws and Towzash live on the north side of Red River, in the Witchitaw mountains. The other tribes reside upon the Brazos, about one hundred miles above the Comanche Peak. They informed us that they had lost their numbers by smallpox and repeated wars with the Texans. They have the reputation of being the best horse thieves in the prairie.†

The Court of Claims says further in this regard:

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*Ib., p. 7.

†H. R. Doc. No. 76; 29th Cong., 2d sess., pp. 6-7.

> In 1847 a special Indian agent for Texas went to the village of the Wacos, Wichitas, Tah-wah-caroos, and Keechies and compelled the return of stolen horses. This village was situated on the Wichita River, and the six tribes met there were reported as making corn to considerable extent. If this statement be true the main Wichita village was on the Wichita River (i. e., the Big Wichita, where the village is shown on De Cordova's map), while another village was near the Brazos. If the Wichitas lived on Cache Creek, near Mount Scott, at that time, it could only have been but a few families. (Rec., 372.)

It is true that Agent Neighbors does refer to the village on the Big Wichita as the main Wichita village, in 1847, but he undoubtedly meant the main settlement of these Indians in Texas, where they were intruders from north of Red River, and had a temporary residence only, as will appear from contemporaneous reports.

The opinion continues:

> In 1849, the Chickasaw agent reported the Wichitas and other Texas Indians in the western part of the Chickasaw country. Catlett's report of that year stated, however, that they lived upon the Brazos head of the Trinity and upon the Big Wichita. Agent Neighbors, to all intents and purposes, confirms this report, and consequently before they could have lived in the Chickasaw country. (Rec., 373.)

This exerpt affords us an excellent opportunity to point out two things: First, how untrustworthy was the evidence furnished by the claimants, and, second, how it misled the court. Catlett's report has a comma after the word Brazos, in the portion quoted, while it is omitted in the quotation in the claimant's brief below (Chickasaw brief,

p. 91); the court also omits the comma, showing that it did not examine the original, which is to be found in the report of the Indian Commissioner for 1849, at page 30, et seq.; and which, if examined, would prove quite a different fact from that which the claimants' exerpt would indicate. Captain Catlett's report is so important on this question of residence that we print the germain portion quite fully in a note. He had long been in the service as quartermaster on Texas frontier, and that he knew whereof he spoke is evidenced by the report of Commissioner Medill, on page 39 of the same document.*

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*(The small caps are italics in original; the italics are ours).—"I shall confine my statements to those Indians living and hunting south of Red River, and will divide them into two classes, the first comprising those who BELONG PROPERLY TO TEXAS, and the second those who have migrated from tribes residing beyond the limits of Texas, and have intruded themselves upon her soil.

"The several bands of Comanches, the Tonkaways, the Lipans, Wacoes, and Towacanies, and about fifty Karankaways, who live among the Mexican settlements on the Rio Grande, and seventy-five or one hundred Bedies, who live in the settlements around Houston and the lower Trinity, are the only aborigines of the country, and compose the FIRST CLASS.

"The second class are those who have intruded themselves upon the soil of Texas. They are much more formidable, and have done more damage, and given more trouble and alarm, than those PROPERLY BELONGING TO TEXAS. They are the Wichitas, Towash, Kechies, Caddoes, Anna-darkoes, Ionies, *Delawares*, Shawnees, Baluxies, Cooshates, Creeks, Cherokees, Iowanes, Alabamas, Unataguas, Quapaws, Tohookatokies, Seminoles, Osages, Chickasaws, and Choctaws, and occasionally a few Pottawatomies, Ottawas, Pawnees, Mahas, Arapahoes, Cheyennes, and other tribes living in the far northwest. The aggregate number of these tribes in Texas will probably average about 7,000 or 8,000 souls. They are constantly going to and from their own homes, and at times their numbers in Texas will probably amount to 12,000 souls, and is, I believe, hardly ever less than 7,000.

* * * * * *

"I now proceed to show the position, etc., of those people in

The only conclusion to be drawn from this authoritative report is that the Wichitas in Texas were intruders there, constantly going, with other northern Indians, to and from their real homes north of Red River; and further that, in 1849, the Wichita villages had "for years past" been situated in the Wichita Mountains.

The report of the Chickasaw agent,* referred to by the court below, that in 1849 the Wichitas lived in the western part of the Chickasaw District, is, therefore, correct; as that district from 1837 to 1855 extended to the 100th meridian and embraced the Wichita Mountains.†

Further the court below says in its opinion:

Texas. The Wichitas, Towash, and Kechies, numbering in all about six hundred souls, live near together upon the Brazos, head of the Trinity, and upon the Big Wichita (the main southern branch of Red River). They are about 180 miles above the upper white settlements on the last-named river, and about 200 miles above the settlements upon the Brazos. *They are all of the Wichita Tribe, and their proper homes are in the Wichita Mountains, north of Red River, and within the United States Indian Territory.*

* * * * * *

"It may be asked, how those Indians, if once out of the country, are to be kept out. I answer, by the establishment of a military post near Red River, on the south side, at the upper edge of the upper cross timbers, and about 100 miles above Fort Wachita. The post would be near the great crossing on Red River, used by these bands in passing from the south of Red River to their homes, *and to the Wichita and Kiechie villages, situated in the Wichita Mountains, some 80 miles north of Red River.* Those villages have *for years past* been the rendezvous for all the predatory and thieving bands that have so much plundered and disturbed the Texas frontier, to which they resort for the purpose of exchanging and disposing of a portion of their plunder to the Indians living farther to the north and east." (Indian Report, 1849, p. 30 et seq.)

*Indian Report, 1849, p. 191.

†Choctaw-Chickasaw treaty, 1837. (11 Stat., p. 573.)

> On July 19, 1852, Marcy passed the deserted Wichita village on Cache Creek, and three days later he came upon the new Waco and Wichita villages on Rush Creek, built after the removal from Texas reported by the agent in 1851. Marcy was probably ignorant of the fact that the Wichitas, or most of them, had been living in Texas. His report must be taken for what it is worth. His opinion was that their claim to the country around the Wichita Mountains was guaranteed to them by right of occupancy and possession. We attach no value to his opinion. (Rec., p. 373.)

This opinion of the court is expressed with entire disregard of the fact that this was the second report that Marcy had made, the first being in connection with a trip from Santa Fé home through Texas in 1849, the route of which is shown on the map in the record, at page 248.

This report, in part, is as follows:

> The Rio Brazos runs through a country much frequented by all Southern prairie tribes of Indians east of the Pecos. Upon the south and west side range that numerous and powerful tribe, the Comanches; also the Kioways, Lepans, and Tonkeways. Upon the north and east side are found the Wichitas, Caddos, Wacos, and those other small tribes which inhabit the country between the Washita and Red River. The Brazos forms the boundary between the Comanches and the tribes living east of it, and the latter are not suffered by the Comanches to hunt upon the west side of this river.*

Three years later (1852) on his return from the sources of Red River, Marcy found the remains of Wichita villages at Mount Scott, and their actual villages at Rush Springs, and reported as follows (the italics are ours):

*Sen. Ex. Doc., No. 64, 31st Cong., 1st sess., pp. 217, 219.

The particular district embracing the Wichita Mountains has for many years been occupied and (*with much justice, it seems to me*) claimed by the Wichita Indians, who have a tradition that their original progenitor issued from the rocks of these mountains, and that the Great Spirit gave him and his posterity the country in the vicinity for a heritage, and here they continued to live and plant corn for a long time.

Notwithstanding this claim of the Wichitas, *which the right of occupancy and possession has guaranteed to them*, yet the whole of this beautiful country, as far as the 100th degree of west longitude, is included in the grant made by the United States to the Choctaws, who thereby possess the greater part of the lands upon the upper Red River.*

And subsequently he says under date of July 19, 1852:

We passed two old Indian villages, which John Bull, one of the hunters, says were formerly occupied by the Wichitas and Kechies; several of the lodges were still standing, with their old cornfields nearby.

Our camp is upon the creek about a mile above the last village occupied by the Wichitas before they left the mountains. *Here they lived and planted corn for several years*, and they have exhibited much taste and judgment in the selection of the site of their town. It is situated at the eastern extremity of the mountains, upon a plateau directly along the south bank of the creek, and elevated about a hundred feet above it, commanding an extensive view of the country towards the North, South, and East. * * *

This must have been a favorite spot with the Indians; and why they abandoned it I can not imagine, unless it was through fear of the Coman-

*Marcy's Exploration, etc., p. 69.

> ches. *It is nearly two years since they removed from here*, and their lodge frames are still standing, with the scaffolds upon which they dried their corn. (Explorations, etc., p. 72.)

The first report (1849) was made from the Texas point of view, and entirely accords with Catlett's of the previous year. Marcy's observations, in 1852, but strengthened his previous opinion in favor of Wichita right of occupancy north of Red River. He spoke with evidence of recent occupation before him.

The agent's report mentioned by the court below was that of Mr. Stem, which gives the following census of Indians at his agency and comments thereupon:

Towaccaros	141	
Wacoes	114	
Keechies	38	
		Total 293, Warriors 90.
Caddos	161	
Andaicos	202	
Ionies	113	
		Total 476, Warriors 161.
Delawares		Total 63, Warriors 31.
Shawnees		Total 70, Warriors 35.
		Total 902, Warriors 317.

* * * * * * * *

> It will be seen, upon examining the files of the Department, that the tribes above enumerated, including the Wichitas, were, in 1849, reported officially as having 800 warriors, and numbering 4,000 persons. The Wichitas were represented to me as a small tribe, numbering 100. They, together with about 80 warriors from the Caddoes, Wacoes, and Keechies (including about two-thirds of the latter tribes), together with a small proportion of women and children, have within the last

> two years, left Texas, and are now inhabiting the Wichita Mountains, beyond Red River. But deducting these, the above enumeration shows that former estimates have been very much too large, and I entertain no doubt that upon actual enumeration it will be found that there has been a proportionate overestimate of the other Indians in Texas.*

The 1849 report, referred to by Stem, was by Neighbors and is found on page 28 of the annual report of that year.

Neighbors had given the following census of Indians under his agency:

Comanches	20,000
Kiowas	1,500
Lipans	500
Caddos, Ionies, and Anadalikas	1,400
Keechies	300
Wichitas, Wacos, and Tahwaccarros	1,000
Toukahiras	650
Delawares and Shawnees	650
Creeks (50), Cherokees (25)	75
Apache bands	3,500
Total supposed number	29,575

Of these, one-fifth were estimated as warriors.

Neighbors further says, referring to them all:

> These Indians range promiscuously across our frontier, from Red River to the Rio Grande, during the greater portion of the year; and seek shelter during the winter in the upper Cross Timbers of Texas, between the head waters of the Colorado River and the Wichita Mountains.

The 1851 report, by Stem, shows conclusively that the

*Report Com. Ind. Aff., 1851, p. 261.

number of Wichitas living in Texas had been very much overestimated by Neighbors, and as Marcy reported, after personal examination, that there were 500 Wichitas living at Rush Springs, in 1852, those mentioned by Stem were but a small portion of the whole tribe. The fact that they were accompanied by a "small proportion of women and children," indicates that it was in the nature of a war party, which again accords with Catlett. The court can little afford to disregard the opinion of so careful an explorer as Marcy.

In 1852, this same agent, Stem, reported that certain Texas Indians had summered *in the vicinity of the Wichitas* engaged in the chase *beyond the Wichita Mountains*, as was their custom.*

In 1853, Agent Capron, of the Texas Indians, reported as follows:

> Now, as to the right of the Wishitaw Indians over this country. I have taken the pains, by a visit to their nation and by conversation with old and influential Indians and whites, to possess myself with facts which, with other information in relation to this tribe of Indians, will be found in its proper place in this report.
>
> * * * * * * *
>
> The Wishitaws, with whom are associated the Kechies, Wacoes, and Tewakanies, all talking the same language and claiming to have the same origin, occupied a country, taking in a portion of northwestern Texas, running east to the mouth of the Washitaw, thence north to the Canadian, and west, taking in the Wishitaw Mountain. This was originally their country, and to which they now lay claim with all the evidence that can sustain any Indian title, clear and indisputable, they never having by treaty or otherwise relinquished their right

*Report of Com. Ind. Aff., 1852, p. 144.

> to it. They say they have been driven from that portion of their country which lay within the territory of Texas, and the United States has taken the balance, giving it to other Indians, the Choctaws, Cherokees, and Creeks, without their consent or compensation.*

In 1854 Special Agent Hill, in discussing the rights of the various tribes to settlement in the Texas reservations, reported:

> The Wacos, Tawaccamos, Keechies, and Wichitas, though considered in charge of this agency, have not, at any time during the year, been located within the limits of this State. * * * The Wacos, Keechies, and Tawaccamos, numbering about three hundred souls, have a claim to be located in Texas, which I am of the opinion may be done. * * *
>
> I have not been able to discover any well-founded claim for the settlement of these people (Wichitas) in Texas, nor do I learn that they desire it; on the contrary, from the best information I have been able to obtain, they claim a home north of Red River, in the vicinity of the Wichita Mountains, from early and long occupancy. Any attempt to remove them from that locality, and settle them among a people upon whom they have only looked for years as enemies, and yet do, could not fail to be attended with many and serious difficulties.†

In 1855, Superintendent Neighbors reported from Texas the number of Indians on the Brazos reservations, and further said:

*This report, by Horace Capron, afterwards Commissioner of Agriculture, was in evidence in the court below, but inadvertently omitted in making up the record.

†Report of Com. Ind. Aff., 1854, pp. 372-3.

> I have had application from the Wichitas and a number of other Indians who do not belong to Texas, for permission to settle on the reservations, but in conducting the settlements I conceived it to be my duty to prohibit the introduction of any Indians not properly belonging to Texas.*

In 1859, Superintendent Rector, detailed to find a permanent location for the villages of the Wichitas and their Texas kindred, in the recently formed "Leased District," reported:

> Of the country on the Canadian selected by the Wichitas and Kichais, I obtained accurate information from Se-kit-tu-ma-qua, my Delaware interpreter, who is thoroughly acquainted with it; and I, therefore, did not deem it necessary to examine it in person. The Wichitas and Kichais all desire to settle there, *and as they have resided in this region from a time beyond any one's memory*, they ought, I think, to have the privilege of selecting their own home.†

With the foregoing reports of Government agents before it, all supporting the claim of the Wichitas to occupant rights around the Wichita mountains, the Indian Department could not but be impressed with their justice and accuracy. They were, as we have seen, as follows:

Council Springs treaty commissioners	1846
Chicasaw agent	1849
Agent Catlett	1849
Captain Marcy	1849
Agent Stem	1852
Captain Marcy	1852
Agent Capron	1853
Agent Hill	1854
Superintendent Neighbors	1855

*Indian Report, 1855, p. 180.

†Ex. Doc. No. 13, 48th Cong., 1st sess., p. 21.

And with these reports before it the department received, in 1855, the suggestion of Superintendent Neighbors, that an arrangement be made with the Choctaw and Chickasaw delegates then in Washington, to lease a part of their territory for the Wichitas and neighboring prairie tribes. Of this we shall speak more fully.*

Based upon the foregoing historic facts, and the reports of accredited agents of the Government whose duty it was to advise it on such matters, and in the absence of ought but inferences to the contrary, we submit that we have sustained our contention that the Wichitas have occupant rights to the land at issue herein as a part of the Great Prairie west of the Cross Timbers. Their villages lay therein from the earliest report from Spanish sources (1778) until they sought refuge at Fort Arbuckle, in 1858, escaping from hostile Comanches on the warpath, and especially irate against the Wichitas because of their supposed complicity in an attack upon them by United States troops under Van Dorn.

The Wichitas were residents of the Great Prairie when the United States were fighting for their independence; when they purchased the territory from France, in 1803; when they made their treaty of limits with Spain, in 1819; and when they first sent a representative (Dodge) to visit the country of these Indians, in 1834. Their villages were

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Washington City, D. C., February 1, 1855.

*Sir: I have the honor to suggest the propriety of negotiating with the Choctaw delegation now at Washington for a tract of land lying on the east side of Red River (known as Cache Creek), near the Wichita Mountain, for the colonization of the Wichita Indians, and such other prairie Indians as may be convenient to that location; also for the establishment of an agency or subagency. The honorable Secretary of War informs me that in the event of it becoming necessary, he will establish a military post at that point. (Doc. No. 13 supra, p. 15.)

there and their hunting grounds when the treaty of 1835 was made; and there they have continued to live until the present day. Their occupant rights extend as far as their hunting grounds, and these were bounded on the north by the Canadian; to that stream, therefore, we claim rights of occupancy. It was a knowledge of these facts that caused army officers of the day to refer to that section as "the Wichita Country." (Maj. Emory, Rec. 190.)

The court below says that while the country was successively under French, Spanish, Mexican, and Texan rule, that neither recognized the Wichitas as occupants thereof. In the first place the country north of Red River never was under Mexican or Texan rule, and secondly, none of the four powers ever made a treaty affecting this territory with any of the prairie tribes. The treaty of 1835 with the United States was the first, and the Wichitas were parties to that.

Opposed to this Wichita claim of occupant rights the Government sets up a title under the Quapaw treaty of 1818, by which it pretends to have extinguished the Indian title to a tract of land extending to the 105th meridian. As we have shown in the statement of the case, and as is shown by the red lines on the argument map on the end of this brief, this cession had the following bounds:

> Beginning at the mouth of the Arkansas River; thence extending up the Arkansas, to the Canadian fork, and up the Canadian fork to its source; thence south, to Big Red River, and down the middle of that river to the Big Raft; thence a direct line, so as to strike the Mississippi River, thirty leagues in a straight line, below the mouth of the Arkansas.

But we submit that the United States acquired no title

from the Quapaws to the lands at issue in this cause, as the Quapaws never occupied them and had no title to cede.

The Quapaws, or Arkansas, lived, when first known by the whites (1682), on the Mississippi, near the mouth of the Arkansas River. (Rec., p. 146.) Later they spread up the latter stream (Joatel, 1687, ib.), although some still lived on the Mississippi, and the movement was still continuing in 1722, when La Harpe ascended the river. (Rec., p. 158.) They then knew nothing of the Indians living beyond the forks of the Arkansas, at longitude 95. (La Harpe, 6 Margry, 363.) They were not then Indians who roamed and hunted over great areas, as they possessed few horses. (Account of Fabry de la Bruyière, 6 Margry, 483.) In 1758 they resided four leagues from the mouth of the Arkansas and on its banks. (Le Page du Pratz, Rec., p. 226.)

In 1803 Dr. Sibley reported to the Government that the Quapaws lived twelve miles above Arkansas Post in three villages, and claimed the territory to the Cadron; that the Osages claimed above that. (Am. St. Pap. Ind. Af., Vol. II, p. —) In 1806 Major Stoddard wrote that they lived in two villages above Arkansas Post, and were much reduced in numbers, because of wars with the Chickasaws and use of ardent spirits. (Sketches of Louisiana, p. 206.) In 1816 Auguste Choteau, one of the commissioners who made the treaty of 1818, reported on the limits of the Quapaw country, which he also carried to the Cadron, or Quadrant, as he calls it.* (Rec., p. —.) This is also shown on the map which is printed in the record at page 159.

In 1818 Major Long reported that the Quapaws resided on the Arkansas 100 to 150 miles from its mouth. He says that they originally claimed a tract forty by fifty miles,

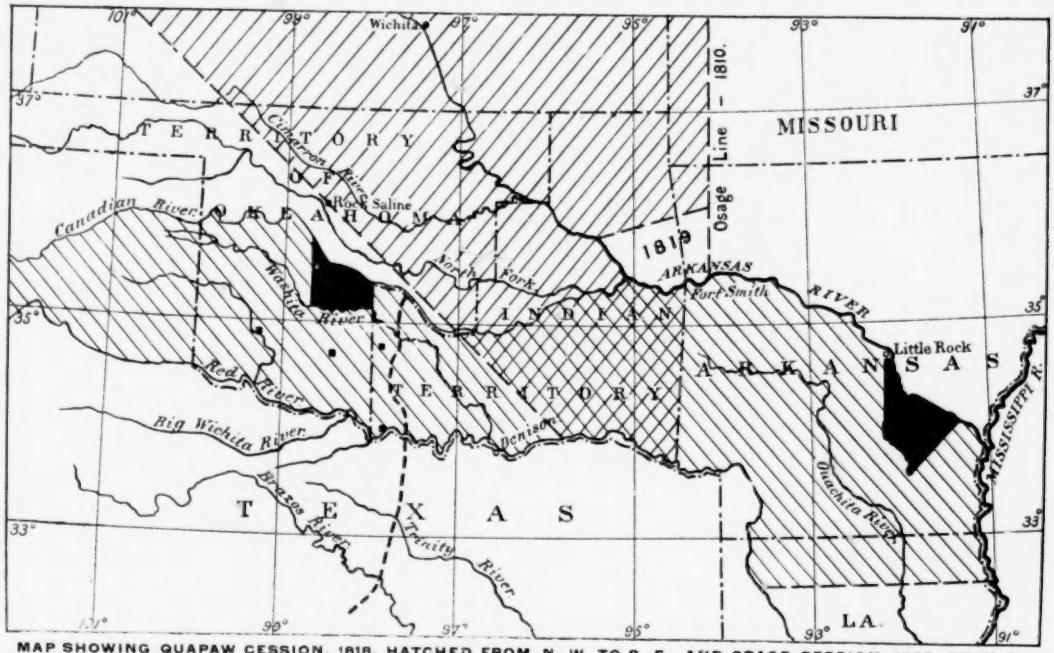
*That Cadron and Quadrant are the same see Nutall's "Travels into Arkansas Territory," 1819, p. 219.

extending west from Arkansas Post, but that they had, through the instigation of whites intermarried with the tribe, extended their claim as far west as the Forks of the Arkansas (95°). (Rec., p. 169.)

Before General Clark (who, with Choteau, negotiated the treaty) left Washington (February 6, 1818), he advised the War Department to have the Quapaw cession embrace all the white settlements, and in forwarding the treaty (September 6, 1818), he exultantly informed the department that he had not only accomplished this, but that he had obtained lands far to the west. The Quapaws freely sold him what belonged to other Indians. (Am. St. Pap. Ind. Af., Vol. 2, pp. 173 and 177.) They reported that all the villages were in the reservation provided for by the treaty and shown in red on the map at the end of this brief. In 1818 Commissioner Clark wrote to the Secretary of War that the Quapaw cession contained about 30,000,000 acres, and so it would if the map attached to the treaty were correct geographically. The same limits, geographically correct, contain more than 43,000,000 acres.

From the nearest village of the Quapaws to the 98th meridian is 340 miles, 200 of which was certainly dominated by the Osages, hostile to the Quapaws, and there is not one iota of proof that any war or hunting party of the latter tribe ever penetrated it before 1818. And yet their cession extends to the Rocky Mountain, at longitude 105.

This territory being received, as we are told, from the Quapaws, in 1818, was ceded, for the most part, to the Choctaws in 1820. But in order to make this latter cession good, it was found necessary to buy out the Osage rights in 1825. In forwarding the 1818 treaty the commissioners claimed that the Osages admitted that it only covered Quapaw lands. Why, then, any necessity for the Osage cession, which superposes on the Quapaw cession, as shown by the map on the opposite page?



MAP SHOWING QUAPAW CESSION, 1818, HATCHED FROM N. W. TO S. E., AND OSAGE SESSION, 1825, FROM N. E. TO S. W. QUAPAW RESERVATION CONTAINING ALL VILLAGES IN BLACK AT EAST; LANDS AT ISSUE IN BLACK AT WEST; CROSS TIMBERS, BROKEN LINE BETWEEN 97° AND 98°.

Map showing Quapaw cession, 1818, hatched from N.W. to S.E., and Osage cession, 1825, from N.E. to S.W. Quapaw reservation containing all villages in black at east; lands at issue in black at west; Cross Timbers, broken line between 97° and 98°.

It is therefore submitted that the Quapaw cession actually included none of the land at issue herein because the Quapaw territory did not extend so far west, and that this claim of rights under the Quapaws does not in any way nullify the Wichita rights of occupancy which we have set up, and we submit, established, under this subhead.

There are physical reasons, too, why the Quapaws never went west of the 98th meridian—the barrier of the "Cross Timbers." This formed a line between the eastern and western tribes, and the Wichitas, Comanches and Kiowas did not go east of it. When Dodge wanted to take chiefs of these tribes with him to Fort Gibson, in 1834, two chiefs objected in the following terms:

> Wichita chief—We do not like to pass through the timber; it will be hard for our horses to pass through the thick timber country between us and the white men. (Rep. Sec. War., 1834. p. 81.)
>
> Comanche chief—If I go with you, I shall be afraid to come back through the timber. (Ib., p. 84.)

The Cross Timber is the eastern limit of the prairie country, runs from the Arkansas to the Brazos, and is formed of small, thickly-set trees, difficult of penetration. In the notes will be found some description of its peculiarities.*

*The eastern portion is fertile and well watered. The surface is mainly rolling prairie, with broad stretches of rich land along the streams, and an abundance of timber. This section of the

But we are told, in the opinion of the court below, that "prior to 1833 twenty-seven other tribes resided between the Red River and the Canadian." (Rec., p. 374.) The names of these twenty-seven tribes were culled from all the old maps in the Congressional Library by the inge-

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Territory is separated from the western part, which presents a different aspect, by a broad belt of forest, known as the "Cross Timbers," which extends nearly across the Territory in a north and south direction, marking the outcrop of the Carboniferous formation. Its breadth ranges from 40 to 60 miles.

West of this singular strip of forest the country assumes the appearance of the "Great Plains"—that long incline which stretches eastward from the base of the Rocky Mountains. The surface is a monotonous, rolling, treeless expanse. The valleys are shallow, and the dividing ridges are broad and slightly marked. Timber is found only in the river valleys, on the faces of the bluffs, and among the hills.

The generally level surface of the prairies and plains is broken in the southern and southeastern parts of the Territory by ranges and groups of hills, which rise from a few hundred to 1,500 feet above the surrounding country. These hills, known as the Sans Bois Hills, Shawnee Hills, Wichita Mountains, etc., form a part of the Ozark Mountains, which extend eastward over into Missouri and Arkansas.

The principle rivers of the Territory are the Arkansas with its branches, the Neosho, the Salt and Red Forks; and the Canadian, with its North Fork, and, in the southern part of the Territory, the Red River, which forms the southern boundary, with Texas, and its branch, the Washita. All these are of little or no importance as regards navigation. The eastern part of the Territory is well watered, but the western part, except at the times of flood, in late spring and early summer, has few flowing streams.

(Henry Gannett, in American edition of the Encyclopaedia Britannica, title "Indian Territory."

*The celebrated Cross Timbers, of which frequent mention has been made, extend from the Brazos, or perhaps from the Colorado of Texas, across the sources of Trinity, traversing Red River above the False Washita, and thence west of north, to the Red Fork of Arkansas, if not further. It is a rough hilly range of country, and, though not mountainous, may perhaps

nious counsel for the Chickasaws, and even he makes the northern limit the Arkansas and not the Canadian. Most of these names are not capable of identification with any known tribes of Indians. Not one of the maps of this country has any claim to be an authority on these wilds

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be considered a prolongation of that chain of low mountains which pass to the northward of Bexar and Austin City in Texas.

The Cross Timbers vary in width from five to thirty miles, and entirely cut off the communication betwixt the interior prairies and those of the great plains. They may be considered as the "fringe" of the great prairies, being a continuous brushy strip, composed of various kinds of undergrowth, such as black-jacks, post-oaks, and, in some places, hickory, elm, etc., intermixed with a very diminutive dwarf oak called by the hunters "shin oak." Most of the timber appears to be kept small by the continual inroads of the "burning prairies;" for, being killed almost annually, it is constantly replaced by scions of undergrowth, so that it becomes more and more dense every reproduction. In some places, however, the oaks are of considerable size, and able to withstand the conflagrations. The underwood is so matted in many places with grape vines, green briars, etc., as to form almost impenetrable "roughs," which serve for hiding-places for wild beasts, as well as wild Indians; and would, in savage warfare, prove almost as formidable as The Hammocks of Florida.

South of the Canadian, a branch of these Cross Timbers projects off westward, and afterwards cross the stream; and, having continued up for a hundred miles, it inclines northwest beyond the North Fork, and ultimately ceases, no doubt, in the great sandy plains in that direction.

(Gregg's "Commerce of the Prairies," 1842, Rec.)

This extensive belt of woodland (the Cross Timbers), which forms one of the most prominent and anomalous features upon the face of the country, is from five to thirty miles wide, and extends from the Arkansas River in a southwesterly direction to the Brazos, some 400 miles.

At six different points where I have passed through it, I have found it characterized by the same peculiarities; the trees, consisting principally of post-oak and black-jack, standing at such intervals that wagons can without difficulty pass between them in any direction. The soil is thin, sandy, and poorly watered. This forms a boundary line, dividing the country suited to agriculture from the great prairies, which, for the most part, are

before Pike (1810), and Pike is not cited. After him is the map of Pinkerton, reprinted in the Government brief. The Pawnee and Kansas hunting grounds (two of the twenty-seven) are shown by Pinkerton north of the Canadian. The names "Cancatinos," "Canensis," and "Quichicons," in Pinkerton, are taken from Humboldt (1804) and are not Indian tribes at all, but "Ranchos stations des muletiers."*

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arid and destitute of timber. It seems to have been designed as a natural barrier between civilized men and the savage, as, upon the east side, there are numerous spring-brooks, flowing over a highly prolific soil, with a superabundance of the best of timber, and exuberant vegetation, teeming with the delightful perfume of flowers of the most brilliant hues; here and there interspersed with verdant grades and small prairies, affording inexhaustible grazing, and the most beautiful natural meadows that can be imagined; while on the other side commence those barren desolate wastes, where but few small streams greet the eye of the traveler, and these are soon swallowed up by the thirsty sands over which they flow; here but little woodland is found, except on the immediate borders of the water-courses.

(Marcy's Exploration, etc., p. 85.)

The Cross Timbers of Texas are two long narrow strips of forest region between the 96th and 99th meridians, extending parallel to each other from the Indian Territory southward to the central portion of the State, forming a marked exception to the usual prairie features of that country. They have been delineated upon several maps, but most accurately upon the one accompanying the "Report on the Cotton Production of the State of Texas, with a Discussion of the Agricultural Features of the State," by R. H. Loughridge, Ph. D., Special Agent of the Tenth Census.

(R. T. Hill, "Cross Timbers of Northern Texas," American Journal of Science, 3d Series, Vol. 33, p. 291, 1887.)

*It was from some such sources, doubtless, that Humboldt obtained information of the settlements on upper Red River, noted on his map as "Ranchos stations des muletiers," and named San Calixto, Cancatinos, Canensis and Quichicans.

(Report of Texas Boundary Commission, p. 135.)

For the Comanches, one of the twenty-seven, there is reasonable evidence of the occupancy claimed for them, and for them alone; that is evidence that they roamed over the territory at issue. And of the Comanches and Kiowas we will now briefly speak.

From early times the Comanches and Kiowas, the latter accompanied by the Kiowa Apaches, or Katakas, have roamed the prairies from the extreme north to Mexico. They have never had any fixed villages and never cultivated any crops. Their whole property has been carried around on their horses or the backs of their squaws. They have been so notoriously nomadic that it would be wasting the time of the court and counsel to prov the fact by citing authorities. Their habits did not permit of their acquiring occupant rights, and even if they could and did acquire such, they have been well taken care of by the Government. In 1867, by treaty (15 Stat., 581) a large part of the Leased District, comprising 2,968,893 acres was set apart for them. In 1892 they made an agreement with the Government for taking allotments and ceding the surplus lands to the United States for $2,000,000 (S. Ex. Doc., No. 17, 52d Cong., 2d sess.), an agreement now pending before Congress. For the 2800 members of these tribes in 1892 this gave them each 160 acres of land and $714 in cash to start their lives as citizens. The Wichitas and affiliated bands ask also 160 acres of land each, as their agreement provides, and also $1.25 per acre, or $717,500, for their surplus lands, or $677 in cash for each of their 1,060 individuals; less than the Kiowas, Comanches and Apaches are getting. So, if we must admit equal occupant rights in Kiowas and Comanches (which we do not) we also ask but equal treatment in the disposition of the lands of the "Leased District."

The Comanches signed the treaty of 1835 with the

Wichitas, and it was intended that the Kiowas should do the same, but they were absent from the council ground. They, however, did sign a similar treaty in 1837 (7 Stat., 533) to which their associates, the Katakas, or Kiowa Apaches, were parties, as well as the Tawakonies, a clan of the Wichitas. As we have shown, all these have been taken care of but the Wichitas and Tawakonies, who are before the court in this cause.

There is to be added one item of evidence about Wichita occupancy around the Wichita Mountains, as contained in the deposition of Captain Scott, U. S. A., who was located for many years at Fort Sill, after a long army career among the Indians of the West. It will be found in the record at pages 193 et seq, and shows how this claim of occupancy is regarded by these same Comanches and Kiowas. He says:

> Tabananaca, one of the old Comanche chiefs, who died about 1892, told me on one occasion that the Comanches came into this country before any other Indians (meaning the vicinity of the Wichita Mountains), *except the Wichitas*, who came first, and the mountains on the north fork of Red River, at the cattle-trail crossing, were named for Wichita Indians, and so called by the Indians before the coming of the white man. Another old Comanche chief, White Wolf by name, now living on the Comanche Reserve, who grew up with Tabananaca, has told me within a week past that the Wichitas came to these mountains before any other Indians; that the Comanches were next, and afterwards the Kiowas and Kiowa Apaches.

On redirect he says that the Kiowas, who came to these mountains after the Comanches, in using the sign language, use the sign for "mountains" to indicate the Wichitas.

That is to say, to the Kiowas, the Wichitas are the people of the mountains.

b. *The affiliated bands of Indians gave full value for their share of the lands at issue in this cause when they surrendered their homes in Texas at the instance of the Government:*

The affiliated bands may be grouped as follows: First, the Caddos, among whom are the remnants of the Ionies and Anadarkos; second, the Wacos and Tawakonies, who are clans of the Wichita tribe, but who lived in Texas for the most part; third, the Keechis, who have lived in Texas from the time of the earliest exploration; and fourth, the Delawares, of whom some few members have intermarried and live with the others.

The earliest explorers found the Caddos in the northeast corner of Texas, and western Louisiana and Arkansas, in the great bend of the Red River. They were the leading clan of a group that the French classed as Caddodaquioux, whose habitat is shown as above on all the early maps. In 1835 they surrendered their lands in the United States, comprising essentially Caddo Parish, La., and Miller County, Ark., and moved into Texas, in accordance with a treaty to that effect made with the United States in that year. (7 Stat., 470.)

The Keechis, Wacos, and Tawakonies lived farther west, around the head waters of the Brazos, and to this neighborhood the Caddos had, for the most part removed, when the Republic of Texas began to take cognizance of Indian affairs, in 1843. (Stat., Rep. Tex., 1842-3, p. 23.) A few others, at the time of the war between Texas and Mexico, moved to Caddo Creek, in the Choctaw nation, where they remained until 1859.

On the 9th of October, 1844, the Republic made a treaty with the Comanche, Keechi, Waco, Caddo, Ana-dah-kah, Ionic, Delaware, Shawnee, Cherokee, Lipan, and Tah-wah-karro tribes of Indians, in which it took to itself much the same powers that are held by the United States, agreeing to protect the tribes, forbidding their members from coming among the white settlements, regulating trade with them, and providing for the running of a line beyond which it should be Indian Country.* We have no estimate of the numbers of the different signatories to this treaty, nor of any operations under it, for, in 1845, the Republic became a State by admission into the United States and the care of the Indians devolved upon the general Government.

In 1846 the affiliated bands were parties to the treaty of Council Springs, with the United States, to which we have already referred in relation to the Wichitas. The commissioners who negotiated this treaty say, in their report transmitting it, as follows concerning these bands:

> The Ionies, An-no-dar-coes, and Caddoes * * * live upon the Brazos, about forty miles below the "Peak;" reside in villages, and their houses are made of straw, and are comfortable. They plant corn, pumpkins, &c. The aggregate of the three tribes is about fifteen hundred souls. They have intermarried with each other, and become identified as one people, controlled by one chief.†

We are told on the same page of the same report that the Wacos, Tawakonies and Keechis, numbering about one hundred and fifty each, resided on the Brazos, about one hundred miles above Comanche Peak.

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*Stat. Rep. Tex., 1844-5, App.

†H. R. Doc. No. 76, 29th Cong., 2d sess., p. 7.

As a result of the treaty of Council Springs the general Government took over the control of the Indian tribes of Texas, who placed themselves under its protection. It had no land upon which to colonize them, and the work of keeping them from hostile contact with the whites was a serious one.

In 1851 three new agents were sent among the Texas Indians, and one of them, Stem, reported to the department under date of November 1st, of that year, as follows:

> The tribes on the Brazos, especially the Caddoes, And-dai-coes, and the Ionies, are the most peaceable and well disposed of the Indians of Texas, and for several years, by their uniform good conduct, and readiness to deliver up stolen property brought among them, have maintained a good reputation among the citizens of this State. They desire and should receive, encouragement and proper consideration from the Government.
>
> Since my former report a military post has been established on the Clear fork of the Brasos, some 150 miles further up than Fort Graham. This post is beyond the several Indian villages on the Brasos, and unites the location and settlement of the adventurous citizens of this State on the hunting grounds, and perhaps upon the corn fields, and in villages of these Indians, or otherwise demand their removal beyond this line of posts; in either case it involves serious hardship upon these Indians. They have built up villages, cleared off corn fields, and established homes, which they are forced to yield up without compensation; already have several of these tribes been compelled to yield up homes thus established.*

This is the keynote of the situation as it existed for sev-

*Indian Rep. 1851, p. 263.

eral years after this date. Under date of October 8, 1852, the same agent reported:

> The Caddoes, Ana-da-kos, and Ionis have remained on the Brazos and have peaceably and quietly tilled their corn fields and followed the chase, occasionally calling on me for slight aid to make out the measure of their subsistence. The efforts of these people are much embarrassed by the constant reflection that the tenure by which they hold their homes and improvements is so slight and precarious. With the constant anticipation that the fields that they have subjugated, the warm lodges they have erected, the clear cold springs they have discovered, are to be given up to the adventurous white man, whose surveys have already enclosed and surrounded their villages and "marked their trees," they have no courage for vigorous and hopeful effort.
>
> José Maria (their chief), after the close of his "winter hunt," would not go back to his old village on the Brazos. His lands had been surveyed (a subject about which he had been extremely sensitive), and perhaps he feared interruption.*

In 1854 Texas provided for the laying out of two reservations, one of which, on the Brazos, near the mouth of Clear Fork, was set apart for the affiliated bands. Upon this reserve these Indians were settled in 1855, and Supervising Agent Neighbors reported on the 10th of September, of that year, that there were there 205 Anadahkos, 188 Caddoes, 136 Tawakonies and 94 Wacos; that they had put 400 acres of land under cultivation; and that there was no more peaceful settlement in Texas, and that the Indians were making astonishing progress in the arts of civilized life.†

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*Indian Rep. 1852, p. 145.

†Indian Rep. 1855, p. 178.

In 1856 the agent at the Brazos agency reported:

> The Indians at the several villages have neat cottages, with good gardens and fields adjacent, and the many conveniences to be seen on every hand give me abundant evidence of the progress made by the Indians since their settlement. The Caddoes and Anadahkos show a great desire for the adoption of the customs as well as the habits of the white men.*

In 1858 a school was established on the reserve, with an enrollment of 60 children and an average daily attendance of 30.† The agent reported increased good feeling towards the reserve residents by the whites of the neighborhood, and prophesied success for the experiment of colonization, "provided the protection guaranteed to them by the treaty of settlement is fully carried out on the part of the Government."‡ This result, however, was not destined to be accomplished, as in December of that year a party of Caddos and Anadarkos were murdered while asleep by some whites, and this engendered such a feeling that it seemed probable that the whole frontier would be in instant uproar.§

A state of great unrest continued through the winter, and open war between the Indians and parties of whites organized for their extermination, was only prevented by the presence of the troops. In March the Commissioner of Indian Affairs wrote to Superintendent Neighbors:

> From the information communicated in your several reports and otherwise obtained, it has become

*Indian Rep. 1856, p. 179.
†Indian Rep. 1858, p. 183.
‡Ib., p. 182.
§Indian Rep. 1859, p. 220, et seq.

> painfully manifest that the colonization of the Indians of Texas on the two reservations heretofore selected must be discontinued, the reservations abandoned, the Indians removed where they can be protected from lawless violence, and effective measures adopted for their domestication and improvement. Measures for that purpose will, therefore, be adopted with as little delay as practicable.*

The commissioner further directed Neighbors to act in conjunction with Superintendent Rector, and arrange for the settlement of these Indians in the leased District, and to effect the removal in the fall of that year.

Accordingly Superintendent Neighbors took the headmen of the affiliated bands, as well as those of the Comanches on the Clear Fork reservation, to Fort Arbuckle, where he met Supt. Rector and the Wichitas about the first of July. Rector reports, in part, as follows:

> After Mr. Neighbors and myself had fully conferred together, the headmen of all the bands, of those here and of those in Texas, met in council and were informed by him and myself of the selections which had been made for their future homes. We explained to them the great pain and regret felt by the Government at being compelled so hastily to remove those in Texas to another country, but assured them that they would be paid for all losses thus incurred, and that after removal they would occupy a country belonging to the United States, and not within any State, where none could intrude upon them, and they would remain, they and their children, as long as the waters should run, protected from all harm by the United States. We advised them to become acquainted with each other and to prepare to live

*Ib., p. 263.

near each other as friends and neighbors, and promised to use every effort in our power to see justice done them. To the Wichitas we also promised to endeavor to obtain remuneration for their losses incurred in consequence of the hostility of the Comanches, provoked by the slaying of so many of their people, encamped with peaceable intentions, by the troops of the United States; and the consumption of their corn by the troops.

The Indians declared themselves entirely satisfied with the country selected for them, well known to many of them, and ready to remove at once.*

Major Neighbors returned to the Texas reserves for his charges, and we have the following reports of the assurances he then made them:

When Major Neighbors and Captain Ross returned to the Brazos with the Indian chiefs who had been to the council at Arbuckle, the Indians were gathered together and were moved to the Indian Territory, leaving nearly all their property behind.

I accompanied the Indians north, and when they arrived on the Washita, there meeting with the Wichitas, Major Neighbors told the Indians, as he had previously told them before leaving the Brazos, that all the country from the Chickasaw line to the one hundredth meridian and from Red River to the Canadian was to be theirs and their children's for a home forever.

He told them that those who had left their houses, farms, and other property on the Brazos would be compensated for the loss, and he was going to Washington to have it replaced; to have houses built and farms made, and to have white men come and learn them how to farm, &c. He told them that they could live anywhere between Red River and the Canadian and within the ninety-eighth and one hundredth meridian.

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*Sen. Ex. Doc. No. 13, supra, p. 21.

Major Neighbors was a good friend of the Indians, and an honest man, and if he had not been killed by an outlaw at Fort Belknap, on his way to Washington, there is no doubt that all that had been promised to these Indians by him would have been fulfilled.*

Interpreter Shirley, of the Clear Fork reserve, says:

I accompanied Major Neighbors to Arbuckle as interpreter, and was present at the council held with the Wichitas, who were then and had been for a long time occupants of the country, and the Caddoes, Towaconies, Wacoes, and others from the Brazos.

At that council it was distinctly stated by the representatives of the Government, Major Neighbors and Major Rector, to the Indian chiefs there present, that the country which they gave to them in exchange for their country on the Brazos was a much larger and better country; that they were to occupy it with the Wichitas, and it was to be theirs and their children's for a home forever; that their country would extend from Red River to the Canadian, and from the creek below the Cottonwood Grove, on the Washita River, to the Antelope Hills. The boundaries thus described were for the purpose of fixing in the minds of the Indians landmarks which they could understand, but, as actually determined by Major Neighbors and Major Rector, the boundaries were defined as the ninety-eighth meridian on the east, and the one hundredth meridian on the west, the Red River on the south, and the Canadian on the north.

The Indian chiefs were told that they could live anywhere within these bounds, and that the Government would build them an agency on the Washita River, and on the sun-setting side of the agency a fort would be built, where soldiers would

*J. J. Sturm, farmer at Brazos Agency, in Doc. 13, supra, p. 38.

> stay to protect them from the hostile plains Indians and from any aggressions by the whites; that the Government would build houses for them to replace those they would leave behind them on the Brazos, and would compensate them for the loss of any property they could not bring with them, and would issue them rations of beef, flour, and salt, and annuities twice a year for five years, and for five years longer if necessary.
>
> This agreement was being carried out by the Government; houses built, and the issue of subsistence and annuities to these Indians, until the breaking out of the war of the rebellion, when the troops were ordered away from Fort Cobb, and the Indians then became afraid of the roving bands of Plains Indians, and moved away from their reservation, some of them going north into Kansas, and did not return until after the war was over in 1867.*

The removal of the affiliated bands had been accomplished in September of 1859, and the rebuilding mentioned by Shirley was in accordance with the provisions of the appropriation acts of 1860 (12 Stat., 56), 1861 (ib., 236), 1862 (ib., 527), and 1863 (ib., 790), which were

> For the expenses of colonizing, supporting, and furnishing agricultural implements and stock, pay for necessary employees, purchase of clothing, medicine, iron and steel, establishment and maintenance of schools, and building houses for the Indians lately residing in Texas, in lieu of those abandoned in that State, to be expended under the direction of the Secretary of the Interior.

Here is a congressional recognition of the liability of United States for the losses of the affiliated bands of Indians, due to the failure of the United States to accord

*Doc. No. 13, supra, p. 38.

them that protection which was promised them by the treaty of Council Springs, in 1846. The war prevented it being immediately carried out, but the liability remained, and still remains, and can not be cancelled by reducing the amount of land to be held by the Indians, and refusing them compensation for the lands in excess of this reduced amount, the whole having been promised them as a home "so long as water should run and grass should grow," in consideration of these particular losses, and the peaceful surrender of their homes south of Red River.

c. *Equitable treatment of the Wichita and affiliated bands of Indians demands that they should receive full compensation for the surplus lands of the Wichita reservation, without regard to any claims to be adjusted as between the Choctaw and Chickasaw nations and the United States.*

After the colonization of the Wichita and affiliated bands of Indians on the Leased District in 1859, as hereinbefore related, the work of settlement was continued until the breaking out of the civil war. The Choctaw and Chickasaw nations were the first to join hands with the Confederacy, and almost immediately the whole of the Indian Territory was invaded by Texan troops, aided by these nations, who drove out all Indians faithful to the Government. The very agent and superintendent of the Wichitas actively joined the Southern cause; the troops were withdrawn, upon whom they relied for protection from the prairie tribes. The Wichitas and affiliated bands fled, perforce, into Kansas, where they remained until 1867, without suitable homes, or subsistence, or medical treatment. Then they returned to their reservation to find everything destroyed.

There is no census of these Indians while on the reserve, and before the war. By the summer of 1872, after the privations of war-time, the number had been reduced to less than twelve hundred, classified as follows:

Wichitas	299	
Keechies	126	
Wacoes	140	
Tawakonies	127	
		692
Caddoes	392	
Ionies	85	
		477
Total		1,169

It was at this time that Captain Alvord, who is authority for the above figures, hastily gathered up some of the headmen of the various bands and brought them to Washington. He says: "The Caddoes and Ionies are virtually one people, and should be so regarded; and the Wacoes, Keechies and Towaccaroes, originally from Texas, have long been affiliated with the Wichitas." (Ind. Rep., 1872, p. 134.) The object of the visit to Washington was to make some agreement by which a reservation should be set apart for these Indians. (Ib., p. 140.)

Arriving here a conference was had with the Commissioner of Indian Affairs, which resulted in the execution of an agreement,* which the department forwarded to

*Articles of agreement made and concluded at Washington City, District of Columbia, this 19th day of October, A. D. 1872, by and between Francis A. Walker, Commissioner of Indian Affairs, representing the United States, of the one part, and the undersigned chiefs, headmen, and members of the Wichitas and other affiliated bands of Indians, duly authorized to act for their people, of the other part, witnesseth:

Article 1. The United States hereby give and grant to the

Congress in January, 1873. (House Doc., No. 65, 42d Cong., 3d sess.) In his annual report for 1872 the Commissioner makes the following recommendations in regard to it:

> The Wichitas and other affiliated bands, having for a long time resided within the limits of the tract known as the "leased district," in the Indian Territory, without any defined reservation set apart for their occupancy; and having a claim, good or bad, to a large tract of country, an agreement was made by the Commissioner of Indian Affairs with a duly authorized delegation of said Indians, by which the following described tract of land is set apart for them, viz: Commencing at a point in the middle of the main channel of the Washita River, where the ninety-eighth meridian of west longitude crosses the same, thence up the middle of the main channel of the said river to the line 98° 40′ west longitude; thence on said line of 98° 40′ due north

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said Wichitas and other affiliated bands, for a home, the tract of country bounded as follows, to wit: Commencing at a point in the middle of the main channel of the Washita River where the ninty-eighth meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the line of ninety-eight degrees forty minutes west longitude, thence on said line of ninety-eight degrees forty minutes due north to the middle of the main channel of the main Canadian River, thence down the middle of said main Canadian River to where it crosses the ninety-eighth meridian, thence due south to the place of beginning.

Art. 2. In consideration of the reservation provided for in the preceding article, the said Wichitas and other affiliated bands hereby cede and relinquish to the United States all right, title, interest, or claim of any nature whatsoever in and to any lands in Texas, Louisiana, Indian Territory, or elsewhere, within the limits of the United States.

In testimony whereof the parties to this agreement have hereunto subscribed their names and affixed their seals on the day and year first above written.

to the middle of the main channel of the main Canadian River; thence down to middle of said main Canadian River to where it crosses the ninety-eighth meridian; thence due south to the place of beginning. In consideration for said tract of land the Indians cede and relinquish to the United States all their right, title, interest, or claim, of any nature whatsoever to any lands in Texas, Louisiana, the Indian Territory, or elsewhere within the limits of the United States.

These Wichitas, &c., have always been friendly and loyal to the Government; have suffered severely on that account; are a good class of Indians, inclined to labor for a support, and absolutely require a reservation which they can call their own. For these reasons, as well as to quiet their claim to unceded lands, I recommend the ratification of the agreement made with the Wichitas, &c., by Congress at its next session. (Ind. Rep., 1872, p. 101.)

Congress never confirmed this agreement. It did, however, consider the reservation as an entity, and ever since in the annual appropriation acts the language has been:

> For subsistence and civilization of the Apaches, Kiowas, Comanches, Wichitas, and affiliated bands who have been collected in the *reservation set apart for their use and occupation.*

In 1889 the Government, in carrying out its policy of settling all Indians in severalty and opening the surplus lands of the various reservations to settlement, passed the following law, as a part of the annual Indian Act:

> Sec. 14. The President is hereby authorized to appoint three commissioners, not more than two of whom shall be members of the same political party, to negotiate with the Cherokee Indians and with all other Indians owning or claiming lands lying west

of the ninety-sixth degree of longitude in the Indian Territory for the cession to the United States of all their title, claim, or interest of every kind or character in and to said lands, and any and all agreements resulting from such negotiations shall be reported to the President, and by him to Congress at its next session, and to the council or councils of the nation or nations, tribe or tribes, agreeing to the same for ratification. (25 Stat., 1003.)

In pursuance of this law the Cherokee Commission visited the Wichita reservation, considering it as a reservation, in the spring of 1891, and submitted to the Indians the following proposition:

"The undersigned commissioners on the part of the United States, appointed for the purpose, now make the following offer to the Wichitas and affiliated bands of Indians in the Indian Territory:

"The Indians shall cede and convey and forever relinquish to the United States all their right, title, claim, and interest in and to the following described tract of country, to wit: Commencing at a point in the middle of the main channel of the Washita River where the ninety-eighth meridian of west longitude crosses the same; thence up the middle of the main channel of said river to the line of ninety-eight degrees forty minutes west longitude; thence on said line of ninety-eight degrees and forty minutes due north to the middle of the main channel of the main to Canadian; thence down the middle of the said main Canadian River to where it crosses the ninety-eighth meridian; thence due south to the place of beginning.

"The United States shall classify said country into grazing and grain growing land, and shall allot to each Indian on said reservation 160 acres of land, at least one-half of it grazing land, the title to which the United States will hold in trust for the period of twenty-five years, during which time it shall not be sold or encumbered, nor subject to taxes, nor execution for debt, and shall never be subject to execution for debt contracted or obligation arising during said period of twenty-five years.

"Should any Indian die during said period of twenty-five years, then his or her land shall descend to his or her heirs according

to the law of the State or Territory in which said land shall be situated.

"In addition to said allotments of land which may be taken anywhere in said reservation except on land set apart, used, or occupied for agency, school, military, or other Government purposes, and except sections sixteen and thirty-six, in each Congressional township, which shall be kept and finally sold for common school purposes.

"The United States will pay said Wichita and affiliated bands of Indians the sum of two hundred and eighty-six thousand ($286,000) dollars, fifty-three thousand ($53,000) dollars of which shall be distributed among said Indians per capita, within one hundred days after Congress shall ratify the agreement.

"Another fifty-three thousand ($53,000) dollars shall, within one year after the contract shall have been ratified by Congress, be paid out to or for said Indians per capita, under the direction of the Secretary of the Interior, for the purpose of improving the allotments of said Indians, and otherwise bettering their condition; the remaining one hundred and eighty thousand ($180,000) dollars shall be placed in the Treasury of the United States to the credit of said Indians, and shall bear interest at the rate of 4 per cent per annum, which interest shall be paid out annually by the Secretary of the Interior to or for said Indians, and for such purposes as to him seems best, reference being had to the comfort and advancement of said Indians in the ways of civilized life. Provided, the number of allotments shall not exceed one thousand and sixty, but if the allotments shall exceed that number then there shall be deducted from said $180,000 the sum of $80 for each allotment in excess of said number 1,060.

"Nothing in the contract shall in any manner or to any extent whatever affect any claim said Indians, or any of them, have against the United States, either for money or lands outside of the Indian Territory.

"Done at Anadarko, I. T., this 13th day of May, 1891.

"DAVID H. JEROME,
"ALFRED M. WILSON,
"WARREN G. SAYRE,
"Commissioners on the part of the United States."

Sen. Ex. Doc. No. 46, 52d Cong., 1st sess., p. 21.

It will be observed that the Cherokee Commission hereby expressly recognized the right of the Indians to be

paid for the surplus lands of the reservation, as the United States was paying Indians who claimed title under distinct and approved treaties and agreements; the only equitable way of looking at the matter. But for reasons stated therein, the Indians submitted the following counter proposition:

"To the Honorable, the Commissioners of the United States:

"The proposition submitted by you on the 13th instant has received our most earnest consideration. Impressed as we are with the gravity of the situation in which we find ourselves, and upon such consideration we are unable to agree to all said propositions.

"In reply we submit as follows:

"The proposed agreement shall be upon the terms following, to wit:

"The Indians to cede and convey and forever relinquish all their right, title, and interest in and to the tract of land described in the honorable commissioners' first proposition for and in consideration of seven hundred and fifteen thousand ($715,000) dollars.

"The said tract of land to be divided by a north and south line, so that on the east side thereof there shall be the quantity requisite for the apportionment to individuals contemplated—this land to be held by the Indians in common—the tract on the west side of said line to be opened to settlement by citizens of the United States.

"The payments of the money, the price of the land proposed to be ceded and relinquished, to be as follows:

"Two hundred and seventeen thousand ($217,000) dollars to be paid to the Indians within one hundred days after the ratification of the proposed agreement by the Congress of the United States.

"Two hundred and seventeen thousand ($217,000) dollars to be paid to the Indians within one year after such ratification.

"The remaining two hundred and eighty-one thousand ($281,000) to be deposited in the Treasury of the United States to the credit of the Indians for the period of twenty-five years and bear interest at the rate of 4 per centum, the interest to be paid annually to the Indians, and the principal to them at the expiration of twenty-five years.

"Each and every of said payments to be made directly to the Indians; each when received by them to be by them distributed among individuals per capita.

"The proposed agreement to recite that the right is reserved to the Indians to prosecute against the United States any and every claim they may believe they have the right to prefer and prosecute save and except any as to the tract of land mentioned in the honorable commissioners' first proposition.

"The proposed agreement to recite that it is made and entered into as well for the benefit of those who (citizens of the United States) are now the adopted citizens of said Indians as for the benefit of the Indians themselves.

"The proposed agreement to recite that when there is a fractional part of a section, caused by the meandering of either the Canadian River or of the Washita River, the individual whose selection shall adjoin such fractional part of a section or sections shall have the preferred right to purchase the same at the price of $1.25 per acre."

Sen. Ex. Doc. No. 46, 52d Cong., 1st sess., p. 22.

It being impossible to reach an agreement with the Commission the Indians withdrew this last proposition and submitted the following:

"To the Honorable the Commissioners of the United States:

"The Indians submit respectfully as follows:

"On yesterday they listened attentively to the arguments advanced by the honorable commissioners, respectively, in support of their proposition that the Indians accept fifty (50) cents per acre as the price of their surplus lands. They have given the arguments their most careful consideration and have to advise the honorable commissioners that they do not convince them that their price (one dollar and a quarter ($1.25) per acre), is not a just and fair one.

"They say, most respectfully, that the honorable commissioners have not viewed the entire country, and that consequently they must proceed upon hearsay and some misinformation as to the character of the lands proposed to be sold.

"The Indians have lived for years in the country, and are familiar with it. Fitness for farming is not the only test of the value of land. There is such a thing as land having value for grazing purposes, and the Indians insist that the country proposed to be sold is, as a whole, well fitted for grazing purposes,

and in the market, if competitive bids were permitted, would bring to them more than the price ($1.25 per acre) they ask. This independent of the quantity of land really good for farming purposes and the large quantity of valuable timber, walnut, &c., &c., there is upon it.

"The Indians ought not to be in any the least degree held responsible for the policy of the Government of the United States acting in this behalf for the advantage of their citizens, and they do not see any soundness in the logic that proposes to them that if their surplus lands can be sold for grazing purposes at $1.25 per acre, and possibly a great deal more if competitive bids at a sale, public or private, were permitted—that because the United States desires to dispose of it as farming land they should sell at 50 cents per acre simply because it is possibly worth only that much for farming purposes—something that is not at all admitted by the Indians.

"The Indians have been most solemnly assured that it was not the intention of the United States in creating the honorable commission to negotiate with them to make money at their expense. The Indians, nevertheless, respectfully submit that if their surplus lands can be sold for grazing purposes at $1.25 per acre, then, if not the United States, some whom the United States seek to favor will make money at the expense of the Indians if they be constrained to sell for 50 cents per acre simply because the United States will force a sale of the land ostensibly for farming purposes at which only the United States can purchase.

"Now, in consequence of these facts, namely: That the price of the land is really the only substantial question at issue between the Indians and the honorable commissioners;

"That it is the Congress of the United States who control the purse of the United States, and can and will say ultimately what price per acre shall be paid for the Indians' surplus lands;

"That Congress has not said that the honorable commissioners shall not offer and agree to pay to the Indians $1.25 per acre, if it be just and fair that that price should be paid for the surplus lands;

"The Indians, who seek to be fair and just, do, in order to manifest this, desire that if it be relegated to the Congress of the United States to determine upon consideration of all existing facts and equities what shall be the price to be paid and the amounts of the respective payments,

"The Indians, looking to such a solution of the question at

issue, propose respectfully that a paper be made in due form reciting all the propositions that are agreed upon and complete, with the single exception of appropriate blank spaces for the insertion, first, of the amount that the Congress shall determine as the price of the surplus lands, and, second, for the insertion of the amounts of the payments thereof.

"The Indians, taught by experience, know well enough if they make a paper with the honorable commissioners saying that they are willing to take 50 cents per acre, when in their hearts they are not willing to do so, and do it only as a way of ending a prolonged and tiresome discussion, and with a hope that notwithstanding the paper the equities of the case will be considered by Congress, and they be paid more than the paper promises will be paid, that the paper will be held against them and they, to their grievous disappointment, will get no more money than the amount named in it.

"The Indians know full well that they can not, and will not, receive any money until the meeting of Congress in December of the present year, and even not then until there is a contract binding the Indians that is approved by Congress; this whether they do or do not now make with the honorable commissioners a full and complete paper.

"Such being the fact the Indians further respectfully submit that neither the interest of the United States nor those of the Indians will be in the least prejudiced by the making of such a paper as is hereby just above proposed.

"In Council, June 2, 1891." (Ib.)

Under this last proposition the agreement was finally signed, and the question was left to Congress as to how much the Wichitas were to receive for their surplus lands. It was not thought for a moment by the Indians that Congress would be so unjust as to give them no compensation whatsoever.

By executive order of August 10, 1869,* the President set apart for the Cheyennes and Arapahoes the whole northern portion of the "leased district," including the Wichita reservation as subsequently formed (1872). This

*Ex. Doc. No. 13, supra, pp. 57-9.

was held by these Indians, although but six hundred of them resided south of the Canadian,* until they took allotments and ceded the surplus lands to the United States, which they did by an agreement executed in November, 1890.† This cession included the whole of the Wichita reservation, its lines extending east to the 98th degree of longitude. (See Article II.)

It was upon the consideration of this agreement that Congress recognized, under misinformation, as we contend, the claim of the Choctaw and Chickasaw nations, that the leased district was held in trust, and paid them for their alleged interest in these surplus lands. (26 Stat., 1022.) These nations were not then paid for any portion of the Wichita reservation, they actually having received $2,942,650,‡ or $1.25 per acre for 2,354,120 acres; the other 135,040 acres having been allotted in severalty to the Indians, and there being, in all, 2,489,160 acres in that part of the cession south of the Canadian not occupied by the Wichitas. *In that case Congress did not pay the Choctaws and Chickasaws for the lands allotted in severalty to the Indians which the said nations seek to have done in the present case by their cross-appeal.*

When the Wichita agreement was forwarded to Congress, in January, 1892,§ it was with the expectation on the part of the Executive that the same claim would be pressed by the Choctaw and Chickasaw nations in regard to this land, and Secretary Noble reported that in his judgment these nations had no legal or equitable right to such compensation.¶ A month later President Harrison sent a mes-

*Sen. Ex. Doc. No. 42, 52d Cong., 1st sess., p. 12.
†Sen. Ex. Doc. No. 1, 51st Cong., 2d sess.
‡Sen. Ex. Doc. No. 8, 53d Cong., 1st sess.
§Sen. Ex. Doc. No. 14, 52d Cong., 1st sess.
¶Ib., p. 1.

sage to Congress* protesting that he would not have approved the appropriation had it not been in a general bill and the end of the session at hand.

Congress, however, approved its previous action by resolution, but did not act on the Wichtia agreement, which went over to the 53d Congress, when it was reported in the third session as a part of the Indian bill, the question of compensation for the surplus lands being referred to the Court of Claims to adjudicate between the Wichitas and affiliated bands on the one hand, and the Choctaw and Chickasaw Nations on the other. This reference is in the following language:

> That as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, which claim is controverted by the United States, jurisdiction be, and is hereby, conferred upon the Court of Claims, to hear and determine the said claim of the Choctaws and Chickasaws, and to render judgment thereon, it being the intention of this Act to allow said Court of Claims jurisdiction, so that the rights, legal and equitable, of the United States, and the Choctaw and Chickasaw nations, and the Wichita and affiliated bands of Indians in the premises shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party in the hearing of said claim.

The decree of the Court of Claims under this jurisdictional Act permits the retention of the allotments by the Wichitas and affiliated bands, a gratuity, be it said, as we shall contend later that the Act gave it no power to pass upon this question. It also held that the Choctaws and

*Sen. Ex. Doc. No. 42, supra.

Chickasaws, and not the Wichita and affiliated bands shall receive the proceeds of the sale of the surplus lands. If this be affirmed by this court it will be the first instance when the United States will have allotted lands in severalty to Indians without one cent of capital to start them on the white man's road of citizenship, upon which the taking of allotments turns them adrift.

In forwarding the Wichita agreement of 1891 to the Secretary of the Interior on its way to Congress, the Commissioner of Indian Affiairs used the following language:

> While the Wichitas have no well defined tenure in these lands, and may in fact be said to have occupied them by sufference, nevertheless, under the general allotment act of February 8, 1887 (24 Stat., 388), as construed by the Attorney-General no part of these lands could be taken from them without their consent, they having been, in effect, set apart for their use by Executive action and recognized by congressional appropriation. (Doc. No. 14, supra, p. 4.)

The same jurisdiction rests in this court as in the court below, to determine the "rights, legal and equitable, of the United States, and the Choctaw and Chickasaw nations, and the Wichitas and affiliated bands of Indians." Each has the right to have these determined, equally with the other. The Court of Claims held that because the Choctaw and Chickasaw nations had rights as against the United States, therefore the Wichita and affiliated bands had none. This was the effect of the decree.

We submit, however, that when the Wichita and affiliated bands signed the agreement of 1891 they submitted their rights to Congress untrammeled with any question of the rights of other Indian nations. If the United States is indebted to the Choctaws and Chickasaws, and this court

so holds, why should the Wichita and affiliated bands be relegated to some other forum, to seek the subsistence that they must needs have or perish. Is it because the United States would otherwise pay twice for the lands at issue herein? They have constantly done this, and will again. They paid twice for the whole of the Choctaw and Chickasaw nations; once to the Quapaws, in 1818, and once to the Osages in 1825. They paid twice for the Cheyenne and Arapahoe lands south of the Canadian, once to those tribes, and once to the Choctaws and Chickasaws. If the agreement made with the Kiowas, Comanches and Apaches is approved and carried out, they will pay those tribes for most of the balance of the leased district, whether the rights of the Choctaw and Chickasaw nations therein are sustained or not. If it is inequitable that the United States should pay twice to extinguish Indian title, why begin to enforce a rule against the Wichitas and affiliated bands, a feeble body, for the benefit of the Choctaw and Chickasaw nations, relatively rich and strong. Does not the United States owe more generous treatment to its more ignorant wards; for no one will contend that the Wichita and affiliated bands are on the same plane of intelligence as their present opponents.

Again, must we suffer, as our opponents would have us, because in the early days of white invasion the Wichitas had a bad reputation for horse stealing. This was the tenor of the plea in the Court of Claims by the learned counsel for the Chickasaws. But admitting, for the sake of the argument that the Wichitas are not blameless in this regard, we challenge him to produce one iota of evidence against the Caddoes. And the Caddoes the larger part of the Indians whom we represent. In 1891, when the agreement was made, the agent reported 1,066 Indians

on the reservation,* although but 1,060 are considered in the agreement. These are made up of the following bands:

Caddos	545
Wichitas	175
Towaconies	150
Wacoes	35
Keechies	66
Delawares	95
Total	1,066

As we have seen these Caddos and some of the others came from Texas, and as we have contended, gave value for the lands they received on this reservation, in return for those which they gave up south of Red River. Since the war there has been no complaint of depredations among these tribes, beyond the usual bad men that will be found in every community of the same size. The Caddos have been frequently referred to as the best Indians on the continent, and they deserve fair, honest treatment at the hands of the United States.

As we have said the only matter submitted to Congress by the Wichita and affiliated bands was the amount to be received for the surplus lands, whether fifty cents or more. Equity demands that this matter should be fairly met by this court before it shall be complicated by the consideration of the demands of the Choctaws and Chickasaws. We feel that we have fairly set before the court the claims that these Indians have to compensation in the full value of these surplus lands, by the aboriginal occupancy of the Wichitas and the promise that was given the Texas Indians of a home so long as water should run. We feel that due

*Ind. Rep. 1891, Vol. I, p. 352.

consideration should be given by the court to the promise that the Wichita and affiliated bands should be allowed to retain the reservation *for a home*, as embodied in the unratified agreement of 1872. It was not the intention of the Indians, in 1891, to rob themselves of all means of making a livelihood, by giving up lands that they could not have been compelled to surrender. If the United States desires to open these lands for settlement, let them be permitted to pay for the lands at a fair price, what they propose to sell them for, $1.25 an acre. That is what the Government contends for in this case, and we submit that it should be allowed to carry out this policy without being prevented by the consideration of the claims of the Choctaws and Chickasaws. No trustee has the right to buy in the realty of his cestui-qui-trust to his own advantage, nor a guardian that of his ward. The same equitable principle applies to the Government as towards its wards, the Indian tribes, and the more ignorant and feeble they are, the more rigorously this rule should be applied.

II.

THE COURT BELOW ERRED IN HOLDING THAT THE WICHITA AND AFFILIATED BANDS OF INDIANS ARE NOT ENTITLED TO PAYMENT FOR THE SURPLUS LANDS OF THE WICHITA RESERVATION AFTER ALLOTMENTS HAVE BEEN MADE TO THE INDIVIDUAL INDIANS.

This is but a corollary of the first assignment of error. If the Wichita and affiliated bands of Indians are entitled to all rights incident to occupancy, the United States can not divest them of these rights without due compensation.

The act of 1830, which provided for the removal of the Choctaw and other tribes of Indians from the east of the Mississippi, and their settlement upon the lands west thereof, required, as a prerequisite to such settlement, the extinguishment of the existing Indian title to the western lands. Our claim throughout this brief has been that the Wichitas have occupant title to the lands at issue herein, to which the affiliates were admitted in 1859, and that that title has never been extinguished. By the treaty of 1891, when finally ratified and carried out, this will be accomplished; but as to the surplus lands, this extinguishment can only be effected by due compensation to the owners of the occupant title, the Wichita and affiliated bands of Indians.

III.

THE COURT BELOW ERRED IN HOLDING THAT THE LANDS AT ISSUE IN THIS CAUSE ARE HELD BY THE UNITED STATES SUBJECT TO A TRUST FOR THE SETTLEMENT OF INDIANS THEREON.

a. *The act of Congress of March 2, 1895, conferring jurisdiction on this Court to try and determine this cause on appeal, gives it no unusual, extraordinary, or extra-judicial powers, as the Choctaw and Chickasaw nations contend.*

It seems to be asserted by these nations that the act giving this Court jurisdiction to "try and determine" this cause revolutionizes the settled laws of evidence and of statute and treaty construction. They hint that Congress intended this and naively move this Court to suspend the rules of law by a sort of unanimous consent *in favorem* the Choctaws and Chickasaws. They say that everything possible should be presumed in their benighted behalf, but

seem to concede the defendant Indians a degree of culture high enough to have everything presumed against them, although the very title of this cause declares that it is the suit of the Choctaw *nation* and the Chickasaw *nation* against the Wichita and affiliated *bands* of Indians. In behalf of these feeble Wichitas and their few affiliated friends we dispute this first claim of these two great civilized and powerful antagonists. The act sending the case here is capable of no such construction. When Congress was about to finally settle the Wichitas and affiliates in the lands in question, these nations interposed and set up their shadowy and belated pretext to title, and ultimately forced the case to this Court.

Let the act speak. It says with a slur on the claimants—

> "That as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the land ceded by the foregoing agreement, which claim is controverted by the United States."

But Congress does not controvert the title of the Wichitas. Again, the act guardedly says (for Congress knows the claimant nations to its cost):

> "Nothing in this act shall be accepted or construed as a confession that the United States admits the claims of the Choctaw and Chickasaw nations."

But no such words of caution are used as to the defendant bands.

Again the act says that "if the Choctaw and Chickasaw nations do not bring their action within ninety days from the approval of the act, their claim shall be forever barred." It makes no such peremptory foreclosure against the Wichitas. It simply says that if they fail to file their

answer within sixty days after notice from the attorney general "they may be barred from all claim in the premises."

The whole text of this jurisdictional act shows that Congress was glad to get rid of these crafty and clamorous claimants. Hence we are not surprised when, in line with Congress and the right, the learned counsel for the United States filed his thorough and able brief in this cause controverting the claim of the Choctaw and Chickasaw nations and admitting, as Congress did, the just and legal title of the defendant bands to the territory in question.

If established law is to be set aside in this cause for the claimant the warrant to do so must be found in these words of the jurisdictional act:

> "It being the intention of this act to allow the said Court of Claims jurisdiction so that the rights, legal and equitable, of the United States and the Choctaw and Chickasaw nations and the Wichita and affiliated bands of Indians in the premises shall be fully considered and determined and to try and determine all questions that may arise on behalf of either party in the hearing of said claims."

These are the usual words by which power is conferred on the Court of Claims by Congress to try and determine a cause. It is a case which this Court is to try and determine by the settled rules of law and not by that novel and elastic code called in derision "Indian law," which seems to have governed the Court of Claims in its decision, and it is a case that comes here with almost the condemnation of Congress upon the nations in the very words of the act under which this Court takes power to hear it.

Yet all through the able briefs of the nations' counsel runs a current of claim for some sort of broad latitude to be given them under the jurisdictional act as "Indians,"

forgetting that the Wichitas and the affiliates are Indians, too, and entitled to the same sort of liberality; whatever it may be and whatever it is we crave it, too.

The very question of the jurisdiction conferred on the Court of Claims by a like act of Congress has been decided by this Court in the United States vs. The Old Settlers, &c., 148 U. S., 509, in which case the act of Congress giving jurisdiction was that:

> "It is the intention of this act to allow the said Court of Claims unrestricted latitude of adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and the said Indians may be fully considered and determined."

In construing what was meant by these words, this Court said:

> "While it was stated (by the Court of Claims) that Congress might confer upon that Court extra-judicial powers, yet the Court was of the opinion that this could not have been held to have been done by the act authorizing the institution of this suit, since it was therein provided that whatever judgment might be rendered, whether for the plaintiffs or defendants, might be appealed to the Supreme Court, whose jurisdiction as defined by the Constitution was strictly judicial, and could neither be enlarged nor diminished by legislative authority."

So in this case further on the Court says:

> "The Court of Claims was indeed to have unrestricted latitude in adjusting and determining the said claim so that the rights, legal and equitable, both of the United States and the said Indians, may

> be fully determined and considered, but this did not mean that either party was entitled to have or receive, by virtue of the act, anything more than they were entitled to under the stipulations, or to bring supposed moral obligations into play for the disposal of the case."
>
> "The inquiry was not to be technically limited by rules of procedure or restrained by the distinctions between law and equity, * * * but the language used did not involve the confusion of the respective powers of the departments of the Government, nor furnish a basis for an external attack upon theory of executive or legislative action."

It is difficult to see how the case at bar differs from the Old Settlers' case, and the Court of Claims in its opinion is very discreetly silent upon that point, except to say:

> The act conferring jurisdiction is misleading and delusive if without the power to direct the court to consider the treaty as a contract and apply the rules which obtain in equity to ascertain its meaning. Congress has shifted the responsibility of reaching the intent of the treaty upon the court.

The above language of the Court of Claims is somewhat mystical in meaning, but "to consider the treaty as a contract" must mean that it should be subject to equity rules for recession, as for fraud or duress, or reformation for mistake or inadvertent omissions, etc. Yet this court in the Old Settlers' case distinctly decided that it had no jurisdiction to avoid a treaty for duress or fraud.

What the Court of Claims could have meant by saying that unless they reformed the treaty of 1866, as they have sought to do, the jurisdictional act was "delusive" and "misleading" and ineffective, is difficult to conjecture.

If they had decided that the treaty of 1866 was an absolute cession, and that the Wichitas and affiliates were entitled to the proceeds of their lands, and that all claims of the Choctaw and Chickasaw nations thereto had been settled and paid for by the United States giving them one million one hundred thousand dollars, the act would have been effective enough and just enough. The Court of Claims seem to think that the jurisdictional act gave them power to decide one way only, and that unless they went to treaty making and treaty breaking their occupation was gone so far as this case was concerned.

b. *The treaty of 1866, by which the nations, for $300,000 paid them, cede or sell to the United States the territory in dispute and a part of the lands by them leased to the United States in 1855 for $800,000, is clear, explicit, and unambiguous in all its terms.*

The counsel for the nations have considered that the only part of that treaty sufficiently important to them was the third article. It contains the cession of the territory in question; and, if any ambiguity exists, it must arise from the language of that section, for they are not permitted to arbitrarily insert a section in a treaty and then say that the treaty is ambiguous. Let us analyze the third article and divide it into clauses for convenience.

First. Its first clause is as follows:

> "The Choctaws and Chickasaws in consideration of the sum of $300,000 hereby cede to the United States the territory west of the 98th degree of west longitude, known as the leased district."

(a.) There is no uncertainty as to the parties—they are the Choctaws and Chickasaws on the one part and the United States on the other.

(b.) The consideration is definite. It is for the sum of $300,000.

(c.) The granting word is certain. They "cede," a word universally used by the United States in its treaties with Indians and foreign nations in acts of cession, and needs no interpretation, and is capable of but one meaning.

(d.) The territory ceded is not in doubt; it is the territory west of the 98th degree of west longitude known as the leased district. No ambiguity therefore arises from the first clause.

Second. The second clause is:

> "Provided that the said sum shall be invested and held by the United States at an interest not less than five per cent in trust for the said nations."

Even an "unlettered" Choctaw could have no doubt as to what is meant by these words; they are capable of but one meaning.

Third. The third clause explains the conditions upon which the said sum of $300,000 shall be held in trust by the United States, and for how long. It says:

> "Until the legislatures of the Choctaw and Chickasaw nations, respectively, shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage of citizens of said nations, except in the annuities, moneys, and public domain claimed by or belonging to said nations respectively."

If there is any ambiguity in this clause we would be glad to have the learned counsel indicate where it is vague. The words are clear and are not to be twisted by any ingenuity into any double meaning.

Fourth. The fourth clause is:

> "And also to give such persons who are residents and their descendants forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land after the Choctaws and Chickasaws and Kansas Indians have made their selections, as herein provided."

Nobody can be in doubt as to what is meant by these words.

Fifth—

> "And immediately on the enactment of such laws, rules, and regulations the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter, less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent, before referred to, as within ninety days before the passage of such laws, rules, and regulations shall elect to move and actually remove from the said nations, respectively."

If there is any uncertainty about the exact meaning of this clause, it has not been pointed out.

Sixth. The sixth clause is:

> "And should the said laws, rules, and regulations not be made by the legislatures of said nations respectively within two years from the ratification of this treaty, then the said sum of $300,000 shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem

> proper, the United States agreeing within 90 days from the expiration of said two years to remove from said nations all such persons of African descent as may be willing to remove."

Surely it can not be claimed that this clause presents such vagueness as to drive the court in dismay to seek for light outside of the words of the treaty. It very distinctly says that the $300,000 is on certain conditions to cease to be held in trust for the nations, and excludes the idea of a trust in the lands.

Seventh. The seventh clause is—

> "Those remaining or returning after having been removed from said nations to have no benefit of said sum of $300,000 or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nation."

Can anything be more clear, definite, and certain than the meaning of this last clause of Article III? If, as the claimants assert, this article of the treaty is ambiguous, it is incumbent upon them to point out the words, phrase, clause, sentence, and paragraph in which the ambiguity is located. The court is entitled to this, and the defendants are entitled to some sort of certainty of statement on the part of counsel for the claimants. Wherein the language of the treaty of 1866 is not clear, definite, and unequivocal the brief of neither of the many able counsel of the claimants discloses, and an analysis of the treaty, it seems, demonstrates that there is not lurking anywhere in the language of the treaty itself any such double meaning as would give this court the right to ask for extrinsic aids in its interpretation if it so wished.

It is claimed by all the counsel for the nations that in

the interpretation of the treaty of 1866 we are to observe the rule said to be established by the Supreme Court, that treaties between the United States and Indian nations are to be liberally construed in favor of the Indians, and they quote the decision of the United States Supreme Court in the famous case of Worcester vs. Georgia, 6 Peters, 515, and the Court of Claims says:

> "Chief Justice Marshall, delivering the opinion of the court, said:
>
> "The *language used* in *treaties with* the Indians should never be considered to their prejudice. If words are made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty they should be considered as used only in the latter sense. To contend that the word allotal, with reference to the land granted to the Indians in certain treaties, indicates a bounty conferred rather than a right acknowledged, would, it seems to me, do injustice to the understanding of the parties. How the words of the treaty were understood by these unlettered people rather than their critical meaning should form the rule of consideration."

No such dictum was announced by the Supreme Court of the United States in the case, and Chief Justice Marshall, the weight of whose great name is sought to be used in this case, never uttered any such sentences. The oft-quoted paragraph above is not found in the syllabus of the case, nor in the opinion of the court delivered by Chief Justice Marshall, and is not the opinion of the Supreme Court of the United States as set forth. It does appear, however, in the separate opinion in that case delivered by Mr. Justice McLean.

What Chief Justice Marshall and the court said is as follows:

> "Is it reasonable to suppose that the Indians, who could not write and most probably could not read, and certainly were not critical judges of our language, should distinguish the word 'allotted' from the words 'marked out?' The actual subject of contract was the dividing line between the two nations, and their attention may very well be supposed to have been confined to that subject. * * * If the terms would admit of no other signification, which is not conceded, its being misunderstood is so apparent, results so necessarily from the whole transaction, that it must be taken in the sense in which it was most obviously used."

There is nothing in the opinion of the court in Worcester vs. State which justifies the inference that the court there laid down the rule that in the consideration of Indian treaties, where the *language of the treaty was incapable of doubt*, that recourse must be had to that vague, indefinite, and misleading guide as to how the unlettered nation considered the treaty.

The language of the treaty of 1866, whether liberally or narrowly construed, presents no ambiguity. The words are capable of but one meaning, and that they bear upon their face, and the unlettered Indians understood that meaning well enough when they accepted the $300,000, and understood it well enough when years afterward they declared that they had been forced to sell their lands.

It is submitted that the case of Worcester vs. The State lays down the rule "that the *language* of Indian treaties should not be construed to the prejudice of the Indians; that as a *rule of construction* of such treaties the meaning of words should be liberal and not critical and technical."

But the language of the treaty of 1866, however so liberally construed, can not make cede mean cede in trust.

The counsel for the claimants seek to give the case of

Worcester vs. The State a much broader scope than simply a rule of treaty *construction;* they transform it to *rule* of treaty *revision* and *reformation*, to be exercised by the judiciary upon grounds of so-called high morality, thus usurping the treaty-making power.

c. *The treaty of cession of 1866 being thus clear and explicit in all its terms and containing no ambiguity, this Court must interpret it from its own language and not look aliunde.*

The distinguished counsel for the claimant nations have calmly assumed that the cession of 1866 was not to be construed from its words, but that the Court must of necessity look at everything before and after the treaty to aid in its explanation. This we deny. We insist that the law declares that when a document, a statute, a treaty or any writing is in its terms clear, distinct, unequivocal, and unambiguous the Court has no right to depart from the plain meaning of the language used and seek for delusive guides elsewhere.

The language of the treaty of cession admits of but one meaning, to wit:

A cession, sale, or grant by the Choctaws and Chickasaws of their remainder over, such as it was, to the territory in question to the United States for the sum of $300,000.

Counsel for the claimants have misunderstood or misstated the true rules for the construction of statutes and treaties.

The first and cardinal rule in the interpretation of a statute or a treaty is to look at the statute or treaty itself, its meaning, its scope, and its object, and if upon its face can be seen the intention of its makers, those incidental or secondary rules which are mere aids to be invoked when the meaning is clouded are not to be regarded. It is not allowable to interpret that which has no need of interpretation.

As the courts have repeatedly said, in such a case any departure from the language used would be an unjustifiable assumption by the courts of legislative power.

U. S. vs. Fisher, 2 Cranch, 386.
Clay vs. Erhardt, 48 Fed. Rep.
U. S. vs. Hartwell, 6 Wall., 395.
U. S. vs. Weltberger, 5 Wheat., 95.
Newell vs. Replle, 7 N. Y., 97.
Encyclopaedia of Law, vol. 23, p. 298, and endless list of authorities there cited.

"Where the language is susceptible of but one meaning it must receive that meaning, although such construction leads to results which are absurd or mischievous, courts are not to tamper with the clear and unequivocal meaning of the words used, although the consequences may not be such as were contemplated by the legislature. There can be no departure from the plain meaning of a statute on the grounds of its unwisdom or of public policy."

Am. Ency. Law, vol. 23, p. 299, citing innumerable authorities.
Sedgwick on St. and Const. Law, 231.
Cooley on Const. Limitations, 107, 5th ed.

Even where the Court is convinced that the legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language, which is free from ambiguity.

Smith vs. State, 66 Md., 215.

That which the words declare is the meaning of the instrument, and the courts have no power to add to nor take away from that meaning.

Newell vs. People, 7 N. Y., 97.
Doe vs. Consadine, 6 Wall., 458.
Koch vs. Budges, 45 Miss., 259.

In the light of these authorities it seems clear that this Court will not consider whether the consideration of $300,000 received by the claimant nations from the United States for their remote reversion in the territory in question was adequate or not. It is enough for this Court to know that the claimants took it and keep it, and that the United States paid it. Whether, in the plaintive language of one of the counsel in his brief below, the transaction was "unconscionable," or, in the rugged language of another, it was "black-hearted villany," does not matter. Courts are not created to put their own judgments as to the justice of such a transaction against the action of the legislature. Said the Court in Woodbury vs. Berry, 18 Ohio St., 462:

> "The language as it stands is clear, explicit, and unequivocal. It leaves no room for interpretation, for nothing in the language employed is doubtful. We are satisfied by considerations outside the language that the legislature intended to enact something very different from what it did enact, but it did not carry out its intention, and we can not take the act for the deed. It is our legitimate function to interpret legislation, but not to supply its omission."

Said Lord Campbell in Coe vs. Lawrence, 1 El. & Bl., 516; 72 E. C. L., 516:

> "I can not doubt what the intention of the legislature was, but the intention has not been carried into effect by the language used. It is far better that we should abide by the words of the statute than to seek to reform it according to the supposed intention."
>
> See American Ency. Law, vol 23, p. 301, and authorities.

The question is not what the legislature meant, but what it said.

Sedg. on Construction of Statutory and Constitutional Law, p. 205.
Potter's Dwarris on Statutes, p. 146.
Am. and Eng. Ency. of Law, p. 302, and many authorities cited.

A court may not insert limitations, nor except special cases which fall within the general terms of the statute.

U. S. vs. Combs, 12 Peters, 72.
McIver vs. Ragan, 2 Wheaton, 25.
Lake Co. vs. Rollins, 130 U. S., 662.
Am. and Eng. Ency. of Law, 303, and authorities.

And words may not be imported into a statute in order that it may include a case which has been omitted merely because there seems to be no good reason why it should have been omitted and the omission appears to be unintentional.

Dwarris on Statutes, 2 ed., 579.
Denn vs. Reid, 10 Peters, 524.
Am. and Eng. Ency. of Law, p. 304, and authorities cited.

In Priestman vs. U. S., 4 Dall., 28, Chase, J., said:

> "I shall always deem it a duty to conform to the expressions of the legislature as to the letter of the statute when free from ambiguity and doubt, without indulging in speculation either upon the policy or hardship of the law."

Said Sharswood, C. J., in Dames' appeal, 62 Pa., St., 417:

> "The moment we depart from the plain words of the statute according to their ordinary and grammatical meaning in the hunt for some intention

> founded on the general policy of the law, we find ourselves in a 'sea of troubles.' Difficulties and contradictions meet us at every turn."

d. *Neither this Court nor the Court of Claims possesses the power under the Constitution to reform or correct Article III of the treaty of 1866, or any part thereof, as requested in the eighteenth paragraph of claimants' petition and in its fifth prayer and as claimed throughout all the claimants' briefs.*

Article VI of the Constitution declares the sanctity of a treaty made by the treaty-making power when it says:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all *treaties* made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or the laws of any State to the contrary notwithstanding."

No distinction is made therein between a treaty with a foreign nation and an Indian nation or tribe, and none seems to have been made in any adjudged cases. Prior to our revolution Great Britain recognizes the Indians as nations capable of maintaining the relations of peace and war, and she made treaties with them, the obligations which she acknowledged. This policy inherited from Great Britain the United States continued from its first treaty with the Delawares in 1778 until act of Congress of March 3, 1871 section 2079, Rev. Stats., a different policy was declared. And this court, in case of Fellows vs. Blacksmith, 19th Howard, 336, answering the objection to the validity of the treaty with the Tonawanda band of Indians because the band was not represented by their chiefs and headmen in the negotiation and execution of the treaty, the court said

"But the answer to this is, that the treaty after executed and ratified by the proper authorities of the Government becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation than they can go behind an act of Congress.

As to right of suffrage under the Fourteenth Amendment the Indians have been regarded as foreigners not entitled to vote unless naturalized. Such has been the action of the political departments of the Government and the courts.

Elk vs. Wilkins, 112 U. S., 94.

The treaty of 1866 is, then, a part of the law of the land, and should be interpreted by the same rules applicable to acts of Congress.

True, by the act of March 3, 1871, now Revised Statutes, section 2079, it is provided that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty." * * *

But the same section as clearly sanctions all former treaties made therewith by declaring that "no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

When the war between the States ended, the Choctaws, Chickasaws, Cherokees, Creeks, and Seminoles found themselves in the position to forfeit their treaty rights with the United States by having aided Confederate States and were anxious to regain those rights by new treaties.

Hon. D. M. Cooley, the Commissioner of Indian Affairs, headed a commission sent by the Government to these "Five civilized tribes," whose delegates they met at Fort Smith, Arkansas, in September, 1865.

Seven proposition were insisted upon by the Government, the fifth of which was as follows:

Fifth. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government or such as may be fixed by the Government.

Nothing came of this but a treaty of peace. A draft of a treaty with the Choctaws and Chickasaws fully embodying these seven proposition was submitted by the United States to them, but was never executed. After this, in 1866, authorized delegates from the Choctaws and Chickasaws came to Washington, where they signed the treaty of cession of April 28, 1866. It is claimed with great vigor, but with no proof, that by "mistake" or "inadvertence" these seven proposition made in 1865 were not put in the treaty of 1866, and this court is asked to "reform" or "correct" the treaty of 1866 by inserting them—especially the fifth proposition. With equal logic they might ask the court to "reform" the executed treaty of 1866 by substituting the unratified one of 1865 by alleging mistake and inadvertence. They produce no evidence to show by whose mistake or inadvertence these propositions were omitted, but as the whole structure of their case is built upon the fifth proposition, they assert that this court shall add it to the treaty of 1866 by virtue of its equity power to correct in an instrument accident or mistake.

In answer to this it needs only to be said that no court in the United States has the power to "reform" or "correct" a treaty made by the President, with the advice and consent of the Senate, as provided by the Constitution.

The Supreme Court of the United States, speaking through Mr. Justice Story, in the case of "The Amiable Isabelle" (6 Wheaton, p. 1) said:

"In the first place, the court does not possess any treaty-making power. That power belongs by the Constitution to another department of the Government, and to alter, amend, or add *to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power and not an exercise of judicial functions.* It would be to make and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject-matter, and, having found that, our duty is to follow it *as far as it goes and to stop where that stops, whatever may be the imperfections or difficulties which it leaves behind.* The parties who formed this treaty, and they alone, have a right to annex the form of the passport. * * *

"In the next place this court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty or to take away any qualification or integral part of any stipulation upon any notion of equity or general convenience or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation rest in the exclusive discretion of the contracting parties and, whether they belong to the essence or the model parts of the treaty, equally give the rule to judicial tribunals. The same parties which have contracted are alone competent to change or dispense with any formality. The doctrine of a performance *cy pres*, so just and appropriate in the civil concerns of private persons, belongs not to the solemn compacts of nations, so far as judicial tribunals are called upon to interpret or enforce them.

> We can as little dispense with forms as with substance. * * *
>
> "We may, indeed, conjecture, but in this conjecture we may err, and to assert what it would be *in literis* would be to exercise a sovereign control over the compact itself."

Can anything be more explicit than this decision? The claimant nations seek not alone to amend the treaty of 1866, but to abrogate it.

The Supreme Court, in reviewing and approving the decision of the Court of Claims in the "Old Settlers" case, said:

> "The Court of Claims declined to go behind the treaty of 1846, upon the ground that it was not within the province of a court either of law or equity to determine that a treaty or act of Congress had been procured by duress or fraud and declare it inoperative for that reason."

Yet claimant nations ask this court to go behind the treaty of 1866 and "reform" and "correct" it, and to practically declare it inoperative on the uproven statement of "mistake" and "inadvertence," a cognate ground in equity with fraud and duress. The counsel in the rhetoric of their briefs claim that by mistake and inadvertence the fifth proposition of 1865, made at Fort Smith, was not put in the treaty of 1866, made at Washington, but the Choctaw nation, by a solemn act of their legislature passed in 1867, declare that they were forced by the United States to sell their lands by this treaty. Whether they will ask this court to frame a decree in this cause declaring the treaty of 1866 invalid and void as procured by duress, as their clients say, or to have a decree drawn "reforming" it for mistake or "inadvertence," as they say, we do not know.

> "Wise indeed was Sharswood, J., in saying when we depart from the plain words of a statute, in a hunt for some intention found elsewhere, we find ourselves in a sea of troubles. Difficulties and contradictions meet us at every turn."

Again say the Supreme Court in the "Old Settlers" case:

> "Undoubtedly a treaty may be modified or abrogated by an act of Congress, but the power to make and unmake is essentially political and not judicial, and the presumption is wholly inadmissible that Congress sought in this instance to submit the good faith of its own action or the action of the Government to judicial decision."

Again this court says:

> "The settlement of a controversy arising or growing out of these Indian treaties or the laws of Congress relating thereto and the determination of what sum, if any, might be justly due under them certainly does not include a claim which could only be asserted by disregarding the treaties or laws or holding them inoperative on the ground alleged."

Every brief filed for the claimants seeks to demolish the treaty of 1866; indeed, the whole case of the Choctaw and Chickasaw nations is but a huge structure built upon the ruins of their solemn treaty of 1866.

Skillfully and laboriously it has been constructed, but, judged by this decision of the Supreme Court, it must fall.

Again say the Supreme Court in the "Old Settlers" case:

> "The Court of Claims was indeed to have 'unrestricted latitude in adjusting and determining the said claim so that the rights, legal and equitable, both of the United States and of the said Indians, may be fully considered and determined,' but this

> did not mean that either party was entitled to have or receive by virtue of the act anything more than each was entitled to under existing stipulations or to bring supposed moral obligations into play for the disposal of the same."

But in this case supposed moral obligations are brought into play, the good faith of the Government is impugned, the adequacy of the consideration is impeached and the United States is made to figure as a tricky guardian oppressing his helpless ward.

e. *Assuming the Court will permit any inquiry as to the validity of the treaty of 1866 or the adequacy of the consideration the Choctaw and Chickasaw nations ought to be and are equitably estopped against the United States and the Wichitas and affiliates because they accepted and still retain the consideration and are further estopped by conduct.*

On page 264 of the record will be found the dates and the amounts of the payments of the $300,000 to the Choctaw and Chickasaw nations.

The Choctaws have received all of their share of $225,000, and the Chickasaws a larger part of their $75,000, all except $17,375; but as they have not yet passed the necessary laws for their freedmen they are not entitled to that they have received, and stand in the singular position of refusing in defiance to carry out some provisions of their treaty with the Government, and yet asserting their claims under it. The Choctaws took their share, keep it, make no offer to refund, and yet claim ownership in what they have sold.

The two nations have received from the United States, under the treaties of 1855 and 1866, for perpetual lease and sale of their equity about one million one hundred thousand dollars, and without offering to return a dollar, assert

their right to the proceeds of the entire tract, and by their cross-appeal in this court seek to oust the Wichitas and their affiliates from any part or parcel of the land. Even the Court of Claims revolted at this and by their decree allowed the Wichitas and affiliates 160 acres of land each. The two nations seek to attain this injustice to the United States and to the Indian bands under a claim that by rules of equity the treaty of 1866 can be reformed by this court on account of mistake and inadvertence.

In connection herewith we may refer to the Act of the Choctaw legislature instructing its national attorney, in connection with this treaty, approved November 20, 1867.

> An act entitled an act to authorize the national attorney to attend to the claims set up against the nation under 49th and 50th articles of the treaty of April 28, 1863, and for other purposes.
>
> Sec. 1. *Be it enacted by the General Council of the Choctaw Nation assembled*, That the present national attorney be, and he is hereby, required to proceed to Washington city as soon as possible, and appear before his honor the Secretary of the Interior, and file such arguments as he may deem essential to make touching the origin and present of the claims awarded by Messrs. Rice and Jackson under the 49th and 50th articles of the treaty of April 28, 1866, and insist upon the importance of having a new commission raised to investigate the said claims, in order to enable this nation to introduce rebutting testimony.
>
> Sec. 2. *Be it further enacted*, That if in the opinion of the said Secretary of the Interior, that a new commission to investigate the claims aforesaid can not be ordered without the action of Congress, or by consent of parties to the case, then, in that event, the national attorney shall exercise his best judgment and discretion in the premises, and report the facts to the Principal Chief.

Sec. 3. *Be it further enacted*, That the national attorney be, and he is hereby, instructed to respectfully bring to the notice of the Commissioner of Indian Affairs of Washington city, that this nation will not consent to give the freedmen residing among them the forty-acre lots of land, including the right of suffrage, mentioned in the 3d article of the treaty of April 28, 1866, *when they have submit humbly to the forced sale of the "leased district" lying west of 98th degree west longitude, for about two and a half cents per acre*, for objects of negro colonization upon their borders; and he shall also request the said Commissioner of Indian Affairs to provide in due time for said freedmen for their removal to some country, and remove Kansas Indians here in their stead, if they are willing to be removed.

Sec. 4. *Be it further enacted*, That said attorney shall use his best endeavors to delay and defer the territorial organization contemplated under article 8 of the treaty of April 28, 1866, until such time as the several nations composing the Indian country shall become more friendly and more disposed to unite and come under one head, or, in other words, under one form of government, to be controlled by the Congress of the United States, and shall have become more qualified to take good care of their landed interest, than the present state of feeling seems to exist between the citizens of each nation in regard to the whole policy of coming under a territorial government—the Government at Washington must understand that the habits and customs of Indian nations can not be easily changed, whether for weal or woe, without their consent.

Sec. 5. *Be it further enacted*, That, in order to provide against contingencies that might occur during the prosecution of the duties herein required of the national attorney, there shall be elected by joint ballot of both houses of the present session of the General Council, an assistant attorney,

whose duty shall be to aid and assist the principal attorney in all matters touching the interest and welfare of this nation, especially the claim set up by "loyal Indians" under 49th and 50th articles of said treaty, and whose terms of service shall expire with the adjustment of all the claims herein specified, and who shall act as principal attorney when so required by the principal national attorney —it is agreed and understood by this act that the nation will only defray actual expenses of traveling, and other incidental expenses to and from Washington city, for each of the attorneys mentioned in this act, at three dollars per day each and expenses paid, and hereby agree to give them one-half of the amount that they may recover or save for the nation upon the claims arising under 49th and 50th articles of the treaty of April 28, 1866, other than the "net proceeds question;" and it is also understood that should they employ claim agent or counsel to answer for them in any given case, it shall be done at their own expense and responsibility.

Sec. 6. *Be it further enacted*, That a correct statement of all the acts, proceedings, accounts, and correspondences had upon the business herein intrusted to the national attorney, shall be kept by his assistant and who shall make his report upon the same to the Principal Chief of this nation.

Sec. 7. *Be it further enacted*, That the Principal Chief is hereby requested to authenticate the credentials of each of the national attorneys herein mentioned to the Commissioner of Indian Affairs at Washington city.

Sec. 8. *Be it further enacted*, That this act take effect, and be in force from and after its passage.

Repassed the Senate by two-thirds vote.

November 20, 1867.

Repassed the House of Representatives by two-thirds vote.

November 20, 1867.

(Constitution and Laws of the Choctaw Nation,

New York, 1869, p. 478 *et seq.* Defendant Indians' Evidence Ex. 24.)

After this solemn act of this claimant nation's legislature, they accepted $52,125 more, being the full sum due them, with interest, for the residue of their share of the $300,000.

They call it a sale, a forced sale, but they accept and keep the consideration, and without offering to return it, with interest, ask that the United States pay them again.

We assert that they are estopped from this claim.

This case is to decide the rights, legal and equitable, of the parties, which means that those rights are to be determined by the rules of law and equity.

Their counsel appeal to equity for the reformation of the treaty of 1866, for equity rules declaring that the cession of 1866 was not absolute, but in trust.

We, too, invoke in our behalf some other rules of equity —the doctrine of estoppel by record, estoppel by taking benefits, estoppel by conduct, estoppel by an election between inconsistent positions, and estoppel by acquiescence.

They say their case is based upon an appeal to what is termed higher reason. What limit "higher reason" may have no one has ascertained or can. We claim that the rules of established law and equity govern the determination of this cause.

When we seek to know what justice is, we must find it in the judgments of courts of law and equity. We beg to quote Ferguson vs. Landman, 1 Bush., 548. This was a case in which in 1864 the people of Gallatin County, Kentucky, met and resolved to raise $20,000 as a fund to draft soldiers for the Union cause. They appointed a committee to get an act of the legislature authorizing the county to issue bonds for this amount and to levy a tax to

pay the money. It was done and the volunteers were obtained. Certain parties who aided in getting the act passed afterwards sought by injunction to restrain the collection of the tax. In its decision refusing the injunction the court said:

> "Upon what principle of exalted equity shall a man be permitted to receive a valuable consideration through a statute procured by his own consent or subsequently sanctioned by him or from which he receives an interest or a consideration, and then keep the consideration and repudiate the statute as unconstitutional?"

To this extreme courts of equity have applied the doctrine of estoppel.

See Bigelow on Estoppel, p. 652, and cases cited in note 4.

The claimants in 1866 had the right to refuse to receive the consideration they elected to take and are estopped.

Bigelow on Estoppel, p. 651, and authorities cited.

Their long acquiescence in the sale of these lands, by twenty-four years of silence, should bar them.

Bigelow on Estoppel, p. 597.

It can not be *justly* claimed that the Choctaw and Chickasaw nations, claimants, were in 1866 not *sui juris* and subject to all the laws of equity, a part of which they now invoke as not applicable to them.

This court in trying and determining this case must meet the question as to the exact status of the claimants when they signed the treaty of 1866, by which on its face they sold their remote reversion to these lands in question for $300,000 to the United States. If that treaty is as a deed between persons where one has paid the price agreed and the other has received and retained it without protest

for at least twenty-four years, the principles of equitable estoppel put these claimants out of court. If the law of estoppel is not applicable to them it must be on the theory that they have the immunity supposed to be granted to infants and *femmes covert* when nothing is supposed to bind. Certainly they can ask for nothing more of privilege in equity than this; but even infants and *femmes covert* are bound by the receipt of the proceeds of the sale of their property and the retention of the proceeds. Estoppel binds them.

But, admitting that the Supreme Court of the United States declared in the case of Worcester vs. The State that the language of Indian treaties should not be construed to their prejudice, and that a later decision of the same high court said they were the "wards of the nation," and that another decision declared that in dealing with them the United States stood in the position of a superior to an inferior, to what conclusion do these authorities lead? If they mean what the claimants' counsel boldly proclaim, that in Indian treaties made by the treaty-making power of the United States as granted by the Constitution the adequacy of the consideration and the moral and political reasons inducing the treaty-making power of the Government in executing them shall be reviewed and annulled in whole or in part by new conditions annexed by the judiciary, we are at once confronted with a conflict between the legislative, executive, and judicial branches of our Government, to the dismay of the court attempting such usurpation and to the ultimate absorption by the judiciary of the powers and functions of the national executive and legislature.

What, then, was the status of the claimant nations in 1866?

Were they helpless creatures, tribes, or nations?

They called themselves nations then and are nations now.

It is true they were "dependent and domestic nations," in the language of the Supreme Court.

But they themselves declared themselves independent nations, and united with the Confederate States as such in treaties of alliance, and furnished aid and comfort to the enemies of this Republic. They sent regiments of troops to sustain what was either a rebellion or a war between the States. By those acts *per se* their treaties were annulled. Congress gave the President of the United States power to declare them so, but it was never exercised by him. When that great war ended they made, in 1865, a general treaty of peace. If they were, as we may say, *sui juris* to make that treaty they were *sui juris* to make the treaty of a year later. If they had power to make a treaty of peace one year they had power to make a treaty of cession a year afterwards, and it seems to us that to declare that a nation that in 1861 could declare its independence and make war against this Government was in 1865 and 1866 entitled to plead that it was "unlettered" and crave judicial mercy on that ground, is an insult to common sense.

If they were "lettered" enough to make their nation's treaty with the Confederate States in 1861 they were "lettered" enough to make one with the United States in 1866. Their relations in 1866 to this Government were in all respects changed from that of the poor Cherokees in 1842. They were not in any sense wards of this nation in 1866; they had made themselves "wards" of the Confederacy, and the Confederacy had fallen.

Their newly chosen guardian died at Appomattox. The United States therefore, in 1866, stood absolved from any laws governing its treatment of them, except such as a conqueror chooses to use over the conquered, judged by the

standard of right of that day.

The United States had a perfect right by power to say to them: The lands you leased to us for $800,000 by your releasing the same to the Confederacy are now forfeited forever and are ours. It had the power and the right to visit them with severe restrictions in keeping with their offense. The United States with its grand amnesty embraced them in a treaty of peace. In 1866 it made with them as a nation the generous treaty in dispute.

For this court in 1898 to declare that either the consideration was inadequate or the terms unjust is for this court to usurp the powers of the Government and to condemn its action.

We say these claimant nations are estopped by that treaty as much as France is by the treaty by which she ceded Louisiana, Spain Florida, and Mexico California. If one can be torn asunder by the courts, so can all.

If the laws of estoppel do not, as a matter of right, apply to a "domestic dependent" nation, they do not to a foreign independent nation.

If it is claimed, as doubtless it will be (since everything in this case is claimed and nothing proven), that the doctrine of estoppel is a "technical rule" not to be invoked in such a case as this, but rules of "higher reason" must guide, we beg leave for a reference to some authority outside the counsel, so we may learn this lofty jurisprudence. It seems to us that even in the mystical mid-region of higher ethics it must be admitted, as a rule of morality, that if A sells his lands to B for $300,000 and keeps the price, as long as he does, he is estopped from asserting his rights until he pays it back.

We can not refer to decisions as to estoppel between nations, since, for a violated treaty between them, there is no appeal save by war or arbitration, and we therefore

plead no estoppel by judgment or record, since there could be no place of record of judgment.

Nations in their dealings are only in honor bound. The treaty is but a deed. We quote these decisions as of the "highest reason" we know as illustrative of our contention.

A party to his contract can not pronounce its own deed invalid although that party be a sovereign State.

Fletcher vs. Peck, 6 Cranch, 87.

Where a grantor acknowledges the receipt of a sum as consideration he is estopped from denying it.

Lawrence vs. McCalmont, 2 How., 426.

Where a doubtful land claim has been confirmed by Congress on certain terms and the claimant has accepted those terms and taken the benefit, he can not come into court and enforce his entire claim as if no adjustment had been made.

United States vs. Roselius, 15 How., 31.

Where a county received in exchange for its bonds a certificate of stock of a railroad company and held it seventeen years and still holds it, it is estopped from asserting that the conditions on which the bonds were to be issued had not been fulfilled.

Pendleton Co. vs. Amy, 13 Wall., 297.
Savannah vs. Kelly, 108 U. S., 184.
Daniels vs. Turnay, 102 U. S., 415.
Storm vs. U. S., 94 U. S., 76.

It may be asserted that the doctrine of estoppel does not apply to Indian nations in making treaties and in dealing with the United States because they are "unlettered." If so, no Indian treaty can ever have a settled validity; no cession can ever be consummated. All their sales will be

"Indian gifts," to be taken back whenever they please. We insist that the ordinary rules of equity can not thus be demolished. There must be an end somewhere to the extraordinary latitude claimed for them. They elected in 1866-1867 to accept the consideration. It is too late now to refuse to abide the consequences. This court is to *try* and *determine* a cause, not *ex gratia* to make a gift to them.

f. Admitting that the United States by settling in severalty upon the defendant Indians the lands ceded to it by the treaty of 1866 as varied and construed by the treaty of 1855, no pecuniary loss is sustained by the nations.

The position of the claimant nations is that the treaty of 1866, construed with that of 1855 and by all the circumstances environing both treaties, and considered from the relationship of the United States towards the Indians, as gathered from history—legislative, executive, and judicial—makes the United States a holder of the lands in question as a sort of trustee, and that when the United States by the act of 1895 violates its duties as such trustee, the claimants become entitled to the whole title, legal and equitable, of the lands in question. Concede this, the whole case of the claimants, and we deny that their conclusions are legally drawn. Granted that the United States, by the whole case of the claimants, as stated by them, became a trustee to hold the lands for the permanent settlement of the defendant Indians and other Indians, and that as such trustee the United States breaks the trust, what pecuniary damage comes to the claimants, if any? We say that they are so imponderable that this court has no scales in which to weigh it. Their injury is nothing, estimated in any legal manner. If the treaty of 1855 leased the whole territory and that of 1866 did the same, if the United States now breaks the treaties, what is the injury to the claimants and

in what forum can they seek redress? We concede in this part of our argument that by the legal effect of the treaty of 1855 and 1866 the claimants relinquished to the United States all their title to the lands in question on the condition that the United States, as trustee, should use them for the "permanent settlement of friendly Indians on them."

We concede that the United States seeks to break the treaty by settling the Wichitas and their affiliates on the lands in question and by selling the rest of the lands. Here, then, by their claim, is a trustee who maladministers his trust by not using the trust fund in part for the beneficiary, the friendly Indians, but seeks to use a part of the trust estate in another way. What, then, is the damage to the claimants? What is their legal injury? How are the claimants harmed, and how much in money? We say that if the lands were given by the claimants for our use, we alone are the ones who are injured if the trustee fails to fulfill his trust, and we alone have the right to ask for remuneration; but we are content. We, as the beneficiaries under the trust, say that we consent to the disposition made by the trustee. By what right do the claimants, as against us, say that they are injured?

Are they the beneficiaries under the trust deed or are we?

If the United States fulfill the trust and permit us to remain on the lands, are they injured?

If the United States permit us to be permanently settled on a part of the lands, we consenting, are they injured pecuniarily, and, if so, how much, and where, and how estimated? Whom will they sue, and where, and for how much?

The ultimate conclusion of the claimants' case is that they ask for a return of the value of the lands in issue because the United States gives them to us on a different

holding, one in severalty in lieu of a tribal holding; but, no matter how we hold, how are they hurt?

They took the money and the United States took the land for our benefit, and it is a question solely between the United States and us how the lands or their proceeds are used.

Admitting that the United States violates the condition of the treaty of 1866, how are the claimants injured? We still remain permanently settled on the lands, or a part thereof, and the residue are to be occupied by others. How are the claimants harmed in purse, and what special damage do they allege and prove? None; none whatever. They claim that Congress by the act of 1895 gave this court the right to award damages to them for a violated treaty. We deny their claim and assert that there is no forum in which such damages can be estimated.

For a broken treaty between two nations there is no appeal, except to arms or arbitration.

If the cession of 1866 is as a treaty between nations, the Congress had no right to refer the question of damages under it to this court. The power that made the treaty is alone the power to judge of the penalty for its infraction, and that power in this case still remains where the Constitution reposed it.

If the treaty of 1866 and its annexed conditions are broken and disregarded by the United States, the amount of damages for it are not to be estimated by this court. It is and must remain a mater for an appeal by the claimants to the United States. The act giving this court jurisdiction does not confer upon it the power to settle the amount of damages due for a violated treaty. If it does, it is unconstitutional and void to that extent.

Suppose this court should arrive at the conclusion that the claimants were entitled to the value of the lands they

ceded, and also for damages from the United States for its violation of the treaty or contract of 1866, this court at once assumes the right to add conditions to a treaty and usurps the treaty-making power.

To decide the amount of such damages this court would be forced to consider the moral and political reasons impelling the treaty, and to wander through the province of the treaty-making powers.

This the Constitution forbids and the decided law denies.

In the case of Chai Chan Ping vs. The United States, 130 U. S., 69; Lowery's ed., 1074, the Supreme Court of the United States said:

> "The question whether our Government is justified in disregarding its engagements with another nation is not one for the determination of the courts. * * *
>
> "This court is not a censor of the morals of other departments of the Government. It is not vested with any authority to pass judgment upon the motives of their conduct. When once it is established that Congress possesses power to pass an act, our province ends with its construction. * * * The province of the court is to pass upon the validity of laws, not to make them, and, when their validity is established, to declare their meaning and apply their provisions. All else lies beyond their domain."

What the claimants ask is for this court not only to censure the morality of the United States in making the treaties of 1855 and 1866, but to impeach the validity of the latter and by its decree to revest in the Choctaw and Chickasaw nations the title to the lands that they ceded by treaty to the United States. It would be interesting as a piece of curious legal ingenuity to examine the decree that the claimants ask this court to sign and contrast it with the contract, treaty, deed, and agreement of 1866. If this

court is to decree damages against the United States for its alleged violation of its agreement from 1855 to 1866 with the claimants, where, may we ask, does the power of the judiciary end as to the acts of the treaty-making powers?

As this court has before decided that it had no power to annul a treaty as procured by duress or fraud, so we claim it has no power to award damages as of tort because the United States has broken a treaty, if such were the case.

g. *If, as claimant nations contend, the seven propositions made to the Indians in 1865 were by mistake or inadvertence omitted from the treaty of 1866, the burden of proof is on them to sustain this by evidence, which they have not done.*

Unless this case is, as a sort of "hotchpotch" of law and equity, the usual orderly rules of evidence must be applied to it. The treaty of 1866 being on its face a clear cession of all rights by the claimants, as we assert, and attacked by them on the grounds of "mistake" and "inadvertence," they must prove by testimony the omissions in the treaty upon which they rely. The real issue is between the "unletterd nations" as claimants and the "unlettered tribes" as defendants, the United States standing as a mere stakeholder. The uncultured defendants stand on the treaty of 1866, and entrenched within its plain provisions await the attack of their unread opponents. Against us they marshal several hundred pages of printed arguments, but not one paragraph of proof from the lips of any witness, living or dead, is offered to sustain, or is put by them into the record to sustain, their contention.

None of the delegates who for them signed the treaty have testified, if living. If dead, none of their declarations have been proven; nothing is here from the learned counsel who carefully guarded their rights in 1866, employed for that purpose by them. By whose "mistake" or "inadvert-

ence" in 1866 the conditions upon which they now stand were omitted they neither allege nor attempt to prove. The burden being upon them, they utterly fail in proof and give no reason for their failure. They ask this court arbitrarily to insert conditions in that treaty by presumption and conjecture. It seems to the defendants beyond doubt that if in 1865 propositions were made to the Indians, and that the treaty of 1866 did not contain them, the only legal conclusion that can arise is that they were purposely omitted by consent of both parties.

This conclusive legal presumption needs no vindication, but the proof on our behalf shows that as a matter of fact the claimants positively scorned in 1865 the propositions they now say were "inadvertently omitted" in 1866. The stone rejected by the builders of the treaty of 1866 has now become the cornerstone of their new edifice.

Even if this court had the power to supply a "casus omissus" in a treaty, the proof shows conclusively that there was no such omission. After solemnly executing a treaty by commissioners and ratification by the legislatures of the Choctaw and Chickasaw nations, after taking and keeping the benefits under the treaty, after an acquiescence therein for nearly a quarter of a century, a "casus omissus" appearing on the stage thus late comes in such a questionable shape as to deserve no recognition.

h. *We deny that the act of Congress of March 3, 1891, appropriating $2,991,400 to pay the Choctaw and Chickasaw nations for their supposed interest in the part of the "leased district" set apart by the Government for the use of the Cheyenne and Arapahoe Indians by a treaty of 1866, said lands so paid for by the Government being a part of the territory in dispute in this cause, is binding on this Court as being in pari materia with the cession of 1866.*

We concede that the act of Congress of March 3, 1891, said that the part of the "leased district" occupied by the Cheyenne and Arapahoe Indians *"have been ceded in trust by Article III of the treaty"* of 1866, and that the Choctaw and Chickasaw nations extracted from the Treasury of the United States by this act the above sum for their supposed interest therein remote and groundless, as we assert such interest to have been. It may not be amiss to state of that bill that in the closing hours of the session of the Fifty-first Congress by legislative legerdemain it was shuffled in the general appropriation bill, and turned up as a winning card. Because of that fact President Harrison signed it under protest as to its justice.

And in submitting the whole matter embraced in the clause of Indian appropriation act of March 3, 1891, the President of the United States transmitted to the Senate and House of Representatives on the 17th of February, 1892, the following message, which we ask to be made a part of this brief:

To the Senate and House of Representatives:

The Indian appropriation bill, which was approved March 3, 1891, contains the following provision:

> "And the sum of two million nine hundred and ninety-one thousand four hundred and fifty dollars be, and the same is hereby, appropriated, out of any money in the Treasury not otherwise appropriated, to pay the Choctaw and Chickasaw nations of Indians for all the right, title, interest, and claim which said nations of Indians may have in and to certain lands now occupied by the Cheyenne and Arapahoe Indians under executive order; said lands lying south of the Canadian River, and now occupied by the said Cheyenne and Arapahoe Indians, said lands have been ceded in trust by article three of the treaty between the United States and said

Choctaw and Chickasaw nations of Indians, which was concluded April twenty-eighth, eighteen hundred and sixty-six, and proclaimed on the tenth day of August of the same year, and whereof there remains, after deducting allotments as provided by said agreement, a residue ascertained by survey to contain two million three hundred and ninety-three thousand one hundred and sixty acres; three-fourths of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of said Choctaw Nation to receive the same, at such time and in such sums as directed and required by the legislative authority of said Choctaw Nation, and one-fourth of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of said Chickasaw Nation to receive the same, at such times and in such sums as directed and required by the legislative authority of said Chickasaw Nation; this appropriation to be immediately available and to become operative upon the execution, by the duly appointed delegates of said respective nations specially authorized thereto by law, of releases and conveyances to the United States of all the right, title, and interest, and claim of said respective nations of Indians in and to said land (not including Grier County, which is now in dispute), in manner and form satisfactory to the President of the United States; and said releases and conveyances, when fully executed and delivered, shall operate to extinguish all claim of every kind and character of said Choctaw and Chickasaw nations of Indians in and to the tract of country to which said releases and conveyances shall apply."

If this section had been submitted to me as a separate measure, especially during the closing hours of the session, I should have disapproved it; but as the Congress was then in its last hours a disapproval of the general Indian appropriation bill of which it was a part would have resulted in consequences so far-reaching and disastrous that I felt it

my duty to approve the bill. But as a duty was devolved upon me by the section quoted, viz.: the acceptance and approval of the conveyances provided for, I have felt bound to look into the whole matter, and in view of the facts which I shall presently mention, to postpone any executive action until these facts could be submitted to Congress.

Very soon after the passage of the law it came to my knowledge that the Choctaw legislature had entered into an agreement with three citizens of that tribe to pay to them as compensation for procuring this legislation 25 per cent of any appropriation that might be made by Congress. The amount to be secured by these three agents, under this agreement, out of the three-fourths interest in the appropriation of the Choctaw Nation, is $560,896. I have information that a contract was made by the Chickasaws to pay about 10 per cent of their one-fourth interest to the agents and attorneys who represented them.

Within a month after the passage of the law, R. J. Ward, one of the agents who was to divide with his two associates the enormous sum to be paid by the Choctaws, presented to me an affidavit dated April 4, 1891, which is herewith submitted. It appears from his statement that the action of the Choctaw council in this matter was corruptly influenced by the execution of certain notes signed by Ward for himself and his associates in sums varying from $2,500 to $15,000. His associates deny any knowledge of this, but the giving and existence of these notes is not refuted. The statement of the two associates of Ward, denying any knowledge of or participation in this fraud are also submitted, together with other papers relating to the matter. Whatever may be the fact as to the use or non-use of corrupt methods to secure this legislation from the Choctaw council, I do not think the Congress of the United States should so legislate upon this matter as to give effect to such a contract, which I am sure

must have been unnoticed when the measure was pending. If the relations of these Indians to the United States are those of a ward, Congress should protect them from such extortionate exactions. We can not assume that the expenses and services of a committee of three persons to represent this claim before Congress could justly assume such proportions. The making of such a contract seems to convey implications which, I am sure, are wholly unjust.

After the passage of the appropriation bill, legislation was had by the Choctaw Nation looking to the completion of the contract made with their delegates as to the payment of this money, but subsequently, when it was supposed that this extraordinary arrangement might require me to bring the matter to the attention of Congress, an act was passed by the Choctaw general council, approved October 19, 1891, declaring all contracts made by the Choctaw delegates with any attorneys in connection with this appropriation void and of no effect. A copy of this law will be found with the papers submitted. There has also been submitted to me an unofficial copy of the opinion of the attorney-general of the Choctaw Nation holding that this last legislation is unconstitutional and void. I am of the opinion that, if this appropriation is to stand, provision should be made for protecting these tribes against extortionate claims for compensation in procuring action by Congress.

Copies of the several laws passed by the Choctaw Nation with reference to this matter will be found in the accompanying papers. It will be noticed that the distribution proposed is limited to Choctaws by blood, excluding the freedmen and the white men who have been given full citizenship from any participation. A protest against this method of distribution has been filed by a white citizen of the tribe, and also a representation by Hon. Thomas C. Fletcher, their attorney, on behalf of the freedmen.

In view of the fact that the stipulations of the treaty of 1866, in behalf of the freedmen of these tribes, have not, especially in the case of the Chickasaws, been complied with, it would seem that the United States should, in a distribution of this money, have made suitable provision in their behalf. The Chickasaws have steadfastly refused to admit the freedmen to citizenship as they stipulated to do in the treaty referred to, and their condition in that tribe, and in a lesser degree in the other, strongly calls for the protective intervention of Congress.

After a somewhat careful examination of the question, I do not believe that the lands for which this money is to be paid were, to quote the language of section 15 of the Indian appropriation bill, already set out, "ceded in trust by article three of the treaty between the United States and said Choctaw and Chickasaw nations of Indians, which was concluded April 28, 1866," etc. It is agreed that that treaty contained no express limitation upon the uses to which the United States might put the territory known as the leased district. The lands were ceded by terms sufficiently comprehensive to have passed the full title of the Indians. The limitation upon the use to which the Government might put them is sought to be found in a provision of the treaty by which the United States undertook to exclude white settlers, and in the expressions found in the treaties made at the same time with the Creeks and other tribes of the purpose of the United States to use the lands ceded by those tribes for the settlement of friendly Indians.

The stipulations as to the exclusion of white settlers might well have reference solely to the national lands retained by the Choctaw and Chickasaw tribes, and the reason for the non-incorporation in the treaty with them of a statement of the purpose of the Government in connection with the use of the lands is well accounted for by the fact that as

to these lands the Government had already, under the treaty of 1855, secured the right to use them perpetually for the settlement of friendly Indians. This was not true as to the lands of the other tribes referred to. The United States paid to the Choctaws and Chickasaws $300,000, and the failure to insert the words that are called words of limitation in this treaty points, I think, clearly to the conclusion that the commissioners on the part of the Government, and the Indians themselves, must have understood that this Government was acquiring some thing more than a mere right to settle friendly Indians, which is already possessed, and something more than the mere release of the right which the Choctaws and Chickasaws had under the treaty of 1855 to select locations on these lands if they chose.

Undoubtedly it was the policy of this Government for the time to hold these and the adjacent lands as Indian country, and many of the expressions in the proclamations of my predecessors and in the reports of the Indian Bureau and of the Secretary of the Interior mean this and nothing more. This is quite different from a conditional title which limits the grant to a particular use and works a reinvestment of full title in the Indian grantors when that use ceases. But those who hold most strictly that a use for Indian purposes, where it is expressed, is a limitation of title seem to agree that the United States might pass a fee absolute to other Indian tribes in the lands ceded for their occupancy. Certainly it was not intended that in settling friendly Indians upon these lands the Government was to be restrained in its policy of allotment and individual ownership. If, for an adequate consideration by treaty, the United States placed upon these lands other Indian tribes, it was competent to give them patents in fee for a certain and agreed reservation. This being so, when the policy of allotment is put into force the compensation for the unused lands should certainly go to the occupying tribe, which,

in the case supposed had paid a full consideration for the whole reservation.

It will hardly be contended that in such case this Government should pay twice for the lands. In the appropriation under discussion this principle is in part recognized, for no claim is made by the Choctaws and Chickasaws for the lands allotted to the Cheyennes and Arapahoes. The claim is for unallotted or surplus lands. The case of the Cheyennes and Arapahoes is this: In consideration of other lands the Government gave them a treaty reservation in the Cherokee Outlet, but never perfected it by paying the Cherokees the stipulated price and placing these Indians upon it. The Cheyennes and Arapahoes declined to go upon the strip and located themselves further south, where they now are. The Government subsequently recognized their right to remain there and set apart the lands now being allotted to members of that tribe, and the lands for which payment is now claimed by the Choctaws and Chickasaws, as the Cheyenne and Arapahoe Reservation. I think the United States must be held to have assented to the substitution of these lands for the treaty lands in the Cherokee Strip, and that being true when the reservation is broken up, as now, by allotments, it would seem that the Cheyennes and Arapahoes were entitled to be compensated for these surplus lands. In fact, a commission which has been dealing with the tribes in the Indian Territory has concluded an arrangement with them by which the Government pays $1,500,000 for these surplus lands and for the release of any claim to the Cherokee Strip, so that, in fact, in this agreement with the Cheyennes and Arapahoes, the Government has paid for the lands for which payment is now claimed by the Choctaws and Chickasaws.

It should not be forgotten, also, that the allotment to the Cheyennes and Arapahoes is still incomplete. The method of calculation which resulted in

stating the claim of the Choctaws and Chickasaws at $2,991,450 is explained by a letter of Mr. J. S. Standley, one of the Choctaw delegates, dated April 6, 1891. The agent for the Cheyennes and Arapahoes wrote Mr. Standley that there were 600 Indians residing upon the lands south of the Canadian River, and who it was supposed would take allotments there, and upon this statement the legislation was based. Now, it must be borne in mind that the Cheyennes and Arapahoes have the right to locate anywhere within their reservation, and that instead of 600, double that number might have taken their allotments south of the Canadian River upon these lands. This is not probable, but a later report indicates that the number will certainly be in excess of 600. If the sum to be paid to the Choctaws and Chickasaws depended upon a knowledge of the number of acres of unalloted land south of the Canadian River, it would seem to have been reasonable that the appropriation should have been delayed until the exact number of acres taken for allotment had been officially ascertained. This has not yet been done.

It is right also, I think, that Congress in dealing with this matter should have the whole question before it; for the declaration of Indian title contained in this item of appropriation extends to a very large body of land and will involve very large future appropriations. The Choctaw and Chickasaw leased district, embracing the lands in the Indian Territory between the ninety-eighth and one hundredth degrees of west longitude and extending north and south from the main Canadian River to the Red River, including Greer County, contains, according to the public surveys, 7,713,239 acres, or, excluding Greer County, 6,201,663 acres. This leased district is occupied as follows: Greer County, by white citizens of Texas, 1,511,576 acres. The United States is now prosecuting a case in the courts to obtain a judicial declaration that this county is

part of the Indian country. If a decision should be rendered in its favor, the claim of the Choctaws and Chickasaws to be paid for these lands at the rate named in this appropriation would at once be presented.

The Wichita Reservation is also upon the leased lands and is occupied by the Wichitas, Caddoes, Delawares, and remnants of other tribes, by Department orders made to depend upon the treaty with the Delawares in 1866 and some other unratified agreements with tribes or fragments of tribes in 1872. This reservation contains 743,610 acres.

The Kiowa, Comanche, and Apache Reservation is occupied by those Indians under a treaty proclaimed August 25, 1868, which provides that said district of country "shall be, and the same is hereby, set apart for the absolute and undisturbed use and occupation of the tribes herein named, and for such friendly tribes or individual Indians as from time to time they may be willing (with the consent of the United States) to admit among them." This reservation contains 2,968,893 acres.

The Cheyennes and Arapahoes, whose surplus lands are to be paid for by this appropriation, have occupied the country between the Washita and Canadian rivers extending west to the one hundredth degree of longitude. This reservation contains 2,489,160 acres.

I have stated these facts in order that it may be seen what further appropriations are involved in a settlement for all these lands upon the basis which Congress has adopted. It does not seem to me to be a wise policy to deal with this question piecemeal. It would have been better if a remnant of title remains in the Choctaws and Chickasaws to the lands in the leased district, to have settled the whole matter at once. Under the treaty of 1855 the Choctaws and Chickasaws quitclaimed any supposed interest of theirs in the lands west of the one hundredth degree. The boundary between the Louisiana pur-

chase and the Spanish possessions by our treaty of 1819 with Spain was, as to these lands, fixed upon the one hundredth degree of west longitude.

Our treaty with the Choctaws and Chickasaws, made in 1820, extended their grant to the limit of our possessions. It followed, of course, that these lands were included within the boundaries of the State of Texas when that State was admitted to the Union, and the release of the Choctaws and Chickasaws, whatever it was worth, operated for the benefit of the State of Texas and not of the United States. The lands became public lands of that State. For the release of this claim and for the lease of the lands west of the ninety-eighth degree the Government of the United States paid the sum of $800,000. In the calculations which have been made to arrive at the basis of the appropriation under discussion, no part of this sum is treated as having been paid for the lease. I do not think that is just to the United States. It seems probable that a very considerable part of this consideration must have related to the leased lands, because these were the lands in which the Indian title was recognized and the treaty gave to the United States a permanent right of occupation by friendly Indians. The sum of $300,000, paid under the treaty of 1866, is deducted, as I understand, in arriving at the sum appropriated. It seems to me that a considerable proportion of the sum of $800,000 previously paid should have been deducted in the same manner.

I have felt it to be my duty to bring these matters to the attention of Congress for such action as may be thought advisable.

BENJ. HARRISON.

Executive Mansion, February 17, 1892.

So we deny that it is an act *in pari materia* with the treaty of 1866 and binding on this court in this case.

If this act of the Fifty-first Congress stood alone there

might be some force in the claim of counsel, but the following Congress—the Fifty-second—passed a joint resolution, which became equally a law, correcting an error of $48,000 in figuring the sum said to be due the Choctaws and Chickasaws under the act of the Fifty-first Congress of March 3, 1891, and to it added this clause:

> "*Provided, however,* That neither the passage of the original act of appropriation to pay the Choctaw and Chickasaw tribes of Indians for their interests in the lands of the Cheyenne and Arapahoe reservation, dated March 3, 1891, nor of this resolution, shall be held in any way to commit the Government to the payment of any further sum to the Choctaw and Chickasaw Indians for any alleged interest in the remainder of the lands situated in what is commonly known and called the "leased district." (27 Stats., 753.)

So if the Fifty-first Congress passed a law declaring that the part of the "leased district" occupied by the Cheyenne and Arapahoe Indians was, in the opinion of that Congress, ceded in trust by article third of the treaty of 1866, the next Congress, with the action of its predecessor full in view and with the intent to destroy any conclusions to be drawn from the prior act, distinctly said that it should not commit the Government for the rest of the "leased district," which included the lands in question here.

It is true the last act did not say the lands were not "ceded in trust," but it did say that the act of the Fifty-first Congress should not be a precedent by which the Government should be considered as admitting that the Government had as of right admitted that it owed the Choctaws and Chickasaws for the remainder of lands as having been ceded in trust. It meant this or nothing.

The act of the Fifty-second Congress thus intentionally

destroyed any legal inference to be drawn from the act of the Fifty-first Congress and left the treaty of 1866 untouched by the act of 1891, and as though that act had never been passed. The act of 1891 did declare that the part of the "leased district" held by the Cheyenne and Arapahoe Indians had been ceded in trust; but the act of 1893 purposely repudiated any conclusion to be drawn from the prior act that the rest of the leased district was so ceded in trust.

It therefore seems that when the counsel insist that the act of 1891 is *in pari materia* with the treaty of 1866, and that this court should on that account declare that the treaty of 1866 was a cession in trust as to the lands in question, and that hence the United States should pay the Choctaws and Chickasaws for their supposed interest in the rest of the leased district, is to demand of this court on account of the act of 1891 to admit a liability which the act of 1893 distinctly declares should not be inferred. At every point in this case the claimants are asking this court to array itself in their behalf against established law.

In Hadden vs. Barney, 5 Wall., 107, Field, J., said:

> "What is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of a court in the interpretation of a statute."

So no inference can be drawn from these acts of Congress. It is the duty of the legislature to enact laws not to interpret and expound them, and in this case Congress has declared itself both ways.

The doctrine of *in pari materia* only applies when the action of the legislature has been uniform.

Merret vs. Cannon, 137 U. S., 551.

So, too, the argument advanced that the departmental construction should be considered. Mr. Justice Brown delivering the opinion of this court in the case of United States vs. Tanner, 147 U. S., 6613, said: "It is only in cases of doubt that the construction given to an act by the department charged with the duty of enforcing it becomes material," and again this court said in the case of United States vs. Graham, 110 U. S., 219, 221.

> Such being the case, it matters not what the practice of the departments may have been or how long continued, for it can only be resorted to in aid of interpretation, and "it is not allowable to interpret what has no need of interpretation." If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. But with language clear and precise and with its meaning evident there is no room for construction, and consequently no need of anything to give it aid. The cases this affect are numerous. (Edwards' Lessee v. Darby, 12 Wheat., 206; United States v. Temple, supra; Swift Co. v. United States, 105 U. S., 691; Ruggles v. Illinois, 108 U. S., 526.)

So it would seem that the various acts of Congress and the various rulings of the Department of the Interior are irrelevant and amount simply to the opinion of individuals and have no binding force, and are not properly in evidence in this cause.

i. *This Court has no right under the act giving it jurisdiction to require the defendants, as a condition precedent to a decree in their favor, to execute a quit-claim of all their rights to all other lands in Texas, Louisiana, etc., as suggested by the attorney for the United States.*

The learned counsel for the Government in his most thorough brief concedes us the judgment of this court, but couples it with the provision that we give a quitclaim to the United States of all our rights, whatever they may be, in all other lands everywhere. If the defendants have any such claims, they have the right to present them to Congress for action. As a matter of right, if we are entitled to the lands in dispute the court should so decide and we should have an unconditional decree for them, but for this court to say that we are entitled to these lands, and to add that we are entitled to nothing else from the United States, is to enlarge the scope of the jurisdictional act.

That act, it is true, says that the court shall "try and determine all questions that may arise on behalf of either party in the hearing of said claim;" but that language means all questions on the hearing of "said claim" in respect simply to the territory described in the act, in the petition, and in the answer. No other "claim," no other territory, is referred to in the act.

Surely the court, if it should decide for the claimants, would not be justified in a proviso to its decree declaring that the rights of the claimants to the residue of the "leased district" were by it forever denied; but the agreement of 1891, which is recited in and a part of the jurisdictional act of 1895, bears for us this saving clause in Article VI as follows:

> "It is further agreed that there shall be reserved to said Indians the right to prefer against the

> United States any and every claim that they may believe they have the right to prefer, save and except any claim to the tract of country described in the first article of this agreement."

We claim our "unlettered" rights to this part of the agreement.

IV.

THE COURT BELOW ERRED IN HOLDING THAT THE CHOCTAW AND CHICKASAW NATIONS ARE THE OWNERS OF THE REMAINDER IN SAID LANDS AFTER SATISFYING THE PROVISIONS IN FAVOR OF THE WICHITA AND AFFILIATED BANDS OF INDIANS IMPOSED BY SAID TRUST.

As was the second assignment of error a corollary of the first, so is this of the third. If the treaty of 1866 was an absolute cession of the Leased District, free from any trust, as we contend, then the Choctaw and Chickasaw nations retained no interest whatever in the said lands, and are not the owners of the remainder.

CROSS-APPEAL OF THE CHOCTAW AND CHICKASAW NATIONS.

From so much of the judgment rendered in this cause as found in favor of the defendants (the United States and the Wichita and affiliated bands of Indians), the Choctaw and Chickasaw nations have appealed to this court. (Rec., p. 444.)

As error these nations assign that the court erred in decreeing one hundred and sixty acres of the land to each member of the Wichitas and affiliated bands of Indians. (Rec., p. 447.)

To this assignment of error we submit that the Court of Claims had no jurisdiction to do otherwise, and that this finding, as we have already stated, was a gratuity. By Article I of the agreement of 1891, the Wichita and affiliated bands of Indians ceded to the United States all their claim, title and interest to and in the Wichita Reservation, the lands at issue in the cause now before the court.

Article II of the same agreement provides as follows:

> In consideration for the cession recited in the foregoing article, the United States agrees that out of the said tract of country there shall be allotted to each and every member of said Wichita and affiliated bands of Indians in the Indian Territory, native and adopted, one hundred and sixty acres of land, in manner and form as follows:

And the act proceeds to set out how the land shall be divided and selected by the individual Indians, infant and adult.

Article III provides that these allotments shall be selected within ninety days after the ratification of the agreement by Congress, and Article IV, that when selected the titles shall be held in trust for the allottees for twenty-five years, as is usual in such cases.

Article V has already been quoted in this brief (page 7), and provides for the submission to Congress of the question upon which the Cherokee Commission had been unable to agree with the Indians, that of compensation for the surplus lands.

The act approved March 2, 1895, under which this court

derives jurisdiction in this cause, "approved, ratified, and confirmed" this agreement, and the same immediately went into effect by the terms of Article VIII.

By this ratification was placed in the hands of the executive the power to immediately allot to the Indians 160 acres of land each. The same act conferred jurisdiction on the Court of Claims in the following terms:

> That as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, which claim is controverted by the United States, jurisdiction be, and is hereby, conferred upon the Court of Claims, to hear and determine the said claim of the Choctaws and Chickasaws, and to render judgment thereon, it being the intention of this Act to allow said Court of Claims jurisdiction, so that the rights, legal and equitable, of the United States, and the Choctaw and Chickasaw nations, and the Wichita and affiliated bands of Indians in the premises shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party in the hearing of said claim.

If this jurisdictional act gave power to the Court of Claims to determine whether the Wichita and affiliated bands of Indians should receive their allotted lands, then, after the years of delay incident to the litigation herein (just five years have already elapsed) it would be within the power of that court to take away those allotments after they had been determined upon, and the Indians had constructed impovements thereupon. Such a ridiculous provision would be unheard of and simply needs to be stated to the court itself to refute any arguments put forward in its behalf. Whatever, therefore, may be the equitable right

of the Choctaw and Chickasaw nations to object to allotments being granted to the Wichitas and affiliated bands, we submit that nowhere in the act of March 2, 1895, is jurisdiction reposed either in this court or the court below to consider that right, and that the said cross-appeal should be dismissed.

ANDREW A. LIPSCOMB,
JOSIAH M. VALE,
Attorneys for Wichita and Affiliated Bands of Indians.

PHILIP WALKER,
WILLIAM C. SHELLEY,
Of Counsel.

EXPLANATION.

Quapaw Cession to U. S. . . . . ———

U. S. Cession to Choctaws . . . . . ———

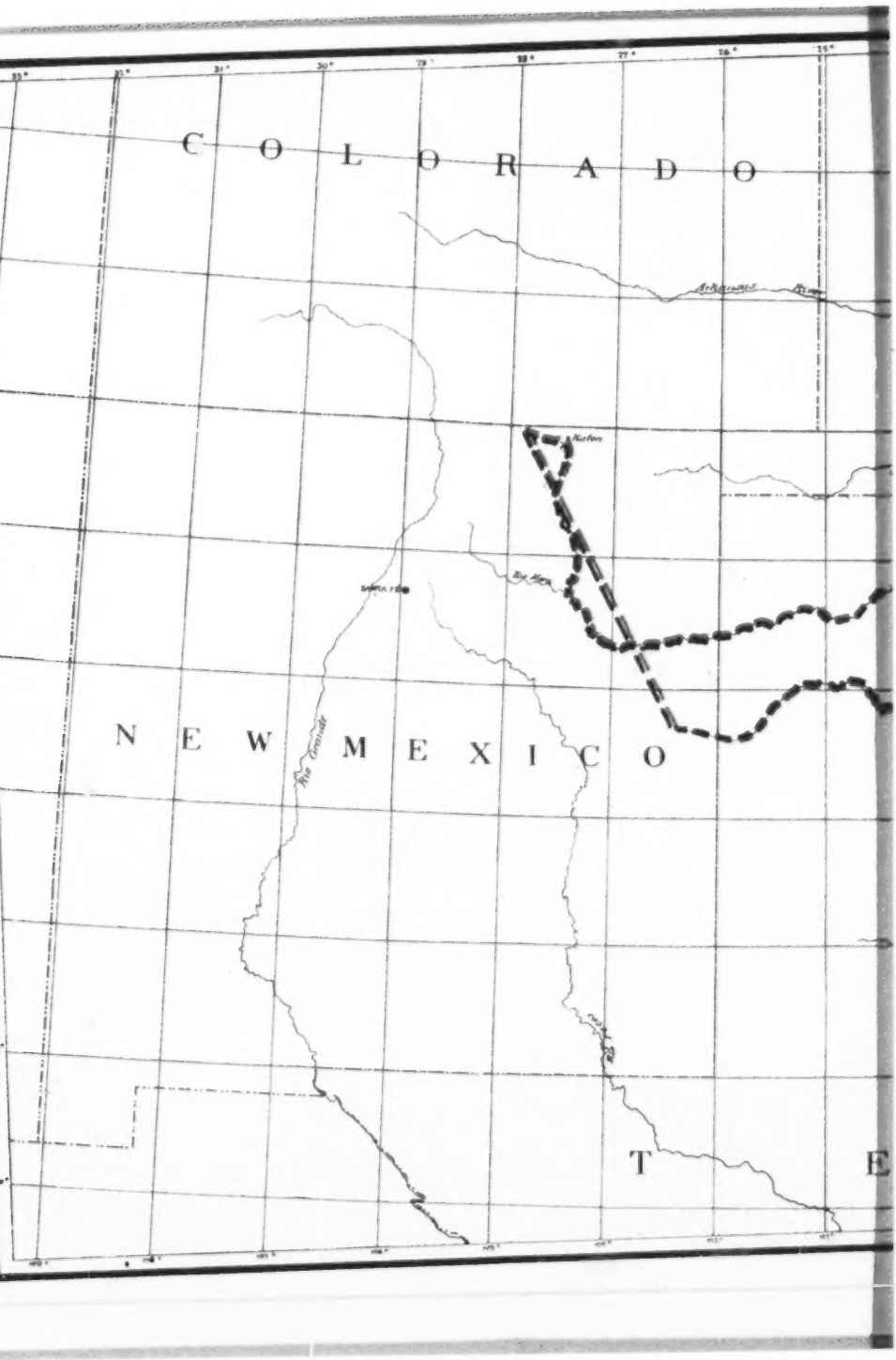
Limits of western part of said Cessions as claimed by Choctaws and Chickasaws .. . . . . – – – –

Western limits of Cross Timbers . . . . . ———

Quapaw Reservation containing all their Villages in 1818 . . . . .

Wichita Reservation, 1872 . . . . .

Wichita Villages, with date of occupation . . . ▲ 1834.


COLORADO
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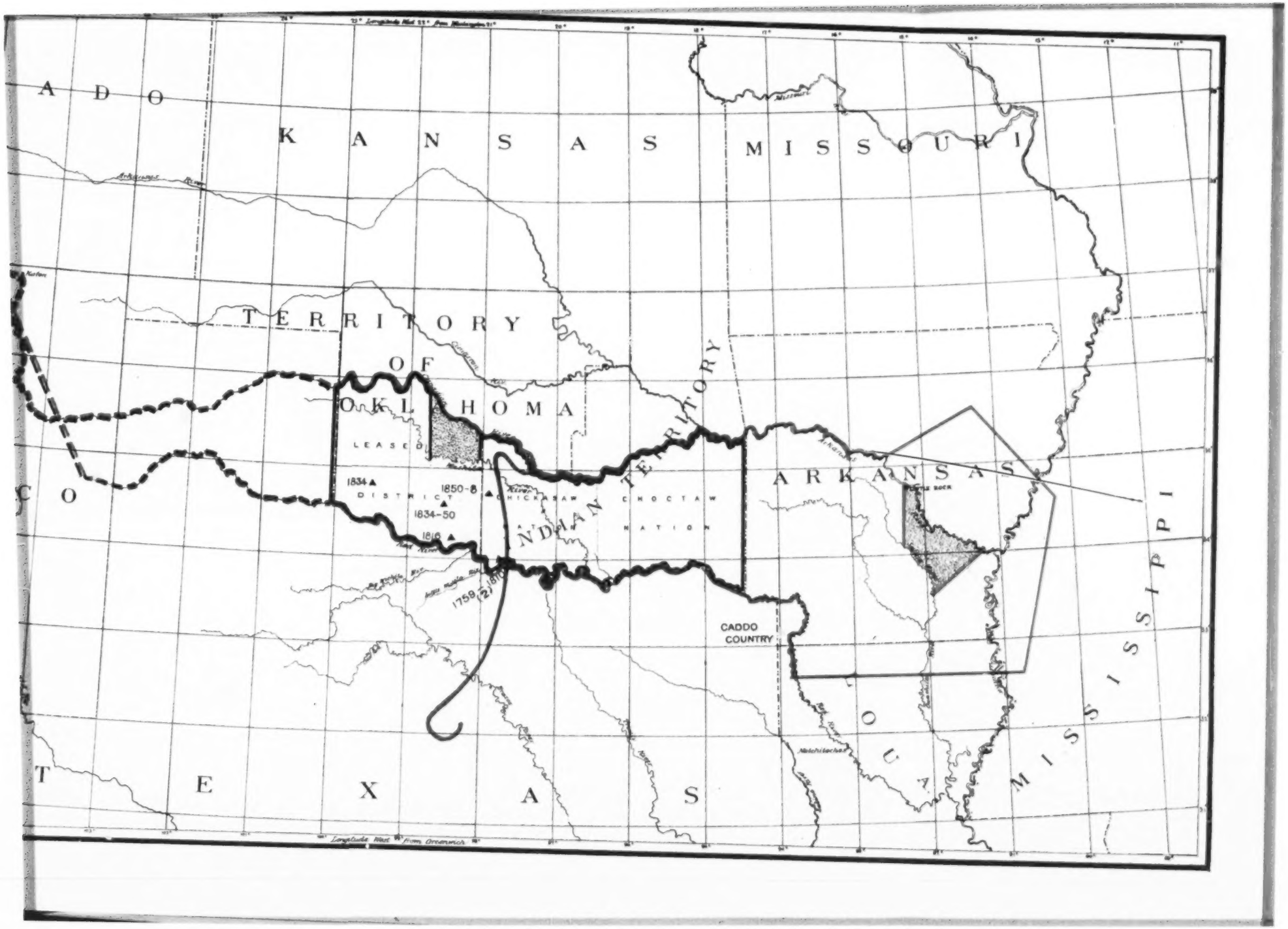

ADO
KANSAS
MISSOURI
TERRITORY
OF
OKLAHOMA
LEASED
DISTRICT
1834
1850-8
1834-50
1816
CHICKASAW
CHOCTAW
NATION
INDIAN TERRITORY
ARKANSAS
CADDO
COUNTRY
LOUA
MISSISSIPPI
CO
TEXAS
Arkansas River
Missouri
Longitude West from Greenwich

Supreme Court of the United States.

OCTOBER TERM, 1900.

88	The United States, Appellant, *vs.* The Choctaw Nation and The Chickasaw Nation.	Appeals from the Court of Claims.
89	The Wichita and Affiliated Bands of Indians, Appellants, *vs.* The Choctaw Nation, The Chickasaw Nation, and The United States.	
90	The Choctaw Nation and The Chickasaw Nation, Appellants, *vs.* The United States and The Wichita and Affiliated Bands of Indians.	

[December 10th 1900.]

Mr. Justice HARLAN delivered the opinion of the Court.

On the 4th day of June 1891 an agreement was entered into between commissioners on behalf of the United States and the Wichita and Affiliated Bands of Indians, in the Indian Territory, whereby those Indians did "cede, convey, transfer, relinquish, forever and absolutely, without any reservation whatever," to the United States "all their claim, title and interest of every kind and character" to the land embraced in the following boundary: "Commencing at a point in the middle of the main channel of the Washita [Wichita] River where the 98th meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the line of 98° 40′ west longitude, thence on said line of 98° 40′ due north to the middle of the channel of the main Canadian River, thence down the middle of the channel of said main Canadian River to where it crosses the 98th meridian, thence due south to the place of beginning." 28 *Stat.* 876, 895, *c.* 188.

In consideration of that cession, it was agreed on behalf of the United States that out of the territory ceded there should be allotted to each member of the Wichita and Affiliated Bands of Indians in the Indian Territory, native and adopted, one hundred and sixty acres of land in the manner and form described in the agreement. It was provided that upon the allotments being made the titles should be held in trust for the

allottees for a period of twenty-five years, in the manner and to the extent provided for in the act of Congress of February 8th 1887. (24 *Stat.* 388, 389, *c.* 119;) and at the expiration of that period the titles should be conveyed in fee simple to the allottees, or their heirs, free from all incumbrances. 28 *Stat.* 876, 895, 896, *c.* 188.

This agreement recited that in addition to the allotments provided for, and the other benefits to be received, the Wichita and Affiliated Bands of Indians claimed and insisted "that further compensation, in money, should be made to them by the United States, for their possessory right in and to the lands above described in excess of so much thereof as may be required for their said allotments." And it was stipulated in the agreement that "the question as to what sum of money, if any, shall be paid to said Indians for such surplus lands shall be submitted to the Congress of the United States, the decision of Congress thereon to be final and binding upon said Indians; provided, if any sum of money shall be allowed by Congress for surplus lands it shall be subject to a reduction for each allotment of land that may be taken in excess of one thousand and sixty at that price per acre, if any, that may be allowed by Congress." *Art.* 5.

It was further stipulated in the agreement that "there shall be reserved to said Indians the right to prefer against the United States any and every claim that they may believe they have the right to prefer, save and except any claim to the tract of country described in the first article of this agreement." 28 *Stat.* 876, 896, *c.* 188.

This agreement of 1891 was ratified by the act of Congress known as the Indian Appropriation Act of March 2d 1895. 28 *Stat.* 876, 894, 897, *c.* 188.

By that act it was among other things provided:

"The compensation to be allowed in full for all Indian claims to these lands which may be sustained by said court in the scrip hereinafter provided for shall not exceed one dollar and twenty-five cents per acre for so much of said land as will not be required for allotment to the Indians as provided in the foregoing agreement, subject to such reduction as may be found necessary under Article 5 of said agreement: *Provided*, That no part of said sum shall be paid except as hereinafter provided."

"That whenever any of the lands acquired by this agreement shall, by operation of law or proclamation of the President of the United States, be open to settlement, they shall be disposed of under the general provisions of the homestead and town-site laws of the United States: *Provided*, That in addition to the land-office fees prescribed by statute for such entries the entryman shall pay one dollar and twenty-five cents per acre for the land entered at the time of submitting his final proof: . . *Provided*, That said lands shall be opened to settlement within one year after said allotments are made to the Indians.

"That sections 16 and 36, 13 and 33, of the lands hereby acquired, in each township, shall not be subject to entry, but shall be reserved, sections 16 and 36 for the use of the common schools, and sections 13 and 33 for university, agricultural college, normal schools and public buildings of the Territory and future State of Oklahoma; and in case either of said sections or parts thereof is lost to said Territory by reason of allotment under this act or otherwise the Governor thereof is hereby authorized to locate other lands not occupied in quantity equal to the loss: *Provided*, That the United States shall pay the Indians for said reserved sections the same price as is paid for the lands not reserved.

"That as fast as the lands opened for settlement under this act are sold, the money received from such sales shall be deposited in the Treasury subject to the judgment of the court in the suit herein provided for, less such amount, not to exceed fifteen thousand dollars, as the Secretary of the Interior may find due Luther H. Pike, deceased, late delegate of said Indians, to be retained in the Treasury to the credit and subject to the drafts of the legal representative of said Luther H. Pike: *Provided*, That no part of said money shall be paid to said Indians until the question of title to the same is fully settled.

"That as the Choctaw and Chickasaw Nations claim to have some right, title and interest *in and to the lands ceded by the foregoing agreement* [the agreement above referred to], which claim is controverted by the United States, jurisdiction be and is hereby conferred upon the Court of Claims to hear and determine the said claim of the Choctaws and Chickasaws, and to render judgment thereon, it being the intention of this act to allow said Court of Claims jurisdiction, so that the rights, legal and equitable, of the United States and the Choctaw and Chickasaw Nations and the Wichita and Affiliated Bands of Indians in the premises, shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party in the hearing of said claim; and the Attorney General is hereby directed to appear in behalf of the Government of the United States, and either of the parties to said action shall have the right of appeal to the Supreme Court of the United States: . . *And provided further*, That nothing in this act shall be accepted or construed as a confession that the United States admit that the Choctaw and Chickasaw Nations have any claim to or interest in said lands or any part thereof. That said action shall be presented by a single petition making the United States and the Wichita and Affiliated Bands of Indians parties defendant, and shall set forth all the facts on which the said Choctaw and Chickasaw Nations claim title to said land. . . *And provided*, That it shall be the duty of the Attorney General of the United States, within ten days after the filing of such petition, to give notice to said Wichita and Affiliated Bands through their agents, delegates, attorneys, or other repre-

sentatives of said bands, that said bands are made defendants in said suit, of the purpose of said suit, that they are required to make answer to said petition, and that Congress has, in accordance with Article 5 of said agreement, *adopted this method of determining their compensation, if any.*"

It was also provided that the Court of Claims "shall receive and consider as evidence in the suit everything which shall be deemed by said court necessary to aid it in determining the questions presented, and tending to shed light on the claim, rights and equities of the parties litigant, and issue rules on any department of the Government therefor if necessary." 28 *Stat.* 876, 897, 898, *c.* 188.

Pursuant to the above act the present suit was brought in the Court of Claims by the Choctaw and Chickasaw Indians against the United States and the Wichita and Affiliated Bands of Indians.

A diagram which was incorporated into the opinion of the Court of Claims is here reproduced to show the land ceded by the Wichita and Affiliated Bands of Indians. It is sufficiently accurate for the purposes of the present discussion.

Ft. Smith
ARKANSAS.
Little R.
Ar. Kansas Riv.
CHOCTAWS.
2
TEXAS
Canadian River.
CHICKASAWS.
3
Red River.
.85
WICHITAS
5
6
KIOWAS COMANCHES AND APACHES.
CHEYENNES AND ARRAPAHOES
4
7
GREER CO.
.001
8
Exceeding 6,589,410 Acres.
Relinquished Art. 10 Treaty 1855.

Tract 5, marked "Wichitas," is the particular land now in dispute, containing, it is stated, 743,257.19 acres; and, with tract 4, marked "Cheyennes and Arrappahoes," tract 6, marked "Kiowas, Comanches and Apaches," and tract 7, marked "Greer Co.," constituted what has been known as the "Leased District," containing, it is supposed, 7,713,239 acres. That District, it will be observed from the diagram, did not extend west of the 100th degree of west longitude.

It may be here remarked that according to the census report for 1890 the Choctaws then numbered between 14,000 and 15,000 people, of whom about 10,000 were Indians and about 4,500 were of African descent; the Chickasaws about 7,000, of whom about 3,400 were Indians and 3,700 were of African descent; and the Wichitas and Affiliated Bands, known as Caddoes, Wacoes, Towacanies, Keechies, Delawares and Ionies, about 1,100 people, of whom not exceeding 175 were Wichitas and about one-half Caddoes.

The decree of the Court of Claims recited that by the treaties between the United States and the Choctaw Nation or tribe of Indians, and between the United States and the Choctaw and Chickasaw Nations or tribes of Indians, the lands in dispute and other lands were acquired by the United States "*in trust* for the settlement of Indians thereon, and *in trust* and *for the benefit* of said claimant Indians when the aforesaid trust shall cease;" that "the Wichita and Affiliated Bands of Indians were by the United States located within the boundaries of the lands hereinbefore described;" that they "now number not more than one thousand and sixty persons;" and that the location of the Wichitas and Affiliated Bands within said boundaries was "for the purpose of affording them permanent settlement therein."

It was then adjudged—Mr. Justice Peele dissenting—that the lands in dispute had been acquired and were held by the United States in trust for the purpose of settling Indians thereon, and that whenever that purpose was abandoned as to the whole or any part thereof then all the lands not so devoted to Indian settlement should be held in trust by the United States for the Choctaw and Chickasaw Indians exclusively.

It was also adjudged and decreed that the members of the Wichita and Affiliated Bands, not exceeding one thousand and sixty, were equitably entitled to one hundred and sixty acres of land each out of the lands in dispute and that the same should be set apart to them by the United States, due regard being had to any improvements made thereon by them respectively for their permanent settlement.

It was further adjudged that the Choctaw and Chickasaw Nations were in law and equity entitled to and were the owners of such of the lands ceded to the United States by the Wichita and Affiliated Bands as remained, after satisfying the provisions for the Wichitas and Affiliated

Bands, and that in the event of the sale thereof by the United States the Indian plaintiffs should be entitled to and receive the proceeds of such sale.

From this decree the United States, the Wichita and Affiliated Bands, and the Choctaw and Chickasaw Nations severally appealed. 34 *C. Cl.* 17.

The fundamental question to be determined on these appeals arises out of the treaty concluded April 28th 1866 between the United States and the Choctaw and Chickasaw Nations (14 *Stat.* 769) relating to the lands constituting what has been known as the Leased District, north of Red River and between the 100th and 98th degrees of west longitude—the lands marked on the above map as tracts 4, 5, 6 and 7. By that treaty the Choctaws and the Chickasaws, in consideration of the sum of $300,000, *ceded* to the United States the territory known as the Leased District.

The Government insists that this cession was absolute and unaccompanied by any trust upon the termination or abandonment of which the Indians would be entitled either to the territory ceded or to the proceeds of its sale.

The Choctaw and Chickasaw Nations deny such to be the effect of the treaty of 1866, and insist that the United States took the lands *in trust* to be used only for the settlement of Indians, and that on the abandonment of such trust the lands reverted, or should be adjudged to have reverted, to the Choctaws and Chickasaws.

The Wichita and Affiliated Bands of Indians contend that they are entitled to compensation in money for all the lands left in the territory in dispute after making the allotments provided for in the agreement of 1891, and that it should have been so adjudged.

The Choctaws also contend that they once owned, by transfer from the United States, a vast body of lands west of the Leased District, for which they have never received anything, and that the treaty of 1866 must be interpreted in the light of that fact. What connection such a fact, if it had any existence, could have with the construction of the treaty of 1866 it is not easy to perceive. But as the proposition just stated was the subject of much consideration in the Court of Claims, and as it is earnestly pressed upon our attention, we will first inquire whether the Choctaws ever owned any lands west of the Leased District, that is, west of the 100th degree of west longitude, and then bring into view the circumstances leading up to the treaty of 1866 which, it is argued, throw light on its interpretation. This being done, we will examine the provisions of that treaty so far as they bear upon the title to the particular lands in dispute.

I. By a treaty concluded August 24th 1818 an Indian tribe called the Quapaws, in consideration of certain promises and stipulations, did "cede and relinquish" to the United States all the lands within the follow-

ing boundaries: "Beginning at the mouth of the Arkansaw River; thence extending up the Arkansaw to the Canadian Fork, and up the Canadian Fork *to its source;* thence south to Big Red River, and down the middle of that river to the Big Raft; thence, a direct line, so as to strike the Mississippi River, thirty leagues in a straight line, below the mouth of the Arkansaw; together with all their claims to lands east of the Mississippi and north of the Arkansaw River, included within the colored lines 1, 2 and 3 on the above map,* with the exception and reservation following, that is to say: the tract of country bounded as follows: Beginning at a point on the Arkansaw River, opposite the present post of Arkansaw, and running thence, a due southwest course, to the Washita [Wichita] River; thence, up that River, to the Saline Fork; and up the Saline Fork to a point from whence a due north course would strike the Arkansaw River at the Little Rock; and thence, down the right bank of the Arkansaw, to the place of beginning; which said tract of land, last above designated and reserved, shall be surveyed and marked off, at the expense of the United States, as soon as the same can be done with convenience, and shall not be sold or disposed of, by the said Quapaw tribe or nation, to any individual whatever, nor to any State or nation, without the approbation of the United States first had and obtained." *Art.* 2; 7 *Stat.* 176.

Observe in this boundary the words "extending up the Arkansaw to the Canadian Fork, and up the Canadian Fork to its *source*." One of the questions much discussed is whether the Quapaws owned and really intended to cede lands situated as far west as the source of the Canadian Fork or river—that point being far west of the 100th degree of west longitude. Did the United States understand that it acquired by the Quapaw treaty of 1818 lands as far west at that time as the *source* of the Canadian Fork or river, which (as is now known, but was not known in 1818) rises in the northeastern part of New Mexico, 36° north latitude by 105° west longitude, while the Red River rises in the Staked Plains and arid table lands near the eastern border of New Mexico, about latitude 35° north and longitude 103° 10′ west? This question cannot well be determined without referring to other documents pertinent to the present inquiry.

By a treaty signed within a few months after the date of the treaty with the Quapaws, that is, on February 22d 1819, the United States and Spain agreed:

"ART. 3. The boundary line between the two countries west of the Mississippi shall begin on the Gulph of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river, to the 32d degree of latitude; thence, by a line due north, to

*A map which accompanied the treaty of 1818.

the degree of latitude where it strikes the Rio Roxo of Natchitoches, or Red River; then following the course of the Rio Roxo westward, *to the degree of longitude* 100 *west from London and* 23 *from Washington*; then crossing the said Red River, and running thence, by a line *due north*, to the river Arkansas; thence, following the course of the southern bank of the Arkansas, to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January 1818. But if the source of the Arkansas River shall be found to fall north or south of latitude 42, then the line shall run from the said source due south or north, as the case may be, till it meets the said parallel of latitude 42, and thence, along the said parallel, to the South Sea. . . The two high contracting parties agree to cede and renounce all their rights, claims and pretensions to the territories described by the said line; that is to say; the United States hereby cede to His Catholic Majesty and renounce forever all their rights, claims and pretensions to the *territories lying west* and south of the above-described line; and, in like manner, His Catholic Majesty cedes to said United States all his rights, claims and pretensions to any territories east and north of the said line; and, for himself, his heirs and successors, renounces all claim to the said territories forever." 8 *Stat.* 252, 254, 256.

We here remark that the words in this treaty, "then following the course of the Rio Roxo [Red River] westward, to the degree of longitude 100 west from London and 23 from Washington, then crossing the said Red River, and running thence, by a line due north, to the river Arkansas," indicate that in the judgment of the United States at the time the treaty with Spain was signed the lands west of the 100th degree of west longitude and south of the 42d parallel of latitude constituted or should constitute part of the possessions of that country.

The treaty with Spain, although signed in 1819, was not finally ratified until February 19th 1821. But between the signing of that treaty and its ratification, namely, on the 18th day of October 1820, a treaty was concluded between the United States and the Choctaw Nation, whereby the latter ceded to the United States certain lands east of the Mississippi River. The main object of that treaty with the Choctaws was to exchange some of the lands then occupied by them for "a country beyond [west of] the Mississippi, where all, who live by hunting and will not work, may be collected and settled together." The second article of that treaty was in these words: "For and in consideration of the foregoing cession on the part of the Choctaw Nation, and in part satisfaction for the same, the commissioners of the United States, in behalf of said States, do hereby cede to said nation a tract of country west of the Mississippi River situate between the Arkansas and Red Rivers, and bounded as follows:

Beginning on the Arkansas River, where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian Fork, and up the same *to its source;* thence *due south to the Red River;* thence down Red River, three miles below the mouth of Little River, which empties itself into Red River on the north side; thence a direct line to the beginning." 7 *Stat.* 210, 211.

Those who supervised the drawing of the treaty of 1820 evidently did not closely scrutinize the provisions of the treaty with Spain signed the year previous; for the line "up the same [Canadian Fork] to its source, thence due south to the Red River" was in conflict with the Spanish treaty of 1819 which fixed the dividing line, running north and south, between the United States and Spain on the 100th degree of west longitude. This is clear from the use of the words in the Choctaw treaty of 1820, "up the Arkansas to the Canadian Fork, and up the same to its source, thence due south to the Red River." Or, perhaps, those who drew the treaty of 1820 assumed without inquiry that the source of the Canadian River was not farther west than the 100th degree of west longitude, which the treaty of 1819 designated as the dividing line between the United States and Spain. As the westernmost point of the Canadian River or Fork is 103° west, and the westernmost point of Red River is about 103° 10′ west longitude, a line running up the Canadian Fork "to its source, thence due south to Red River," was an impossible line; for necessarily a line directly south from the actual source of the Canadian River would never strike Red River; while a line drawn from the actual source of the Canadian River to the westernmost point of Red River would cross the Canadian River several times, striking Red River about longitude 103° 10′ west.

The difficulties arising from the conflicting description of boundaries as given in the Quapaw, Spanish and Choctaw treaties, above referred to, seem to have been recognized when the United States and the Choctaws, in execution, or in further recognition, of the treaty of 1820, made another treaty on the 27th of September 1830. 7 *Stat.* 333, 334.

By the latter treaty it was provided:

"ART. 2. The United States, under a grant specially to be made by the President of the United States, shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it; beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian Fork, *if in the limits of the United States, or to those limits;* thence *due* south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeably to the treaty made and concluded at Washington City in the year 1825. The grant to be executed so soon as the present treaty shall be ratified.

"ART. 3. In consideration of the provisions contained in the several articles of this treaty, the Choctaw Nation of Indians consent and hereby cede to the United States the entire country they own and possess east of the Mississippi River; and they agree to remove beyond the Mississippi River as early as practicable, and will so arrange their removal that as many as possible of their people, not exceeding one-half of the whole number, shall depart during the falls of 1831 and 1832; the residue to follow during the succeeding fall of 1833; a better opportunity in this manner will be afforded the Government to extend to them the facilities and comforts which it is desirable should be extended in conveying them to their new homes.

"ART. 4. The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the United States shall forever secure said Choctaw Nation from and against all laws except such as from time to time may be enacted in their own national councils, not inconsistent with the Constitution, treaties and laws of the United States; and except such as may and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian affairs. But the Choctaws, should this treaty be ratified, express a wish that Congress may grant to the Choctaws the right of punishing, by their own laws, any white man who shall come into their nation and infringe any of their national regulations." 7 *Stat.* 333, 334.

It cannot be doubted that the purpose of Article 2 of the treaty of 1830 was to provide for a special grant to the Choctaws of the lands intended to be ceded to them by Article 2 of the treaty of 1820, and no others. It was as if the parties declared that the words in the treaty of 1820, "thence up the Arkansas to the Canadian Fork, and up the same to its source, thence due south to the Red River," should be held to mean the same as the words in the treaty of 1830, "thence to the source of the Canadian Fork, *if* in the limits of the United States, *or to those limits, thence* due south to Red River." The treaty of 1830 plainly imports the understanding of the parties at that time that whatever might be the wording of the treaty of 1820, the United States had not thereby intended to grant, and the Choctaws had not thereby expected to receive, any lands at or near the source of the Canadian Fork unless that point was within the limits of the United States—that both parties had in view at that time only lands within the limits of the United States.

As the treaty of 1820 provided that the Choctaws should have lands as far west as the source of the Canadian River, it is suggested that the United

States could not legally modify that provision by the subsequent ratification in 1821 of the treaty with Spain signed in 1819. But it was entirely competent for the parties, without any new or valuable consideration intervening, to rectify a mistake in the description of boundaries, and to agree, as in effect they did by the treaty of 1830, that the words "to the Canadian Fork, and up the same to its source," in the treaty of 1820, were to be interpreted as meaning "to the source of the Canadian Fork, if in the limits of the United States, or to those limits"—thus relieving the United States from any obligation to make a special grant to the Choctaws of lands which by the treaty with Spain, ratified in 1821, had been recognized as part of Spanish territory. After the treaty of 1830 the line "thence due south to the Red River" was to be taken as running from a point on the dividing line between the United States and Spain, the 100th degree of west longitude as established by the treaty of 1819–1821, *thence due* south to that river.

In confirmation of the view we have taken of the treaty of 1830, we may refer to the agreement made January 17th 1837, by which the Choctaws assented to the formation by the Chickasaws of a district "within the limits of *their country.*" 11 *Stat.* 573. In the description of the boundaries of that district, which adjoins the district of the Choctaws on the west, it appears that one of the lines ran to a point ten or twelve miles above the mouth of the south fork of the Canadian River, "thence west along the main Canadian River to its source, *if* in the limits of the United States, *or to those limits;* and thence, due south to Red River, and down Red River to the beginning." Here was a repetition of the words of the treaty of 1830 and a distinct recognition of the fact that the Choctaw country was not to be regarded as embracing any lands not then, in 1837, within the limits of the United States. It cannot be contended that any lands west of the 100th degree of west longitude were within such limits as then established.

It is an important fact in this connection that prior to the treaty of 1830 the United States of America and the United Mexican States, by the treaty between them of January 12th 1828, recognized the boundaries of the respective countries to be as fixed by the treaty of 1819–1821. 8 *Stat.* 372, 374. And this position was maintained; for by a treaty concluded in 1838 between the United States and the Republic of Texas, the latter recognized as binding upon it the treaty made in 1828 with the United Mexican States. *Treaties and Conventions,* (1776–1887) *p.* 1079. And in the settlement made in 1850 between the United States and the State of Texas the latter agreed that its boundary on the north should commence at the point at which *the meridian of* 100 *degrees west* from Greenwich is intersected by the parallel of 36° 30′ north latitude, and run from that point west to the meridian 103 degrees west from Greenwich, then due south to the 32d degree of north latitude, thence on that parallel to the

Bravo del Norte, and thence with the channel of that river to the
of Mexico. 9 *Stat.* 446, *c.* 49; *United States* v. *Texas*, 162 *U. S.* 1, 39.
is said that the United States made a gift to Texas of the lands west
ne 100th degree of west longitude, but that it could not give away
s previously ceded by the treaty of 1820 to the Choctaws. We have
ady shown that the United States and the Choctaws substantially
ulated in the treaty of 1830 that the lands to be transferred to the Choc-
in consideration of the transfer by the Choctaws of lands east of the
issippi River were only such as were within the limits of the United
es. But we add, as a fact of significance, that in 1842 the special grant
vided for by the treaty of 1830 to be made to the Choctaws described
of the lines of the lands granted to those Indians as "running thence
ne source of the Canadian Fork, *if in the limits of the United States,*
those limits, thence due south to the Red River." This grant was
pted by the Choctaws, and we find no evidence in the record tending
ow that they at that time or at any time prior thereto claimed that
United States was under any obligation to transfer to them, or to
pensate them for any lands west of the 100th degree of west longitude
h the United States had recognized to be within the limits of Spain.
re is no suggestion even in the petition in this case that the treaty of
did not properly express the intention of the parties as to the lands
e transferred to the Choctaws.

. Proceeding in our examination of the facts supposed to throw light
the meaning of the treaty of 1866, we find that in 1854, for the first
the Choctaws, acting under some influence not explained by the
rd, insisted that their country extended west of the 100th degree of
longitude. In a letter dated July 11th 1854, and addressed to the
missioner of Indian Affairs by Choctaw delegates, it was said:

We shall therefore have to demand the immediate removal of the
al bands of Texas and other Indians, who have settled within our
s; and if this demand be not complied with, we will remove them
lves, using force if necessary. The Government must look to the
quences, whatever they may be. Our country extends west *to the*
waters of the Canadian, about the 103*d degree of west longitude*, and we
repared to maintain our rights to a boundary that far west by facts
vidence which cannot be disputed. In the compromise with Texas in
that portion of our country west of the 100th degree of west longitude
ssigned to that State, in direct and palpable violation of our rights.
nust demand to be repossessed of this portion of our country; and if
s not done our people will take possession of it, and leave the Govern-
to settle with Texas and the Indians upon it for such damages as
claim."

Under date of April 9th 1855 the United States agent for the Choctaws, acting under instructions from the Commissioner of Indian Affairs, asked the Choctaw delegates, then in Washington, for a conference—submitting to them certain interrogatories to be answered in writing—"for the purpose of ascertaining what arrangements, if any, can be made with them, having in view the adjustment of all differences between their tribe and the Chickasaw tribe of Indians, the Government of the United States, and the permanent settlement of the Wichita and other bands of Indians in the Choctaw country."

The Choctaw delegates, in reply, said among other things: "Respecting the Wichita and other bands of Indians, who have intruded themselves within the limits of our country, we have to remark they are, as you know, a nuisance, and we had far rather be rid of them altogether. In our communication to the acting Commissioner of Indian Affairs of the 11th of July last, we demanded their removal as we had a right to do; but we are not aware that any order has been given on the subject. We have had it in contemplation to renew this demand, and if not complied with to remove them by force if necessary. We and our people have, however, as we have ever had, every disposition to comply with the policy and wishes of the Government; and if it be an object of importance to it to have these Indians accommodated with a home within the boundaries of our country, though such an arrangement would be greatly repugnant to our inclinations and feelings, we would consent to it on fair and reasonable terms, if it can be made a part of a just and equitable adjustment of all the matters involved in the existing controversy between the Choctaws and the Government; otherwise we could not take the serious responsibility of encountering the prejudices and opposition of our people to the measure."

The Chickasaw delegates, with whom a conference was also sought, said, under date of April 14th 1855: "In regard to the third point, they have only to say that, in conjunction with the Choctaws, they are willing to enter into an arrangement with the United States Government for the permanent settlement of the Wichita and other bands of Indians in the Choctaw country, upon terms just, fair and safe for both the Choctaws and Chickasaws."

Under date of April 21st 1855 the Secretary of the Interior wrote to the Commissioner of Indian Affairs: "If you have any plan for the settlement of these difficulties, or if the Choctaws will submit a distinct offer, as the terms on which they will settle with the Chickasaws, and provide for the Wichitas and other Indians within the limits of the Choctaw country, the Department will give it prompt consideration, and with every disposition to award to them and the Chickasaws such degree of favor as may not be incompatible with the rights and interests of the United States."

On the 24th of April 1855 the Choctaw delegates wrote to the Indian agent: "2. We will agree to provide, in the same convention or supplemental treaty, that the Government shall have the permanent use of a limited portion of the western part of our country, for the accommodation of the Wichita and other bands of Indians, for a fair and just consideration, the amount to depend, of course, upon the extent of country required for the purpose. The Commissioner of Indian Affairs, in his letter, requires you to ascertain our terms for the use of that portion of our country west of the 98th degree of west longitude, and also for that west of the 99th degree. We are unwilling to lease, for the purpose mentioned, any portion of our country east of the 99th degree; but for the lease of that west of that degree we will consent, in behalf of our people, to take the sum of $400,000."

Two days later, April 26th 1855, the Commissioner of Indian Affairs thus wrote to the Indian agent: ". . You will also ascertain upon what terms the Choctaws will arrange with the United States, for the use of their country west of 98° west longitude, for the Wichitas and such other bands of Indians as the Government may desire to settle permanently west of that degree of longitude, also upon what terms the right to settle said Indians west of 99° west longitude can be obtained, and report to this office with the least delay possible."

On the day last named the Indian agent sent a letter to the Commissioner, enclosing "a proposition for the lease of the Choctaw possessions west of the 99th degree of west longitude to the Government, for the permanent settlement of the Wichita and other bands of Indians within the Choctaw country."

Under date of April 27th 1855 the Secretary of the Interior wrote to the Commissioner of Indian Affairs: "As I have heretofore said, I have every disposition to act towards these Indians in a spirit of the utmost liberality consistent with the just rights and interests of the United States; and, all things considered, am disposed to think the proposition for the permanent accommodation of the Wichita and other Indians, and the amount demanded therefor, worthy your consideration; and you are authorized to enter into negotiations with the Choctaws on that basis. I think, however, that, notwithstanding their claim to an extent of country west of the 100th meridian of longitude is regarded by the Department as without any foundation in law or equity, *it might prevent further trouble, in regard to it, to insert an article in the supplemental treaty or convention, now to be held, requiring the Choctaws to relinquish and abandon all right or claim to the same.*"

Under date of May 2d 1855 the Indian agent wrote to the Choctaw delegates: "In view of the probability that an arrangement will be effected between the Choctaw and Chickasaw tribes, restricting the western

boundary of the 'Chickasaw district' to the 98° of west longitude, west from Greenwich, I desire to ascertain whether you will agree, the Chickasaws assenting, to *lease* the country between 98° and 100° west longitude and between Red and Canadian Rivers to the United States, for the permanent settlement of the Wichita and other bands of Indians within the territorial limits of the Choctaw Nation; and if so, upon what terms, *it being understood that the Choctaws shall relinquish and quitclaim, in favor of the United States, whatever interest they may have in the country lying west of the* 100° *of west longitude.*"

On the 3d of May 1855 the Choctaw delegates wrote to the Indian agent: "In our communication to you of the 9th ultimo, we referred to the prejudices and opposition of our people to the location of the Indians referred to within the limits of our country, and our repugnance to such an arrangement; but we stated that we had every disposition to comply with the policy and wishes of the Government on the subject; and that, if the measure were one of importance to it, we would take the responsibility and consent to it, on fair and reasonable terms. In our subsequent communication of the 24th instant, we stated our unwillingness to lease, for that purpose, any portion of our country east of the 99° of west longitude, but that we would agree to lease that west of that degree, for the sum of four hundred thousand dollars. On further consideration of the subject, however, since the receipt of your letter, we have concluded, in the same spirit of accommodation, to agree to comply with the wishes of the Government by leasing to it the further portion of our country between the 98° and 100° of west longitude. The question of the total relinquishment of any portion of our territorial rights is one of even greater delicacy and difficulty. We have fully acquainted you with the grounds of our claim to title *to the headwaters of the Canadian River, extending as far west as at least to the* 103° *of west longitude.* We believe our title to be perfectly valid and good; but as it is questioned, if not disputed, by the Government, west of the 100° of west longitude, and we are anxious to put at rest all questions of controversy with it, *we will relinquish and quitclaim to it our rights west of that degree of longitude, on fair and equitable terms.* The extent of country involved is large; we know it to be valuable, and we believe the acquisition of our title to it to be important to the Government; still we have no disposition to be exorbitant. As a consideration for the whole arrangement, we would consent to take eight hundred thousand dollars—one half thereof for the lease of the country between the 98° and 100° west longitude, and the other half for the relinquishment of our right west of the latter degree. The above proposition has reference to the arrangement as a whole. Were it to be confined only to the lease of the portion of the country between the two degrees of longitude mentioned, we should for obvious reasons feel constrained to ask not less than six hundred thousand dollars therefor."

On May 4th 1855 the Indian agent wrote to the Choctaw delegates: "If the Choctaws will propose to lease to the United States the territory west of 98° and east of 100° west longitude, (the Chickasaws assenting,) and couple with it a relinquishment of all claims west of 100° west longitude, the Government will agree to pay them $600,000."

Under date of June 7th 1855 the Commissioner of Indian Affairs wrote to the Acting Secretary of the Interior: ". . After consultation with the Secretary of the Interior, and with his concurrence, Agent Cooper was instructed, verbally, to inform the delegation that if they would accept the sum of $600,000 for the lease of the country between the two degrees, *and the relinquishment west of the* 100°, the Government would give that sum. The delegation assented to this proposition, and agreed to take the sum of $600,000 for the lease of the territory within the two degrees mentioned, and the relinquishment of their claims to the country west of the 100th degree. The Chickasaw delegation also assented and agreed to the terms of the lease, and the question was settled, as I supposed; but both delegations now contend that the United States shall be restricted, in the number of bands of Indians to be located in the country leased, to such as are now residing in it. With such a limitation on the use of the country, the lease would be of little value, and I have, therefore, declined to assent to the limitation which the Indians desire to impose, and have claimed that the Government must be left free to locate such Indians as it may desire within the ceded country. . . The delegations propose, as a compromise, *that the Choctaws quitclaim to the country west of* 100°, and that they and the Chickasaws will *lease the country between* 99° *and* 100° for the permanent settlement of any Indians whom the Government may desire to locate therein, for the sum of $600,000."

Under date of June 14th 1855 the Choctaw delegates thus addressed the Commissioner of Indian Affairs: "The lease we had consented to agree to was a limited one, viz., for the permanent settlement, within the country leased, of the Wichita and several alien tribes and bands now in our country, the Government to have the control of them, but we still to retain jurisdiction over the country itself, with the right of settlement therein by Choctaws and Chickasaws as heretofore, as expressed and provided for in the convention. If the Government had the unrestricted right to bring in any and all Indians it pleased, the whole district might soon be filled up with a discordant, restless and predatory population, which would endanger the frontier settlements of the Choctaws and Chickasaws, deprive us practically of our jurisdiction and necessarily exclude Choctaws and Chickasaws from settling within the district, if they so desired. Such an arrangement would be a virtual sale of that portion of our country, to which we could under no circumstances submit. Moreover the consideration offered would be entirely inadequate. We had agreed to relinquish

our claims to territory west of the 100° of west longitude, embracing at least six and a half millions of acres. The district desired to be leased contains quite seven millions more; so that practically the Government would have acquired from us some thirteen and a half millions of acres of land, for the certainly insufficient sum of six hundred thousand dollars."

We have made this extended reference to the correspondence between the Indians and the officers of the United States for the purpose, not only of showing that the Choctaws had no claim, legal or equitable, to territory west of the 100th degree of west longitude, but of indicating the situation and relations of the parties when the treaty of 1855, to be presently referred to, was concluded.

The facts, above stated, so far as they relate to lands west of the 100th degree of west longitude, may be thus summarized:

1. By the treaty of 1818 two of the boundary lines of the tract of country ceded by the Quapaws to the United States were described as extending "up the Arkansaw to the Canadian Fork, and up the Canadian Fork to its source; thence south to Big Red River."

2. By the treaty signed in 1819, the dividing line between the United States and Spain, running north from Red River, was established on the *100th* degree of west longitude.

3. In 1820, before the treaty of 1819 was ratified, the United States made a treaty with the Choctaw Nation ceding certain territory, two of the lines of which were described by the treaty of 1820 as extending "up the Arkansas to the Canadian Fork, and up the same *to its source;* thence due south to the Red River." But those were impossible lines, because the source of the Canadian River or Fork was at the 105th degree of west longitude, while the source of Red River was at the 103d degree of west longitude, and a line running due south from the source of the Canadian River would not strike Red River.

4. When the treaty of 1830 was made with the Choctaws the fact was recognized that the United States had apparently ceded to the Choctaws lands west of the 100th degree of west longitude, which by the previous treaty with Spain signed in 1819 and ratified in 1821 had been recognized as within Spanish territory. But that the United States might not appear to cede or agree to cede lands outside of its limits, the treaty of 1830 corrected or qualified the description in the treaty of 1820 of the line running up the Canadian Fork to its source by using the words "if in the limits of the United States, or to those limits; thence due south to Red River." This change in the wording of the treaty of 1820 was recognized by the agreement between the Choctaws and Chickasaws of 1837, and was confirmed by the Choctaws when they accepted the special grant executed in 1842.

5. It does not appear that the Choctaws made any claim between 1830 and 1854 to have derived by cession from the United States any title to

lands west of the dividing line between the United States and Spain, that is, west of the 100th degree of west longitude, or that the Choctaws complained during that period that any lands ceded to them by the treaty of 1820 were wrongfully or illegally recognized by the treaty of 1819 as belonging to Spain.

6. In 1854–'5 the Choctaws, for the first time, asserted title to lands west of the 100th degree of west longitude as far west at least as the 103d degree. This claim was disputed by the United States, and pronounced by the Secretary of the Interior to be wholly without any foundation in law or equity, although that officer deemed it wise that the new treaty then (1855) contemplated to be made should embrace a relinquishment by the Choctaws to the United States of any interest they might have in lands west of the 100th degree of west longitude.

7. The Choctaws expressed their willingness to make a treaty leasing to the United States certain territory in their country east of the 100th degree of west longitude, *and* relinquishing any and all claim to lands west of that degree.

III. Such was the situation when the parties entered upon negotiations resulting in another treaty. We allude to the treaty of June 22d 1855, upon some of the provisions of which much stress has been placed by the parties.

The preamble to that treaty recites:

"Whereas the political connection, heretofore existing between the Choctaw and Chickasaw tribes of Indians, has given rise to unhappy and injurious dissensions and controversies among them, which render necessary a readjustment of their relations to each other and to the United States; and whereas the United States desire that the Choctaw Indians *shall relinquish all claim to any territory west of the 100th degree of west longitude*, and also to make provision for the permanent settlement, within the Choctaw country, of the Wichita and certain other tribes or bands of Indians, for which purpose the Choctaws and Chickasaws are willing to *lease*, on reasonable terms, to the United States that portion of their common territory which is west of the 98th degree of west longitude [that is, the territory between the 98th and 100th degree of west longitude]; and whereas the Choctaws contend that by a just and fair construction of the treaty of September 27th 1830 they are of right entitled to the net proceeds of the lands ceded by them to the United States, under said treaty, and have proposed that the question of their right to the same, together with the whole subject-matter of their unsettled claims, whether national or individual, against the United States, arising under the various provisions of said treaty, shall be referred to the Senate of the United States for final adjudication and adjustment; and whereas it is necessary, for the simplification and better understanding of the relations between the United

States and the Choctaw Indians, that all their subsisting treaty stipulations be embodied in one comprehensive instrument. Now, therefore," &c.

The boundaries of "the Choctaw and Chickasaw country," as established by Article 1 of this treaty, were as follows: "Beginning at a point on the Arkansas River, one hundred paces east of old Fort Smith, where the western boundary line of the State of Arkansas crosses the said river, and running thence due south to Red River; thence up Red River to the point *where the meridian of one hundred degrees west longitude crosses the same; thence north along said meridian, to the main Canadian River;* thence down said river to its junction with the Arkansas River; thence down said river to the place of beginning;" and pursuant to the act of Congress approved May 28th 1830, 4 *Stat.* 411, *c.* 148, the United States forever secured and guaranteed the lands embraced within those limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common, so that each and every member of either tribe should have an equal and undivided interest in the whole, subject, however, to the condition that no part thereof should ever be sold without the consent of both tribes; and that the land should revert to the United States if the Indians and their heirs became extinct, or abandoned the same.

It will be observed that "the Choctaw and Chickasaw country," as thus established, embraced no lands west of the 100th degree of west longitude.

Article 2 of the treaty established the boundary of the Chickasaw district—the district marked on the diagram heretofore made part of this opinion as tract 3.

By Article 3 it was provided that "the remainder of the country held in common by the Choctaws and Chickasaws shall constitute the Choctaw district, and their officers and people shall at all times have the right of safe conduct and free passage through the Chickasaw district." This territory is designated on the diagram as tract 2.

Article 4 provided that the government and laws then in operation, and not inconsistent with the treaty, should remain in full force within the limits of the Chickasaw district, until the Chickasaws should adopt a constitution.

Article 5 secured to the members of either tribe the right freely to settle within the jurisdiction of the other, and have all the rights, privileges and immunities of citizens thereof, except that no member of either tribe should participate in the funds belonging to the other tribe.

Article 6 provided for the surrender of fugitives from the justice of either tribe.

Article 7 secured to each tribe the unrestricted right of self-government, and, with certain exceptions not necessary to be here stated, full jurisdiction over persons and property within their respective limits.

Article 8 provided that in consideration of the foregoing stipulations, and immediately upon the ratification of the treaty, there should be paid to the Choctaws, in such manner as their national council should direct, out of the national fund of the Chickasaws held in trust by the United States, the sum of $150,000.

Articles 9 and 10 are the important parts of the treaty of 1855 so far as the present litigation is concerned. We therefore give them here in full:

"ART. 9. The Choctaw Indians do *hereby absolutely and forever quit-claim and relinquish* to the United States *all* their right, title and interest in and to any and *all lands west of the 100th degree of west longitude;* and the Choctaws and Chickasaws do hereby *lease* to the United States all that portion of their common territory west of the 98th degree of west longitude, for the *permanent settlement* of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein; excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas River, and whose permanent locations are north of the Canadian River, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas; which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the President for their government; *Provided, however,* the territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore.

"ART. 10. *In consideration* of the foregoing relinquishment *and* lease, and as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct." 11 *Stat.* 611, 612, 613.

The treaty of 1855 contains other articles, but they do not affect the determination of the present issues, and therefore we need not advert to them.

The lands described in this treaty as having been leased to the United States constituted what is called the "Leased District," no part of which as we have seen, was west of the 100th degree of west longitude.

There can be no doubt as to the meaning and scope of the treaty of 1855. In order simply to avoid future dispute, the United States desired the relinquishment by the Choctaw Nation of all claim to any territory west of the 100th degree of west longitude, and, in addition, it obtained a lease of the territory between the 98th and 100th degrees of west longitude for the permanent settlement of the Wichita and certain other tribes or bands of Indians, the right being reserved to the Choctaws and Chicka-

saws to settle on the leased territory as theretofore. The consideration for the "relinquishment *and* lease" was $800,000. It is immaterial to inquire as to the value placed by the Indians or by the United States upon the relinquishment and lease respectively. The Indians accepted for both the aggregate amount named. It is idle therefore to contend that the Indians had any claim upon the United States, after the treaty of 1855, for lands west of the 100th degree of west longitude. The treaty closed that dispute forever, if it had not been closed by previous treaties and by the special grant of 1842 made pursuant to Article 2 of the treaty of 1830, and which, as we have said, estopped the Indians from claiming any lands not within the limits of the United States. As to the lands the control of which was acquired by the lease embodied in the treaty of 1855, it may be assumed that the United States did not then desire to obtain the fee, but took the lands for specifically defined objects, upon the accomplishment of which the Indians could insist as a condition of the lease.

After the treaty of 1855 it was not possible for the Choctaws to assert any claim to lands west of the 100th degree of west longitude, and as to the lands between that and the 98th degree of west longitude, the United States held them under a permanent lease given in 1855, which practically divested the Choctaws of all interest in the territory constituting the Leased District, except that they could settle in it if they so desired.

IV. Subsequently to the making of the treaty of 1855, and until the Civil War intervened, the relations between the United States and these Indians were, so far as the record discloses, entirely harmonious. But their relations changed when that war opened and the Choctaws and Chickasaws co-operated with the Confederate forces, making war upon Indians adhering to the United States. As early as February 7th 1861 the General Council of the Choctaw Nation passed resolutions declaring that in the event of a permanent dissolution of the Union the natural affections, education, institutions and interests of its people indissolubly bound them to the Confederate States; *Reb. Rec. Series I, Vol.* 1, *p.* 682; and on the 25th of May 1861 the Legislature of the Chickasaws passed resolutions declaring that in the war then opening the Confederate States were their natural allies, and called upon the neighboring Indian nations to co-operate with them in the defense of the territory they inhabited "from Northern invasion by the Lincoln hordes and Kansas robbers." *Reb. Rec. Series I, Vol.* 3, *p.* 585.

The Civil War having ended, a council was held in September 1865 at Fort Smith, Arkansas, which was attended by D. N. Cooley, Commissioner of Indian Affairs, and others named by the President. There were also in attendance representatives of the Choctaws, Chickasaws, Creeks, Cherokees, Seminoles, Osages, Senecas, Shawnees, Quapaws, Wyandottes, Wichitas and Comanches. What was said at that meeting by the commissioners on

behalf of the United States is supposed to have some bearing upon the present issues. An address was made by Chairman Cooley to the Indian delegates, the substance of which was printed in a newspaper, and was as follows:

"Brothers: After considering your speeches made yesterday the commissioners have decided to make the following reply and statement of the policy of the Government. Brothers: We are instructed by the President to negotiate a treaty or treaties with any or all of the nations, tribes or bands of Indians in the Indian Territory, Kansas or of the plains west of the Indian Territory and Kansas. The following-named nations and tribes have by their own acts, by making treaties with the enemies of the United States, at the dates hereafter named, forfeited all right to annuities, lands and protection by the United States. The different nations and tribes having made treaties with the rebel government are as follows, viz: The Creek Nation, July 10th 1861; Choctaws and Chickasaws, July 12th 1861; Seminoles, August 1st 1861; Shawnees, Delawares, Wichitas and affiliated tribes residing in leased territory, August 12th 1861; the Comanches of the Prairie, August 12th 1861; the Great Osages, October 2d 1861; the Senecas, Senecas and Shawnees (Neosho Agency), October 4th 1861; the Quapaws, October 4th 1861; the Cherokees, October 7th 1861. By these nations having entered into treaties with the so-called Confederate States, and the rebellion being now ended, they are left without any treaty whatever, or treaty obligation for protection by the United States.

"Under the terms of the treaties with the United States and the law of Congress of July 5th 1862, all these nations and tribes forfeited and lost all their rights to annuities and lands. The President, however, does not desire to take advantage of or enforce the penalties for the unwise actions of these nations. The President is anxious to renew the relations which existed at the breaking out of the rebellion. We, as representatives of the President, are empowered to enter into new treaties with the proper delegates of the tribes located within the so-called Indian Territory and others above named living west and north of the Indian Territory. Such treaties must contain substantially the following stipulations: 1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States. 2. Those settled in the Indian Territory must bind themselves, when called upon by the Government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory, and with the United States. 3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes on an equal footing with the original members, or suitably provided for. 4. A stipulation in

the treaties that slavery or involuntary servitude shall never exist in the tribe or nation except in punishment of crime. 5. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government. 6. It is the policy of the Government, unless other arrangements be made, that all the nations and tribes in the Indian Territory be formed into one consolidated government, after the plan proposed by the Senate of the United States in a bill for organizing the Indian Territory. 7. No white person except officers, agents and employees of the Government, or of any internal improvement authorized by the Government, will be permitted to reside in the Territory unless formally incorporated with some tribe according to the usages of the band.

"Brothers: You have now heard and understand what are the views and wishes of the President, and the commissioners, as they told you yesterday, will expect definite answers from each of you upon the questions submitted. As we said yesterday, we say again, that in any event those who have always been loyal, although their nations may have gone over to the enemy, will be liberally provided for and dealt with."

The committee on the part of the Choctaws and Chickasaws, in reply to the proposition submitted by the commissioners of the United States as the basis of new treaties, said:

"We are pleased to learn that you propose to renew your previous relations with us, and we are willing to go into negotiations for the making of a new treaty with the United States, and as a basis of this new treaty accept articles 1st and 7th. In reference to the requirements of the article 2d, we desire to say that we wish as far as possible to avoid coming in conflict with our red brethren, should any of them be so unfortunate as to get into conflict with the United States authorities. We are willing to guarantee all our influence in favor of peace in all its bearings with our red brethren, and will not object to any of our citizens volunteering in any war in which the United States may become involved, for the aiding of the United States. We are willing to enter into negotiations for the settlement of all the points contained in the 3d and 4th articles. On certain terms, on which we can doubtless agree with you, we are willing to admit the settlement of other tribes within our territory, as proposed in the 5th article. We are willing to submit the Territorial bill referred to in the 6th article for the consideration of our respective general councils, and for this purpose request a copy of that bill for the principal chief of the Choctaw Nation and for the governor of the Chickasaw Nation. We accept article 7th, and are willing to have the provisions thereof incorporated into the treaty. We are also willing to incorporate a provision that no individual shall be proscribed, or any act of

forfeiture or confication passed against those who remain friendly to the United States, and that they shall enjoy equal privileges with other members of the nation."

Among the documents in the record is a draft of a treaty between the United States and the Choctaw and Chickasaw tribes which, it was stated, was submitted by the United States commissioners at the council held at Fort Smith. It is said in the opinion of the Court of Claims—and we think correctly—that this treaty was never agreed upon or executed. It need not therefore be set out here.

The reports, official and unofficial, of what was said and done before and at the Fort Smith council, show that the persons in attendance there were aware of the exact situation. They separated with the expectation or understanding that the matters then under consideration were to be further discussed and a conclusion reached in Washington in the spring of 1866, at which place delegates from the Indian tribes would attend.

In 1866 the negotiations between the United States and the Choctaw and Chickasaw Nations were resumed at Washington. The result was the treaty concluded April 28th 1866. 14 *Stat.* 769. The respective rights of the Choctaws and Chickasaws and of the United States, as involved in the present case, depend upon the construction of that treaty.

It is to be taken as beyond dispute that when the parties entered upon the negotiations resulting in that treaty, neither overlooked the fact that the Choctaws, by the treaty of 1855, had forever quitclaimed any claim they had to territory west of the 100th degree of west longitude. Nor could either have forgotten that the United States had, by the same treaty, acquired the control of the Leased District, without limit as to time, for the permanent settlement of certain Indians, excluding other Indians. Bearing these facts in mind, let us see what was effected by the treaty of 1866.

By Article 1, permanent peace and friendship were established between the United States and those nations—the Choctaws and Chickasaws binding themselves respectively to use their influence and to make every exertion to induce Indians of the plains to maintain peaceful relations with each other, with other Indians, and with the United States.

By Article 2, the Choctaws and Chickasaws covenanted and agreed that neither slavery nor involuntary servitude, otherwise than in punishment of crime whereof the parties had been duly convicted in accordance with laws applicable to all members of the particular nation, should ever exist in those nations.

Article 3—the important part of that treaty—was in these words: "The Choctaws and the Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby *cede* to the United States *the territory west of the 98° of west longitude, known as the Leased District*, provided that the said *sum* shall be invested and held by the United States, at an

interest not less that five per cent, *in trust* for the said nations, until the legislatures of the Choctaw and Chickasaw Nations respectively shall have made such laws, rules and regulations as may be necessary to give all persons of African descent resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys and public domain claimed by, or belonging to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw Nations in the proportion of three-fourths to the former and one-fourth to the latter—less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules and regulations shall elect to remove and actually remove from the said nations respectively. And should the said laws, rules and regulations not be made by the legislatures of said nations respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw Nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from said territory in such manner as the United States shall deem proper—the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove, those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thosand dollars or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations."

The Choctaws and Chickasaws further agreed in the same treaty (Art. 4) that "all negroes not otherwise disqualified or disabled shall be competent witnesses in all civil and criminal suits and proceedings in the Choctaw and Chickasaw courts, any law to the contrary notwithstanding; and they fully recognize the right of the freedmen to a fair remuneration on reasonable and equitable contracts for their labor, which the law should aid them to enforce. And they agree, on the part of their respective nations, that all laws shall be equal in their operation upon the Choctaws, Chickasaws and negroes, and that no distinction affecting the latter shall at any time be made, and that they shall be treated with kindness and be protected

against injury; and they further agree that while the said freedmen, now in the Choctaw and Chickasaw Nations, remain in said nations, respectively, they shall be entitled to as much land as they may cultivate for the support of themselves and families, in cases where they do not support themselves and families by hiring, not interfering with existing improvements without the consent of the occupant, it being understood that in the event of the making of the laws, rules and regulations aforesaid the forty acres aforesaid shall stand in place of the land cultivated as last aforesaid."

By Articles 30 and 43 it was provided:

"ART. 30. The Choctaw and Chickasaw Nations will receive into their respective districts *east* of the 98th degree of west longitude, in the proportion of one-fourth in the Chickasaw and three-fourths in the Choctaw Nation, civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory, not exceeding ten thousand in number, who shall have in the Choctaw and Chickasaw Nations, respectively, the same rights as the Choctaws and Chickasaws, of whom they shall be the fellow citizens, governed by the same laws, and enjoying the same privileges, with the exception of the right to participate in the Choctaw and Chickasaw annuities and other moneys, and in the public domain, should the same or the proceeds thereof be divided per capita among said Choctaws and Chickasaws, and among others the right to select land as herein provided for Choctaws and Chickasaws, after the expiration of the ninety days during which the selections of land are to be made as aforesaid by said Choctaws and Chickasaws; and the Choctaw and Chickasaw Nations pledge themselves to treat the said Kansas Indians in all respects with kindness and forbearance, aiding them in good faith to establish themselves in their new homes, and to respect all their customs and usages not inconsistent with the constitution and laws of the Choctaw and Chickasaw Nations respectively. In making selections after the advent of the Indians and the actual occupancy of land in said nation, such occupancy shall have the same effect in their behalf as the occupancies of Choctaws and Chickasaws; and after the said Choctaws and Chickasaws have made their selections as aforesaid, the said persons of African descent mentioned in the third article of the treaty shall make their selections as therein provided, in the event of the making of the laws, rules and regulations aforesaid, after the expiration of ninety days from the date at which the Kansas Indians are to make their selections as therein provided, and the actual occupancy of such persons of African descent shall have the same effect in their behalf as the occupancies of the Choctaws and Chickasaws."

"ART. 43. The United States promise and agree that no white person, except officers, agents and employees of the Government, and of any internal improvement company, or persons traveling through, or tempo-

rarily sojourning in, the said nations, or either of them, shall be permitted to go into *said territory*, unless formally incorporated and naturalized by the joint action of the authorities of both nations into one of the said nations of Choctaws and Chickasaws, according to their laws, customs or usages; but this article is not to be construed to affect parties heretofore adopted, or to prevent the employment temporarily of white persons who are teachers, mechanics or skilled in agriculture, or to prevent the legislative authorities of the respective nations from authorizing such works of internal improvement as they deem essential to the welfare and prosperity of the community, or be taken to interfere with, or invalidate, any action which has heretofore been had, in this connection, by either of the said nations."

By Article 46 it was provided: "Of the moneys stipulated to be paid to the Choctaws and Chickasaws under this treaty for the *cession* of the Leased District, and the admission of the Kansas Indians among them, the sum of one hundred and fifty thousand dollars shall be advanced and paid to the Choctaws, and fifty thousand dollars to the Chickasaws, through their respective treasurers, as soon as practicable after the ratification of this treaty, to be repaid out of said money or any other moneys of said nations in the hands of the United States; the residue, not affected by any provision of this treaty, to remain in the Treasury of the United States at an annual interest of not less than five per cent, no part of which shall be paid out as annuity, but shall be annually paid to the treasurer of said nations, respectively, to be regularly and judiciously applied, under the direction of their respective legislative councils, to the support of their government, the purposes of education, and such other objects as may be best calculated to promote and advance the welfare and happiness of said nations and their people respectively."

"ART. 51. It is further agreed that all treaties and parts of treaties inconsistent herewith be, and the same are hereby, declared null and void." 14 *Stat.* 769–781.

It is unnecessary to refer to any other provisions of the treaty of April 28th 1866; for none of them throw any light on the present inquiry.

The lands in dispute—being tract 5 and marked Wichitas on the above map—constitute a part of the Leased District which was *ceded* to the United States by the third section of the treaty of 1866. That is admitted. Did that treaty make an absolute, unconditional cession to the United States of these lands, free of any trust, express or implied? Or, stating the question in another form, is it consistent with that treaty to hold, as the court below did, that the lands were ceded to the United States in trust that the lands themselves, or, if they were appropriated or taken by the United States, their value, should be paid to the Indians whenever they ceased to be used exclusively for the settlement of Indians thereon?

There was much discussion at the bar as to the principles that should govern the court when determining the scope and effect of a treaty between the United States and Indian tribes. All agree that as a general rule in the interpretion of written instruments the intention of the parties must control, and that such intention is to be gathered from the words used—the words being interpreted, not literally nor loosely, but according to their ordinary signification. If the words be clear and explicit, leaving no room to doubt what the parties intended, they must be interpreted according to their natural and ordinary significance. If the words are ambiguous, then resort may be had to such evidence, written or oral, as will disclose the circumstances attending the execution of the instrument and place the court in the situation in which the parties stood when they signed the writing to be interpreted.

To what extent, if at all, have these rules been enlarged or modified when the instrument to be interpreted is a treaty between the United States and Indian tribes? In *The Kansas Indians*, 5 *Wall.* 737, 760, it was said that enlarged rules of construction have been adopted in reference to Indian treaties, citing as the words of Chief Justice Marshall in *Worcester* v. *Georgia*, 6 *Pet.* 515, 563, 582, (but which were in fact the words of Mr. Justice McLean in his concurring opinion in that case) the following: "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense." Mr. Justice McLean further said: "How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." In *United States* v. *Kagama*, 118 *U. S.* 375, 383–4, the Indian tribes in this country are spoken of as wards of the nation, communities dependent for their food and their political rights, as well as for protection, on the United States. And in *Choctaw Nation* v. *United States*, 119 *U. S.* 1, 28, it was said that the relation between the United States and the Indian tribes was that of superior and inferior, and that the rules to be applied in the case then before the court were those that goven public treaties, which, even in case of controversies between nations equally independent, were not to be interpreted as rigidly as documents between private persons governed by a system of technical law, "but in the light of the larger reason and the superior justice that constitute the spirit of the law of nations." In *Jones* v. *Meehan*, 175 *U. S.* 1, 11, it was said that a treaty between the United States and an Indian tribe must be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution to the political departments of the Government. Congress did not intend, when passing the act under which this litigation was inaugurated, to invest the Court of Claims or this court with authority to determine whether the United States had, in its treaty with the Indians, violated the principles of fair dealing. What was said in *The Amiable Isabella*, 6 *Wheat.* 1, 71, 72, is evidently applicable to treaties with Indians. Mr. Justice Story, speaking for the court, said: "In the first place, this court does not possess any treaty-making power. That power belongs by the Constitution to another department of the Government, and to alter, amend or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and, having found that, our duty is to follow it as far as it goes and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind. . . In the next place, this court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the modal part of the treaty, equally give the rule to the judicial tribunals."

So in *Beecher* v. *Wetherby*, 95 *U. S.* 517, 525, which involved the question whether the fee to certain lands was in the United States, with the right of occupancy only in certain Indians, this court said: "It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open

to discussion in a controversy between third parties neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the Government."

The same principle was announced in *United States* v. *Old Settlers*, 148 *U. S.* 427, 468. That suit was brought under an act of Congress authorizing the Court of Claims to pass upon a claim preferred by an Indian tribe, the intention of Congress, as stated in the act, being "to allow the said Court of Claims unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of said Indians, may be fully considered and determined." In that case it was sought to have the claimants relieved of certain provisions of a treaty, because of fraud and duress alleged to have been practised by the United States. But this court said: "There is nothing in the jurisdictional act of February 25th 1889 inconsistent with the treaty of 1846, (or any other,) and nothing to indicate that Congress attempted by that act to authorize the courts to proceed in disregard thereof. Unquestionably a treaty may be modified or abrogated by an act of Congress, but the power to make and unmake is essentially political and not judicial, and the presumption is wholly inadmissible that Congress sought in this instance to submit the good faith of its own action or the action of the Government to judicial decision, by authorizing the stipulations in question to be overthrown upon an inquiry of the character suggested, and the act does not in the least degree justify any such inference."

In the jurisdictional act of March 2d 1895, 28 *Stat.* 876, 898, *c.* 188, Congress authorized suit to be brought in the Court of Claims, so that the rights, legal and equitable, of the United States and of the Choctaw and Chickasaw Nations, and the Wichita and Affiliated Bands of Indians in the premises "shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party"—taking care, however, to add that nothing in the act "shall be accepted or construed as a confession that the United States admit that the Choctaw and Chickasaw Nations have any claim to or interest in said lands or any part thereof." It is thus clear that the Court of Claims was without authority to determine the rights of parties upon the ground of mere justice or fairness, much less, under the guise of interpretation, to depart from the plain import of the words of the treaty. Its duty was to ascertain the intent of the parties according to the established rules for the interpretation of treaties. Those rules, it is true, permit the relations between Indians and the United States to be taken into consideration. But if the words used in the treaty of 1866, reasonably interpreted, import beyond question an absolute, unconditional cession of the lands in question to the United States free from any trust, then the court cannot amend the treaty or refuse to carry out the

intent of the parties, as gathered from the words used, merely because one party to it held the relation of an inferior and was politically dependent upon the other, or because in the judgment of the court the Indians may have been overreached. To hold otherwise would be practically to recognize an authority in the courts not only to reform or correct treaties, but to determine questions of mere policy in the treatment of the Indians which it is the function alone of the legislative branch of the Government to determine.

It is said in the present case that the interpretation of the treaty in accordance with the views of the United States would put the Government in the attitude of having acquired lands from the Indians at a price far below their real value. Even if this were true it would not authorize the court in determining the legal rights of the parties to proceed otherwise than according to the established principles of interpretation, and out of a supposed wrong to one party evolve a construction not consistent with the clear import of the words of the treaty. If the treaty of 1866, according to its tenor and obvious import, did injustice to the Choctaws and Chickasaws, the remedy is with the political department of the Government. As there is no ground to contend in this case that that treaty, if interpreted according to the views of the Government, was one beyond the power of the parties to make, it is clear that even if the United States did not deal generously with the Choctaws and Chickasaws in respect of the lands in dispute—and we do not mean to say that there is any ground whatever for so contending—the wrong done must be repaired by Congress, and cannot be remedied by the courts without usurping authority that does not belong to them.

Looking now at the treaty of 1866, we are unable to concur in the interpretation placed upon it by the Court of Claims. In our opinion its words plainly and obviously import a cession to the United States of the territory constituting the Leased District unaccompanied by any condition in the nature of a trust, express or implied, except that the *money* to be paid by the United States in consideration of the cession was to be invested and held by the United States "in trust" for certain specified objects. The declaration of a trust touching the money, and the failure to accompany the cession of the lands with any declaration of a trust in respect to them, manifestly shows that there was an intention to pass to the United States an absolute title to the lands and to abrogate the existing lease. The words in Article 3 of the treaty, "the Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby *cede* to the United States *the territory* west of the 98° of west longitude *known as the Leased District*," and the words in Article 46, "of the moneys stipulated to be paid to the Choctaws and Chickasaws under this treaty *for the cession of the Leased District*," so clearly exclude the idea of

trust in reference to the lands, that a different meaning cannot be attached to them without doing violence to the words used by the parties. It cannot be doubted, as we have heretofore said, that during the negotiations resulting in the treaty of 1866 the parties well knew that the territory constituting the Leased District was held by the United States, not absolutely or in fee, but under lease, for the permanent settlement thereon of the Wichita and certain other tribes or bands of Indians. The treaty of 1855 shows that upon its face. Now there is nothing whatever in the treaty of 1866 that evinces a purpose to preserve the relations of lessor and lessee in respect to the lands constituting the Leased District. On the contrary, the relations of the parties having been disturbed or destroyed by the Civil War, there was a manifest purpose not to renew and continue the relations of lessor and lessee, but to have the territory in question ceded absolutely to the United States.

It is said that the treaty of 1866, if interpreted in the light of what occurred at the Fort Smith council held in September 1865, shows that the parties expected and intended that the lands ceded should be accompanied with a trust in reference to the use of the Leased District for the settlement of Indians. We cannot assent to this view. The persons at that council who represented the United States stated that the new Indian treaties to be made must contain certain stipulations. But no one of those stipulations had specific reference to the lands constituting the Leased District. It is true that of the stipulations mentioned by Commissioner Cooley at the Fort Smith Council, the fifth declared that "a portion of the lands hitherto owned and occupied by you [the Indians] must be set apart for the friendly tribes now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government;" and that by the seventh it was provided that "no white person except officers, agents or employees of the Government, or of any internal improvement authorized by the Government, will be permitted to reside in the Territory unless formally adopted into some tribe according to the usages of the band." But those stipulations had no reference to the Leased District then held by the United States under the treaty of 1855 for the permanent settlement of Indians. The reference in the fifth and seventh proposed stipulations related, so far as the Choctaws and Chickasaws were concerned, to lands "owned *and occupied* by them," that is to the territory, respectively, of the Choctaws and Chickasaws east of the 98th degree of west longitude, which was controlled by them and in which their laws and usages prevailed. Those nations did not then occupy the Leased District, but did own and occupy lands east of that district, and in that territory their laws and usages controlled.

The treaty of 1866 contains no word or clause qualifying or limiting the absolute cession made by Article 3 of the territory constituting the Leased District. If the parties to it intended that the lands constituting that district should continue to be held and used by the United States as they were then held and used under the treaty of 1855—that is, under lease—the treaty of 1866 would not have declared, without qualification, that the Choctaws and Chickasaws "*hereby cede*" to the United States the territory known as the Leased District, and omitted all words that would, under the most liberal interpretation, either import a continuation of the lease then existing or any trust connected with the territory ceded. It is a fact not without significance that one of the persons attesting the treaty of 1866 as a witness was an eminent lawyer who was of counsel for the Choctaws and Chickasaws during the negotiations at Washington resulting in that treaty. In the view we take of the matter, we cannot suppose that he advised the Indians that the treaty made any other than an unconditional cession of the territory known as the Leased District.

If the Indians intended, so far as they were concerned, to pass an absolute, unencumbered title to the United States, it would, we think, have been impossible to employ language more appropriate to that object than is to be found in the treaty of 1866. Our convictions upon this point are so decided that we feel constrained to say that if some of the parties had not been Indians it would never have occurred to any one that the cession of territory made by that treaty was attended by conditions in the nature of a trust. While the dependent character of the Indians makes it the duty of the court to closely scrutinize the provisions of the treaty and to interpret them "in the light of the larger reason and the superior justice that constitute the spirit of the law of nations," (*Choctaw Nation* v. *United States*, 119 *U. S.* 1, 28,) the court must take care, when using its power to ascertain the intention of the parties, not to disregard the obvious import of the words employed, and thereby, in effect, determine questions of mere governmental policy. We may repeat, that if wrong was done to the Indians by the treaty of 1866, interpreted as we have indicated—and we are not to be understood as expressing the opinion that they were not under all the circumstances fairly dealt with—the wrong can be repaired by that branch of the Government having full power over the subject.

It is said that the interpretation placed by us upon the Choctaw-Chickasaw treaty of 1866 is inconsistent with that placed by the United States upon the treaties made in the same year with the Seminoles and the Creeks—all of which treaties contemplated a new policy for the Indian country and for the Indians. Let us see what are the facts in relation to those treaties.

The preamble of the treaty with the Seminoles, (which was concluded March 21st 1866 and proclaimed August 16th 1866, 14 *Stat.* 755,) recited:

"Whereas existing treaties between the United States and the Seminole Nation are insufficient to meet their mutual necessities; and whereas the Seminole Nation made a treaty with the so-called Confederate States, August 1st 1861, whereby they threw off their allegiance to the United States, and unsettled their treaty relations with the United States, and thereby incurred the liability of forfeiture of all lands and other property held by grant or gift of the United States; and whereas a treaty of peace and amity was entered into between the United States and the Seminole and other tribes at Fort Smith, September 10th 1865, whereby the Seminoles revoked, cancelled and repudiated the said treaty with the so-called Confederate States; and whereas the United States, through its commissioners, in said treaty of peace, promised to enter into treaty with the Seminole Nation to arrange and settle all questions relating to and growing out of said treaty with the so-called Confederate States; and whereas the United States, in view of said treaty of the Seminole Nation and the enemies of the Government of United States, and the consequent liabilities of said Seminole Nation, and in view of its urgent necessities for more lands in the Indian territory, requires a *cession* by said Seminole Nation of a part of its present reservation, and is willing to pay therefor a-reasonable price, while at the same time providing new and adequate lands for them." And by the 3d article of that treaty it was provided: "*In compliance with the desire of the United States to locate other Indians and freedmen thereon*, the Seminoles cede and convey to the United States their entire domain, being the tract of land ceded to the Seminole Indians by the Creek Nation under the provision of article first, treaty of the United States with the Creeks and Seminoles, made and concluded at Washington, D. C., August 7th, 1856. In consideration of said grant and cession of their lands, estimated at 2,169,080 acres, the United States agrees to pay said Seminole Nation the sum of $325,362, said purchase being at the rate of fifteen cents per acre. The United States having obtained by grant of the Creek Nation the westerly half of their lands, hereby grant to the Seminole Nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians."

The treaty concluded with the Creeks June 14th 1866, and proclaimed August 11th 1866, 14 *Stat.* 785, contained a preamble similar to the one in the treaty with the Seminoles, and which, in addition, stated that "the United States *required* of the Creeks a portion of their land whereon to settle other Indians." And by the 3d article of that treaty it was provided: "*In compliance with the desire of the United States to locate other Indians and freedmen thereon*, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of

their entire domain, to be divided by a line running north and south; the eastern half of said Creek Lands being retained by them shall, except as otherwise herein stipulated, be forever set apart as a home for said Creek Nation; and in consideration of said cession of the west half of their lands, estimated to contain 3,250,560 acres the United States agree to pay the sum of thirty cents per acre, amounting to $975,168, in the manner hereinafter provided."

By the Indian Appropriation Act of March 2d 1889, *c.* 412, 25 *Stat.* 980, 1004, the sum of $1,912,942.02 was appropriated "to pay in full the Seminole Nation of Indians for all the right, title, interest and claim which said nation of Indians may have in and to certain lands ceded by Article 3" of the above treaty with the Seminoles. And by an act approved March 1st 1889, *c.* 317, 25 *Stat.* 759, 799, Congress appropriated $2,280,857.10 to pay the Creek Nation for the lands ceded by the treaty of 1866 with them—the agreement with those Indians which was the basis of the above act reciting, among other things, that the United States desired that "all of said ceded lands may be entirely freed from any limitation in respect to the use and enjoyment thereof."

Now, it is argued that if the interpretation placed by the United States upon the treaty of 1866 with the Choctaws and Chickasaws is accepted the result will be that the General Government has been more liberal towards the Seminoles and Creeks than it has been with the Choctaws and Chickasaws. But that cannot constitute a reason why the court should depart from the ordinary signification of the words used in the treaty with the Choctaws and Chickasaws. If Congress chose to adopt one course towards the Seminoles and Creeks and a different course towards the Choctaws and Chickasaws, it is not for the judiciary to defeat the will of the legislative branch of the Government by giving to an Indian treaty a meaning not justified by its words.

Apart from this last view we find clauses in the treaties with the Seminoles and Creeks which are not in the treaty with the Choctaws and Chickasaws, and which throw light upon the refusal of the United States to make an appropriation to the latter tribes on account of the particular lands here in question. In the treaties of 1866 with the Seminoles and Creeks, respectively, by which they ceded certain lands to the United States, it is expressly stated that the cession was made "in compliance with the desire of the United States to locate other Indians and freedmen thereon." No such words are found in the treaty of cession concluded with the Choctaws and Chickasaws. When the United States concluded the treaty of 1866 with the Choctaws and Chickasaws it did not need a cession of the lands here in question in order simply to locate Indians and freedmen on them. It already had, by the treaty of 1855, a perpetual lease of those lands for

the settlement of Indians. What it needed, perhaps what it required—at any rate, what it obtained—was an unqualified cession of the territory, unaccompanied by any declaration as to the use intended to be made of it, or by any words qualifying the absoluteness of the title passed to the United States. It took an absolute cession, without any declaration as to the uses to which the territory ceded was to be devoted.

It may be that other considerations than those referred to caused the use of the words in the treaties with the Seminoles and Creeks that are not to be found in the treaty with the Choctaws and Chickasaws. But in our judgment the words of the treaty of 1866 with the Choctaws and Chickasaws so clearly import a cession of title without limitation as to the uses to which the ceded territory was to be devoted, that the claim of those Indians can derive no support from the transactions between the United States and the Seminoles and Creeks.

But the Choctaws and Chickasaws lay great stress on the following paragraph in section 15 of the Indian Appropriation Act of March 3d 1891, 26 *Stat.* 989, 1025, *c.* 543: "And the sum of $2,991,450 be, and the same is hereby, appropriated out of any money in the Treasury not otherwise appropriated, to pay the Choctaw and Chickasaw Nations of Indians for all the right, title, interest and claim which said nations of Indians may have in and to certain lands now occupied by the Cheyenne and Arapahoe Indians under executive order; said lands lying south of the Canadian River, and now occupied by the said Cheyenne and Arapahoe Indians, said lands have been ceded in trust by Article 3 of the treaty between the United States and said Choctaw and Chickasaw Nations of Indians, which was concluded April 28th 1866, and proclaimed on the 10th day of August of the same year, and whereof there remains, after deducting allotments as provided by said agreement, a residue ascertained by survey to contain 2,393,160 acres; three-fourths of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of said Choctaw Nation to receive the same, at such time and in such sums as directed and required by the legislative authority of said Choctaw Nation, and one-fourth of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of said Chickasaw Nation to receive the same, at such times and in such sums as directed and required by the legislative authority of said Chickasaw Nation; this appropriation to be immediately available and to become operative upon the execution, by the duly appointed delegates of said respective nations specially authorized thereto by law, of releases and conveyances to the United States of all the right, title, interest and claim of said respective nations of Indians in and to said land (not including Grier County, which is now in dispute), in manner and form satisfactory to the President of the United States;

and said releases and conveyances, when fully executed and delivered, shall operate to extinguish all claim of every kind and character of said Choctaw and Chickasaw Nations of Indians in and to the tract of country to which said releases and conveyances shall apply."

It is argued that the words in the above paragraph, "said lands have been ceded in trust by Article 3 of the treaty between the United States and said Choctaw and Chickasaw Nations of Indians, which was concluded April 28th 1866," must be taken as an admission by the United States in 1891 that the cession made by the treaty of 1866 was not intended to be absolute and unconditional, but in trust to be used for the settlement of Indians, upon the abandonment of which object by the United States the ceded lands reverted to the Indians.

There would be force in this contention if it appeared that the legislative and executive branches of the Government had adhered to the declaration in the act of March 3d 1891. But such is not the fact. For at the next session of Congress, President Harrison, by special message, dated February 18th 1892, called attention to the above paragraph, and among other things said: "If this section had been submitted to me as a separate measure, especially during the closing hours of the session, I should have disapproved it; but as the Congress was then in its last hours a disapproval of the general Indian appropriation bill of which it was a part would have resulted in consequences so far-reaching and disastrous that I felt it my duty to approve the bill. But as a duty was devolved upon me by the section quoted, viz: the acceptance and approval of the conveyances provided for, I have felt bound to look into the whole matter, and in view of the facts which I shall presently mention, to postpone any executive action until these facts could be submitted to Congress."

After referring to some matters that have no connection with the inquiry as to the meaning of the treaty of 1866 with the Choctaws and Chickasaws, the President proceeded: "After a somewhat careful examination of the question, I do not believe that the lands for which this money is to be paid were, to quote the language of section 15 of the Indian appropriation bill, already set out, 'ceded in trust by Article 3 of the treaty between the United States and said Choctaw and Chickasaw Nations of Indians, which was concluded April 28th 1866,' etc. It is agreed that the treaty contained no express limitation upon the uses to which the United States might put the territory known as the Leased District. The lands were ceded by terms sufficiently comprehensive to have passed the full title of the Indians. The limitation upon the use to which the Government might put them is sought to be found in a provision of the treaty by which the United States undertook to exclude white settlers, and in the expressions found in the treaties made at the same time with the Creeks and other tribes of the purpose of the

United States to use the lands ceded by those tribes for the settlement of friendly Indians. The stipulation as to the exclusion of white settlers might well have reference solely to the national lands retained by the Choctaw and Chickasaw tribes, and the reason for the nonincorporation in the treaty with them of a statement of the purpose of the Government in connection with the use of the lands is well accounted for by the fact that as to these lands the Government had already, under the treaty of 1855, secured the right to use them perpetually for the settlement of friendly Indians. This was not true as to the lands of the other tribes referred to. The United States paid to the Choctaws and Chickasaws $300,000, and the failure to insert the words that are called words of limitation in this treaty points, I think, clearly to the conclusion that the commissioners on the part of the Government, and the Indians themselves, must have understood that this Government was acquiring something more than a mere right to settle friendly Indians, which is already possessed, and something more than the mere release of the right which the Choctaws and Chickasaws had under the treaty of 1855 to select locations on these lands if they chose. Undoubtedly it was the policy of this Government for the time to hold these and the adjacent lands as Indian country, and many of the expressions in the proclamations of my predecessors and in the reports of the Indian Bureau and of the Secretary of the Interior mean this and nothing more. This is quite different from a conditional title which limits the grant to a particular use and works a reinvestment of full title in the Indian grantors when that use ceases. But those who hold most strictly that a use for Indian purposes, where it is expressed, is a limitation of title seem to agree that the United States might pass a fee absolute to other Indian tribes in the lands ceded for their occupancy. Certainly it was not intended that in settling friendly Indians upon these lands the Government was to be restrained in its policy of allotment and individual ownership. If, for an adequate consideration by treaty, the United States placed upon these lands other Indian tribes, it was competent to give them patents in fee for a certain and agreed reservation. This being so, when the policy of allotment is put into force the compensation for the unused lands should certainly go to the occupying tribe, which, in the case supposed, had paid a full consideration for the whole reservation. It will hardly be contended that in such case this Government should pay twice for the lands. . . It is right also, I think, that Congress in dealing with this matter should have the whole question before it; for the declaration of Indian title contained in this item of appropriation extends to a very large body of land and will involve very large future appropriations. The Choctaw and Chickasaw Leased District, embracing the lands in the Indian Territory between the 98th and 100th degrees of

west longitude and extending north and south from the main Canadian River to the Red River, including Greer County, contains, according to the public surveys, 7,713,239 acres, or, excluding Greer County, 6,201,663 acres. This Leased District is occupied as follows: Greer County, by white citizens of Texas, 1,511,576 acres. The United States is now prosecuting a case in the courts to obtain a judicial declaration that this county is part of the Indian country. If a decision should be rendered in its favor, the claim of the Choctaws and Chickasaws to be paid for these lands at the rate named in this appropriation would at once be presented. . . Under the treaty of 1855 the Choctaws and Chickasaws quitclaimed any supposed interest of theirs in the lands west of the 100th degree. The boundary between the Louisiana purchase and the Spanish possessions by our treaty of 1819 with Spain was, as to these lands, fixed upon the 100th degree of west longitude. Our treaty with the Choctaws and Chickasaws, made in 1820, extended their grant to the limit of our possessions. It follows, of course, that these lands were included within the boundaries of the State of Texas when that State was admitted into the Union, and the release of the Choctaws and Chickasaws, whatever it was worth, operated for the benefit of the State of Texas, and not of the United States. The lands became public lands of that State. For the release of this claim and for the lease of the lands west of the 98th degree the Government of the United States paid the sum of $800,000. In the calculations which have been made to arrive at the basis of the appropriations under discussion, no part of this sum is treated as having been paid for the lease. I do not think that this is just to the United States. It seems probable that a very considerable part of this consideration must have related to the leased lands, because these were the lands in which the Indian title was recognized and the treaty gave to the United States a permanent right of occupation by friendly Indians. The sum of $300,000, paid under the treaty of 1866, is deducted, as I understand, in arriving at the sum appropriated. It seems to me that a considerable proportion of the sum of $800,000 previously paid should have been deducted in the same manner. I have felt it my duty to bring these matters to the attention of Congress for such action as may be thought advisable."

The President's message having been referred by the Senate to its Committee on Indian Affairs, that Committee made a report accompanied by the following resolution: "*Resolved*, That for reasons set forth in the report of the Committee on Indian Affairs upon the President's message of February 18th 1892, upon the appropriation of March 3d 1891, for payment to the Choctaw and Chickasaw Nations for their interest in the Cheyenne and Arapahoe reservation in the Indian Territory, submitted with this resolution, it is the opinion of the Senate that there is no sufficient reason

interference in the due execution of the law referred to." *Congr. Rec. l Cong. 1st Sess. Vol.* 23, *Pt.* 5, *p.* 4093. The resolution was adopted, and of similar import was adopted by the House of Representatives.

But on the 15th day of December 1892 the House of Representatives ssed the following resolution: "*Resolved by the Senate and House of Rep-entatives*, That the Secretary of the Treasury be, and he is hereby, directed retain and cover back into the Treasury $48,800 of the appropriation de by Congress to pay the Choctaw and Chickasaw tribes of Indians their interest in lands of the Cheyenne and Arapahoe reservation, ed March 3d 1891, which amount has been ascertained, by a recount the allottees of said Cheyennes and Arapahoes to be by that amount re than is due the said Choctaws and Chickasaws upon the purchase d settlement for their said interest." The Senate amended that resolu-n by adding thereto this proviso: "*Provided, however*, That neither the ssage of the original act of appropriation to pay the Choctaw and ickasaw tribes of Indians for their interest in the lands of the Chey-ne and Arapahoe reservation, dated March 3d 1891, nor of this joint olution shall be held in any way *to commit the Government to the pay-nt of any further sum to the Choctaw and Chickasaw Indians for any eged interest in the remainder of the lands situated in what is commonly own and called the Leased District.*" In this amendment the House ncurred, and on January 18th 1893 the resolution as amended was ap-oved by the President. *Congr. Rec. 52d Cong. 2d Sess. vol.* 24, *Pt.* 1, *pp.* 3, 379, 868; 27 *Stat.* 753.

Then followed the act of 1895, 28 *Stat.* 876, 898, *c.* 188, under which the esent suit was instituted, and which related to the lands in the Leased strict covered by the agreement of June 4th 1891 with the Wichita and filiated Bands of Indians—the lands in dispute. That act contained proviso that nothing in it "shall be accepted or construed *as a con-ion that the United States admit that the Choctaw and Chickasaw Nations ve any claim to or interest in said lands or any part thereof.*"

It thus appears that while the majority of the members of the two Houses Congress, at one time, were apparently of the opinion that the cession de by the treaty of 1866 with the Choctaws and Chickasaws was encum-ed with a trust that the lands be used only for purposes connected with settlement of Indians, the Head of the Executive Department of the Gov-ment in 1892 was of opinion that no such trust existed or was intended. idently, the legislative branch of the Government, when it came to deal h the lands occupied by the Wichita and Affiliated Bands of Indians, der the treaty of 1855, declined to apply the rule adopted in the act of 91 in reference to the lands in the Leased District occupied by the Chey-es and Arapahoes, and intended by the act of 1895 to leave the whole

question as to the legal and equitable rights of the United States and of the Choctaw and Chickasaw Nations in the lands now in dispute to be determined by the courts. In other words, the rights of the parties are to be determined by the rules established for the interpretation of such instruments as the treaty of 1866, giving due weight to every fact proper to be considered in ascertaining the intention of the parties. In this view, we cannot hold that the above declaration in the act of March 3d 1891, 26 *Stat.* 989, 1025, *c.* 543, that the cession made by the treaty of 1866 was attended by a trust is sufficient to defeat such interpretation of the treaty as is required by its words when reasonably interpreted or interpreted in the sense in which they were naturally understood by the Indians when they assented to the treaty.

V. We come to the material questions arising upon the appeal of the Wichita and Affiliated Bands of Indians.

We have seen in the statement of the case that by the agreement of June 4th 1891 between the United States and the Wichita and Affiliated Bands of Indians (ratified by the act of Congress of March 2d 1895, 28 *Stat.* 876, 895, 896, 897, *c.* 188) the latter ceded to the United States, without any reservation whatever, all their claim and title in and to the lands embraced in tract 5 on the above diagram, known as the Wichita Reservation. That agreement shows that in addition to the allotment of lands therein provided for, the Wichita and Affiliated Bands insisted that further compensation, in money, should be made to them by the United States for their possessory right in and to the above lands in excess of that required for the allotments. And it was agreed that the question "as to what sum of money, if any, shall be paid to said Indians for such surplus lands" should be submitted to Congress, its decision thereon "to be final and binding upon said Indians;" provided, if any sum of money was allowed by Congress for surplus lands, it should be subject to a reduction for each allotment of land that was taken in excess of the one thousand and sixty at that price per acre, if any, that might be allowed by Congress. It was further stipulated in the agreement of 1891 "that there shall be reserved to said Indians the right to prefer against the United States any and every claim that they may believe they have the right to prefer, save and except any claim to the tract of country described in the first article of this agreement"—the tract numbered 5 and marked "Wichitas."

The relief asked by the Wichita and Affiliated Bands was that the petition of the Choctaws and Chickasaws be dismissed; and that it be decreed that they were entitled to the proceeds of the sale of all the lands involved in this case, to be paid to them from time to time after being deposited in the Treasury as required by the act of 1895.

The Court of Claims having decided that the Choctaws and Chickasaws were entitled to such of the lands of the Wichita Reservation as remained after making the allotments required by the act of 1895, the only relief given by the decree to the Wichita and Affiliated Bands was to adjudge that the members of those tribes were each entitled to 160 acres of land out of the lands in dispute, to be set apart for them by the United States, having due regard to any improvements made thereon by them respectively, for their permanent settlement. Of this decree the United States does not complain, but the Choctaws and Chickasaws do complain of it so far as it assigned 160 acres of land to each member of the Wichita and Affiliated Bands.

Under the views we have expressed, the Choctaws and Chickasaws have had no interest in the particular lands in dispute since the absolute cession made by them to the United States in the treaty of 1866. They have therefore no concern in the questions that have arisen between the United States and the Wichita and Affiliated Bands of Indians as to the disposition of those lands. And as the United States does not complain of the decree in favor of the latter Indians, awarding to each 160 acres of land, the only question that remains to be considered arises on the appeal of the Wichita and Affiliated Bands, namely, whether the court below erred in not decreeing those Indians to be entitled to the proceeds of the sale of such of the lands in question as may be left after making the allotments in severalty required by the act of Congress.

The question last stated does not require any extended discussion; indeed, we are relieved of the necessity of discussing it, for the United States at the present hearing concedes that the removal of the Wichita and Affiliated Bands from their former habitations and their permanent settlement upon the Wichita Reservation invested them with a full right of occupancy of the lands in dispute and with all the incidents of such right, and that each member of those tribes is now entitled to receive 160 acres in severalty, and "also the proceeds of the balance of the land whenever such sales are made as authorized by the jurisdictional act." "If this were all," say the representatives of the Government, "that the Wichita and Affiliated Bands claimed, the United States would endorse the appeal of these Indians instead of opposing it." The Government itself suggests—and we recognize its right under all the circumstances of this case to ask—that the decree as to the Wichita and Affiliated Bands be reversed and set aside and the cause remanded with directions that, in addition to the dismissal of the petition of the Choctaw and Chickasaw Nations, and ordering the allotment of 160 acres of land in the Wichita Reservation to each member of those tribes, they have the benefit of the proceeds of the sale of such lands in the Wichita Reservation as are not needed for the purposes indicated in the act of Congress.

To what compensation are the Wichita and Affiliated Bands entitled on account of the lands not needed for the allotments required by the act of Congress? Upon this question this court does not feel bound to express any opinion. The agreement of 1891 between the United States and the Indians shows that the question of the amount of money, if any, to be paid to the Indians on account of the surplus lands was in dispute and was left to the determination of Congress, whose action, it was agreed, should be final and binding on the Indians; and then by the act of Congress that question was referred to the Court of Claims, with a right of appeal to this court. But Congress did not indicate any rule for the guidance of the Court of Claims in fixing the amount due the Indians. It only declared that the compensation allowed in the present suit should not exceed one dollar and twenty-five cents per each acre of land not required for the allotments in severalty. This implied that in the judgment of Congress a less amount might suffice to meet the legal and equitable rights of the Indians and the ends of justice. For the purpose of fixing that compensation, should the surplus lands be valued as of the date the Indians were located on the Reservation, or of the date the agreement of 1891 was ratified by Congress, or of the date when this suit was brought, or of the date when the allotments are all made? Upon these points the act of Congress is silent. The decree in the present suit should declare that the Wichita and Affiliated Bands are entitled to compensation in money for such of the lands as are not needed to meet the requirements of the act of March 2d 1895, 28 *Stat.* 894, 897, *c.* 188, leaving the amount to be fixed upon such evidence as may be adduced by the parties, but not, in any event, exceeding the limit prescribed by Congress.

The United States insists that it should be made a condition of any decree recognizing the right to compensation on account of the surplus lands, that the Wichita and Affiliated Bands should execute a release to the United States of all right, title, interest and claim of every nature whatsoever in and to any lands within the limits of the United States except those allotted to them. This view cannot be adopted, because the pleadings do not inform the court of the existence of any claims of that kind; indeed, the pleadings could not properly embrace any claim to lands, or to the proceeds of any lands, except those within the Wichita Reservation. The court below could not make any decree in reference to claims that have not been referred to it by Congress. It is manifest that while Article 6th of the agreement of 1891 between the United States and the Wichita and Affiliated Bands of Indians reserved the right of the latter to prefer against the United States any and every claim they believed they had the right to make, the only suit authorized by the jurisdictional act of 1895 was one that would determine the claim of the Choctaws and Chickasaws of an interest *in the particular lands here in dispute,* and the claim

of the Wichita and Affiliated Bands to be compensated in money for their possessory right *in such lands.* No suit was authorized by that act that would embrace any and every claim that the Wichita and Affiliated Bands might elect to prefer against the United States.

For the reasons given the decree must be reversed with directions to dismiss the petition of the Choctaw and Chickasaw Nations, and to make a decree in behalf of the Wichita and Affiliated Bands of Indians fixing the amount of compensation to be made to them on account of such lands in the Wichita Reservation as are not needed in order to meet the requirements of the act of Congress of March 2d 1895, c. 188, and for such further proceedings as may be consistent with law and with this opinion.

It is so ordered.

True copy.

Test:

Clerk Supreme Court, U. S.